

Case Nos. 14-1167, 14-1169, 14-1173

United States Court of Appeals
FOR THE FOURTH CIRCUIT

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TIMOTHY B. BOSTIC; TONY C. LONDON; CAROL SCHALL; MARY TOWNLEY,
Plaintiffs-Appellees,
—and—

CHRISTY BERGHOFF, JOANNE HARRIS, JESSICA DUFF, and
VICTORIA KIDD, on behalf of themselves and all others similarly situated,
Intervenors,
—v.—

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of
Court for Norfolk Circuit Court,
Defendant-Appellant,
—and—

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records,
Defendant-Appellant,
MICHÈLE MCQUIGG,
Intervenor/Defendant-Appellant.

Appealed from a Decision of the United States District Court
for the Eastern District of Virginia at Norfolk • Civil Case No. 2:13-CV-00395-AWA-LRL
Honorable Arenda L. Wright Allen

**BRIEF FOR AMICI CURIAE MARCIE AND CHANTELLE FISHER-BORNE,
CRYSTAL HENDRIX AND LEIGH SMITH, SHANA CARIGNAN AND
MEGAN PARKER, TERRI BECK AND LESLIE ZANAGLIO, LEE KNIGHT
CAFFERY AND DANA DRAA, SHAWN LONG AND CRAIG JOHNSON,
AND ESMERALDA MEJIA AND CHRISTINA GINTER-MEJIA**

ROSE A. SAXE
JAMES D. ESSEKS
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004-2400
(212) 549-2500

GARRARD R. BEENEY
DAVID A. CASTLEMAN
CATHERINE M. BRADLEY
W. RUDOLPH KLEYTEUBER
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are seven same-sex couples raising children in North Carolina.¹

Some of the *amici* couples married out of state, and some are unmarried but hope to marry in their home state. North Carolina will neither allow same-sex couples to marry nor respect their out-of-state marriages. *Amici*, along with thousands of other same-sex couples raising children in North Carolina, are also prevented by state adoption law from ensuring that both parents have a legal relationship with the children they are raising together solely because the parents are same-sex couples.

Amici Marcie and Chantelle Fisher-Borne, Crystal Hendrix and Leigh Smith, Shana Carignan and Megan Parker, Terri Beck and Leslie Zanaglio, Lee Knight Caffery and Dana Draa, and Shawn Long and Craig Johnson are plaintiffs in *Fisher-Borne v. Smith*.² *Amici* Esmeralda Mejia and Christina Ginter-Mejia are plaintiffs in *Gerber v. Cooper*.³ *Amici* filed the *Fisher-Borne* case in the Middle

¹ Counsel for *amici* include, among others, lawyers affiliated with the American Civil Liberties Union, which is co-counsel for the *Harris* class. (The other co-counsel for *amici*, who also participated in the authoring of this brief, have no relationship with the *Harris* class.) With the exception of one couple, *amici* have been represented by the undersigned counsel for over a year before the *Harris* litigation was filed. The ACLU attorneys who are co-counsel in *Harris* had no participation in the authoring of this brief. No person other than *amici curiae* or their counsel contributed money to fund the preparation or submission of this brief.

² See generally First Amended Complaint, *Fisher-Borne v. Smith*, 1:12-CV-00589 (M.D.N.C. July 19, 2013) (ECF No. 40) (“*Fisher-Borne* Am. Compl.”).

³ See generally Complaint, *Gerber v. Cooper*, 1:14-CV-00299 (M.D.N.C. Apr. 9, 2014) (ECF No. 1) (“*Gerber* Compl.”).

District of North Carolina in 2012, challenging North Carolina's categorical refusal to permit two unmarried individuals to adopt the child they are raising without terminating the rights of the first parent, while at the same time refusing to allow same-sex couples to marry, thereby leaving children who are in fact being raised by two parents with no way to create a legal parent-child relationship with both their parents. *See generally* Complaint, *Fisher-Borne*, 1:12-CV-00589 (M.D.N.C. June 13, 2012) (ECF No. 1). *Amici* sought declarative and injunctive relief that this denial of "second parent adoptions" violates the federal equal protection and due process rights of both the parents and their children. *Id.* at 53. After motions to dismiss were fully briefed, the cases were stayed pending resolution of *Windsor v. United States*. And after *Windsor* was decided, *amici* amended their complaint to also challenge the denial of marriage to same-sex couples in North Carolina. *See Fisher-Borne Am. Compl.* Another round of briefing followed, and motions to dismiss were fully briefed by November 15, 2013 and remain pending. *See* Reply Brief in Support of the State Defendants' Motion to Dismiss, *Fisher-Borne*, 1:12-CV-00589 (M.D.N.C. Nov. 15, 2013) (ECF No. 72).

Earlier this month, facing increasing urgency from the continued refusal by the State of North Carolina to respect their marriages or allow second-parent adoptions by married same-sex couples deemed "unmarried" by the State, *amici* Megan Parker and Shana Carignan, and Christina Ginter-Mejia and Esmerelda Mejia, moved for a preliminary injunction. *See* Memorandum of Law in Support of

Plaintiffs' Motion for a Preliminary Injunction, *Gerber*, 1:14-CV-00299 (M.D.N.C. Apr. 9, 2014) (ECF No. 4) ("*Gerber* Motion"); Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *Fisher-Borne*, 1:12-CV-00589 (M.D.N.C. Apr. 9, 2014) (ECF No. 75) ("*Fisher-Borne* Motion"). (Because, among other reasons, the motions to dismiss were fully briefed in *Fisher-Borne*, a new action was filed on behalf of Ms. Ginter-Mejia and Ms. Mejia, along with two other couples facing immediate injury from the lack of respect of their marriages due to age, poor health and illness. *See generally Gerber* Compl. Given the urgency of their situations, *amici* are hopeful their relationships will be recognized promptly, so they can provide the important protections for their families that flow from marriage and adoption before it is too late to do so.

Because a decision by this Court on the question whether Virginia may continue to deny same-sex couples the protections and benefits of marriage, and deny respect for their out-of-state marriages, may have a substantial impact on *amici's* rights and the North Carolina litigation, *amici* submit this brief to highlight a particular harm caused by bans on marriage for same-sex couples raising children in states like North Carolina. *Amici* and other families like them in North Carolina are living proof that such bans—often erroneously touted as protecting the interests of children—instead cause severe hardship to children and families.

SUMMARY OF ARGUMENT

Since the Supreme Court ruled in *Windsor v. United States*, 133 S. Ct. 2675 (2013), that the federal government could no longer disregard the legal marriages of same-sex couples, nine district courts have struck down bans on marriage or recognition of marriage for same sex couples.⁴ Yet, North Carolina families continue to suffer particular harms of that state's ban on marriage for same-sex couples, despite having filed suit in 2012 seeking the right to second-parent adoptions—when one partner in an unmarried couple adopts the other partner's biological or adoptive child—and amending in 2013 to challenge plaintiffs' exclusion from civil marriage.

This brief addresses the hardship to children and families caused by North Carolina's refusal to recognize the marriages of same-sex couples. That harm is exacerbated by the North Carolina Supreme Court's 2010 decision in *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010), which construed state law to forbid the only other way these families can be legally recognized—a second parent adoption by

⁴ *DeBoer v. Snyder*, 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014) (Michigan); *Tanco v. Haslam*, 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (Tennessee); *De Leon v. Perry*, SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (Texas); *Lee v. Orr*, 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (Illinois); *Bostic v. Rainey*, 2:13-CV-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (Virginia); *Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (Kentucky); *Bishop v. United States*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (Oklahoma); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (Ohio); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (Utah).

unmarried couples. As a result, North Carolina's marriage ban effectively prevents children (like those being raised by *amici*) with two loving parents from having a legal relationship with both their parents—and withholds from them the important protections and benefits that legal parentage brings.

ARGUMENT

North Carolina law forbids same-sex couples from marriage, and bars recognition of valid marriages from other jurisdictions. N.C. Const. art. XIV, § 6 (as amended); *see also* N.C. Gen. Stat. §§ 51-1, 51-1.2. The effect of this ban is identical to the numerous state marriage bans enjoined or struck down by courts following *Windsor*. But, as discussed below, in North Carolina, the exclusion from marriage comes at an even steeper cost than in some other states.

In 2010, the North Carolina Supreme Court ruled that North Carolina's adoption statute categorically prohibits joint or second parent adoption for unmarried individuals without terminating the first parent's rights. *Boseman*, 704 S.E.2d 494. While North Carolina law recognizes one exception to the parental right termination provision in N.C. Gen. Stat. § 48-1-106—allowing a parent's legal spouse, a stepparent, to adopt without termination of the legal parent's right—the Court in *Boseman* ruled that provision is unavailable to unmarried couples. N.C. Gen. Stat. § 48-4-101(1); *see Boseman*, 704 S.E.2d at 501, 504-05. Because North Carolina does not permit gay couples to marry or recognize such marriages performed elsewhere, same-sex couples like *amici* are perpetually classified as “unmarried”

even when they are in fact married, and are unable to secure their parental rights through the adoption provision available to married heterosexual couples.

Prior to *Boseman*, the North Carolina District Court in Durham County had construed the adoption statutes to allow unmarried second parents to adopt children without terminating the parental rights of the legal parent.⁵ But since 2010, such relief has been unavailable for families in the state, leaving children vulnerable and depriving them of important benefits and protections that come from a legally recognized parent-child relationship.

According to 2010 census data, there are approximately 18,309 same-sex couples in North Carolina. Eighteen percent (3,380) are raising children together. And, as of 2010, over a thousand of the couples with children were

⁵ This interpretation was consistent with many other state courts, which had recognized that the termination requirements could be waived or otherwise construed to allow second parent adoptions when in the best interests of children. *See, e.g., In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003) (“Allowing a second parent to share legal responsibility for the financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment can only be in the best interest of that child.”); *In re Hart*, 806 A.2d 1179, 1186-88 (Del. Fam. Ct. 2001) (reading Delaware stepparent exception broadly to further the best interests of the children); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) (“[W]here the mother’s same-sex partner has, with the mother’s consent, participation and cooperation, assumed a full parental role in the life of the mother’s child, and where the child is consequently bonded to the partner in a loving, functional parental relationship, the stepparent provision of [the New Jersey termination statute] should not be narrowly interpreted so as to defeat an adoption that is clearly in the child’s best interests.”); *see also Fisher-Borne* Am. Compl. ¶¶ 31-33, 36-40.

married.⁶ All of those families, including *amici*, are harmed by the state's lack of recognition of the parents' relationships. These harms range from the tangible—including denial of medical decision-making in an emergency, Social Security Insurance survivor benefits, the ability to provide children with quality health insurance of the non-legal parent, detrimental tax status, and denial of veteran's benefits to mention a few—to the intangible, but no less real, dignitary harms and a “second-class status” in the community recently recognized by Justice Kennedy in *Windsor*: “it humiliates tens of thousands of children now being raised by same-sex couples. The law in question 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.” 133 S. Ct. at 2694.

Because some of the opponents of marriage for same-sex couples attempt to justify excluding gay and lesbian couples from marriage in the name of advancing children's well-being, *amici* describe below their families and the injuries inflicted by North Carolina law to show that the ban on marriage for same-sex couples does not protect children, but rather places unique and unwarranted burdens on children being raised by same-sex parents.

⁶ “North Carolina Census Snapshot: 2010,” The Williams Institute, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_North-Carolina_v2.pdf.

Shana Carignan and Megan Parker

Plaintiffs Shana Carignan and Megan Parker are a lesbian couple who were lawfully married in Massachusetts and currently live in North Carolina along with their six-year-old son, J.C. *Fisher-Borne* Am. Compl. ¶¶ 170-73. Ms. Parker and Ms. Carignan became J.C.'s parents in 2011, when Ms. Parker adopted him. *Id.* ¶¶ 170, 185. Because of North Carolina law, Ms. Parker is J.C.'s only legal parent, but Ms. Carignan acts as a parent and wishes to legally adopt J.C., so that both she and Ms. Parker can be his legal parents. *Id.* ¶ 185.

J.C. has cerebral palsy. *Id.* ¶ 181. At the time of J.C.'s adoptive placement, he was evaluated to be severely developmentally disabled. *Id.* ¶ 183. At the age of two, he had the mental capacity of a four-month-old, but since being placed in the care of Ms. Carignan and Ms. Parker and their forming a family together, he has flourished beyond all expectations. *Id.* While J.C.'s physical disability means that he cannot walk and has limited ability to control his limbs or communicate verbally, he can communicate using "eye gaze" communication and special equipment, and he understands a great deal of what he hears. *Id.* After attending preschool in a special education program, he is now enrolled in kindergarten in public school. Affidavit of Shana Carignan, 1:12-cv-00589 (M.D.N.C. April 9, 2014) (ECF No. 78) ("Carignan Aff.") ¶ 5. Because of his condition, J.C. requires constant and considerable care. His caretakers agree that J.C. is at a critical point in his growth and development. *Id.* ¶ 5.

Because he was adopted by Ms. Parker from foster care, J.C. is covered by Medicaid. Ms. Parker, his legal parent, is also covered under Medicaid because of a stroke that she had last year. Ms. Carignan is covered by Blue Cross Blue Shield through her employment. *Id.* ¶ 13. Under the North Carolina Health Insurance Premium Payment Program, the state would pay the premiums required for J.C. to receive secondary coverage for the expenses Medicaid does not cover through a legal parent's private insurance. *Id.* ¶ 17. However, because Ms. Carignan is not allowed to become J.C.'s legal parent, this state program is unavailable and J.C. and his parents suffer as a result.

J.C. has many medical needs which are not covered under Medicaid and are beyond the financial means of Ms. Parker and Ms. Carignan. However, there are numerous currently unfulfilled needs of J.C. that would be met if J.C. could obtain secondary coverage under Ms. Carignan's insurance. For example, although Ms. Parker and Ms. Carignan ordered a wheelchair through Medicaid last June, J.C. is still on a waitlist to receive one; in the meantime, he has to use a chair that is too small for him. *Id.* ¶ 21. Similarly, they have to pay out-of-pocket for repairs to J.C.'s wheelchair, his glasses, additional mounts for his communication system and the other medical equipment he requires, and this sometimes leaves J.C. without the equipment he needs to take complete advantage of the developmental goals he could achieve. *Id.* ¶ 26. Medicaid also will not cover a circumcision for J.C., which is necessary because he needs now, and will always need, assistance cleaning himself;

without this procedure he is at high risk of infection. *Id.* ¶ 23. Moreover, as J.C. grows and increasingly recognizes his differences, he suffers embarrassment and a lack of dignity from being forced to wear diapers in public because Medicaid does not cover the catheter he needs. *Id.* ¶ 24.

Secondary insurance through Ms. Carignan's plan—prevented only by North Carolina's adoption and marriage laws—would also allow J.C. to take advantage of unique developmental opportunities that will vastly improve his quality of life now and in the future, such as one-on-one tutoring and alternative therapies, which have been proven to help children with cerebral palsy. Affidavit of Megan Parker, 1:12-cv-00589 (M.D.N.C. April 9, 2014) (ECF No. 77) ("Parker Aff.") ¶ 13. Being treated at a later time will not undo the damage that is being done at this critical stage in his life. Without relief now, J.C. will never recoup what North Carolina law has taken from him.

Moreover, because Ms. Carignan is not J.C.'s legal parent, she is often faced with situations where her parental rights are not recognized, and she cannot assume the responsibilities that she otherwise would be able to exercise. For example, when J.C. was hospitalized, Ms. Carignan was barred from visiting him after formal visiting hours ended and this left Ms. Parker solely responsible for staying overnight with their child, causing the family to feel scared and vulnerable. Carignan Aff. ¶ 31. Understandably they remain worried about what will happen in the future. Especially in light of Ms. Parker's health issues, including her stroke last

year, the family lives in a state of uncertainty because of Ms. Carignan's lack of a legal relationship with her son.

Esmerelda Mejia and Christina Ginter-Mejia

Esmerelda Mejia and Christina Ginter-Mejia have been a committed couple for over 20 years; they were legally married in Maryland on August 21, 2013. *Gerber* Compl. ¶ 110. They welcomed their son J.G.-M. into their family on September 21, 2007. Affidavit of Esmeralda Mejia, 1:14-cv-00299 (M.D.N.C. April 9, 2014) (ECF No. 9) ("Mejia Aff.") ¶ 13. Although both Ms. Mejia and Ms. Ginter-Mejia share equally in all of their parental responsibilities, only Ms. Ginter-Mejia is their son's legal parent according to North Carolina law. Ms. Mejia cannot obtain legal recognition of her relationship with her son and all the benefits such recognition would bring because North Carolina does not recognize her marriage to Ms. Ginter-Mejia. *Gerber* Compl. ¶¶ 123-24.

Ms. Mejia is a decorated Army war veteran, retiring with the rank of major, and is designated 100% disabled by the military. *Id.* ¶ 107. In 1992 she was diagnosed with cervical cancer and underwent a hysterectomy. *Id.* ¶ 113. In 1996, she had to undergo surgery for a tumor in her left lung; the accompanying chemotherapy, in combination with her repeated exposure to chemicals during her military service, led to liver failure in 2008. *Id.* ¶ 114. Her subsequent liver transplant requires her to take immunosuppressive drugs, exacerbating other illnesses. *Id.* ¶116. Along with remaining lung and liver problems, her system is

vulnerable and, as a result, she visits the emergency room a few times per year. *Id.*

While she is healthy now, the inability to have their family legally recognized creates significant uncertainty and worry about the future.

As a veteran, Ms. Mejia's legally recognized children would be entitled to significant benefits because of the service she gave to our country, including if she were to pass away before the children reach the age of majority. *Mejia Aff.* ¶¶ 17-19. Because her child, J.G.-M., is not recognized as her legal child due to North Carolina law, he is denied protections to which he should be entitled during her lifetime, and he may never become eligible for these protections if she were to pass away before he is legally adopted or his parents' marriage legally recognized.

Chantelle and Marcie Fisher-Borne

Amici Ms. Chantelle Fisher-Borne and Dr. Marcie Fisher-Borne have two children: a six-year-old girl and a two-year-old son. *Fisher-Borne Am. Compl.* ¶ 105. The Fisher-Bornes have lived in a committed relationship for over fifteen years, and were legally married in the District of Columbia in 2011. *Id.* ¶¶ 108-09.

The couple chose together to have children; Marcie Fisher-Borne gave birth to her biological daughter and Chantelle Fisher-Borne gave birth to her biological son. Both women were involved in all aspects of the other's pregnancy. They attended all of each other's prenatal appointments together and made preparations for the arrival of each child together. Each was present when the other gave birth. *Id.* ¶ 112.

The Fisher-Bornes have provided the only home that their children have ever known. They decided to hyphenate their last names in part because they were advised by their minister that it would help their family be recognized for what it is – a loving family of two parents and two children. *Id.* ¶ 114. Yet, because their marriage is not recognized in North Carolina, they suffer daily and are vulnerable in ways that other families in the state are not.

Chantelle Fisher-Borne's extended family embraces Marcie Fisher-Borne and both children without reservation. *Id.* ¶ 116. While Marcie Fisher-Borne's father and her larger family now seem to accept the women's relationship, this has not always been the case. *Id.* ¶ 117. Marcie Fisher-Borne and Chantelle Fisher-Borne still worry about what might happen to their family if Marcie Fisher-Borne were to die or become incapacitated and her family members were to challenge Chantelle Fisher-Borne's parentage of their daughter.

Just one example of the insecurity to the Fisher-Bornes caused by North Carolina law occurred on the night of M.F.-B.'s birth. When Marcie Fisher-Borne was transferred to the maternal floor of the hospital after four days of labor, the first nurse encountered by the family demanded Chantelle Fisher-Borne's power of attorney to allow her to remain at Marcie Fisher-Borne's side. *Id.* ¶ 124. Fortunately, in that instance, the Fisher-Bornes had brought that particular document with them to the hospital. However, based in part on this experience, they constantly

worry that if one of the children were to experience a sudden medical emergency, the second parent would be unable to arrange for proper care.

Terri Beck and Leslie Zanolio

Terri Beck and Leslie Zanolio have been a loving, committed couple for seventeen years, and together decided to form a family through adoption. *Id.*

¶ 133. In early 2009, after qualifying as foster parents, Ms. Beck and Ms. Zanolio received a call from the family services agency to advise them that there were two brothers with “special needs” in need of a foster family. T.B.Z. and D.B.Z., then seven and six, respectively, had been in and out of foster care their whole lives, and had suffered significant abuse and neglect, both physical and emotional. Both boys had been diagnosed with post-traumatic stress disorder (PTSD). *Id.* ¶ 145.

After several months in which the boys and their mothers got to know each other, T.B.Z. and D.B.Z. moved into Ms. Beck and Ms. Zanolio’s home on a full-time basis in June 2009. *Id.* ¶ 146. Creating and providing a family structure for two boys who previously had none has required a significant devotion of time and energy from both Ms. Beck and Ms. Zanolio. Ms. Beck and Ms. Zanolio’s commitment helped the brothers settle into the possibility of having found their “forever family.” *Id.* ¶ 148. The boys have passed through normal and healthy phases of depression, anger, anxiety, and grief, while adjusting to the stability and love in their new home. *Id.* ¶ 151. Since being placed in Ms. Beck and Ms. Zanolio’s home, T.B.Z. and D.B.Z. have thrived in the stable, nurturing, and loving

environment that their parents and extended families provide. The boys are in good physical health, and are performing better in school. *Id.* ¶ 154.

Ms. Beck and Ms. Zanaglio have not yet tried to explain to their children the different legal statuses that their mothers hold. *Id.* ¶ 157. The parents fear that when the boys are old enough to understand that their bonds with Ms. Beck are less legally secure, they will experience anxiety about the possibility of losing yet another parent. *Id.* ¶ 158. Although Ms. Beck and Ms. Zanaglio have undertaken efforts to ensure that each will be able to continue life with minimum legal disruption if the other were to die or become incapacitated, such steps cannot give their family the full protection of legal parentage. *Id.* ¶ 159. Because of their sons' background, Ms. Beck and Ms. Zanaglio are very concerned about what might happen to the boys should anything ever happen to Ms. Zanaglio. After all the uncertainty, deprivation and cruelty that marked their early lives, these two brothers deserve the security of the loving home their parents have worked so hard to provide, which is denied by North Carolina law.

Leigh Smith and Crystal Hendrix

Amici Leigh Smith and Crystal Hendrix are residents of Asheville, North Carolina. Their family includes their son J.H.-S., who is two years old. *Id.* ¶ 159. Ms. Smith and Ms. Hendrix have been a committed couple for almost ten years and consider themselves life partners. *Id.* ¶ 201. The couple decided that Ms. Hendrix should be the biological mother of J.H.-S. *Id.* ¶ 205. Despite the fact that

Ms. Smith was involved in all aspects of the birth of J.H.-S., was present during labor and stood by Ms. Hendrix's side during childbirth, and participates equally in all aspects of raising their son, under North Carolina law, only Ms. Hendrix is recognized as his legal parent. *Id.* ¶¶ 206-208.

Ms. Hendrix's parents do not accept her relationship with Ms. Smith, and do not recognize Ms. Smith as J.H.-S.'s second parent. *Id.* ¶ 217. As a result, both Ms. Smith and Ms. Hendrix fear that if Ms. Hendrix were to die or become incapacitated, Ms. Smith would face attempts to take her child away from her— attempts that would be unavailable if Ms. Smith were legally recognized for what she is—J.H.-S.'s mother. *Id.* ¶ 216.

Shawn Long and Craig Johnson

Amici Craig Johnson and Shawn Long are native North Carolinians raising a twelve-year-old son. *Id.* ¶ 243. They have been in a committed relationship for twenty years. *Id.* ¶ 244. When Mr. Johnson and Mr. Long decided to start a family, they wanted to give a loving home to an older child and chose to pursue adoption through the foster care system. *Id.* ¶ 251. They chose Mr. Johnson to be the adoptive parent because he had parents and extended family nearby. *Id.*

Their son, I.J.-L., was placed in temporary foster care at an early age, and when he was returned to his mother's home, he experienced further neglect, and, at the age of four, was hospitalized for malnutrition and placed into a therapeutic foster home. *Id.* ¶ 252. By the time I.J.-L. joined Mr. Johnson and Mr. Long's

family at five years old, he had already experienced severe trauma from neglect and abuse. *Id.* ¶ 253.

Mr. Johnson and Mr. Long underwent rigorous screening and both were approved and licensed as foster parents in 2006, and I.J.-L. was placed with them as a foster child in 2007. *Id.* ¶ 254. While both men were found by the state to be worthy parents for I.J.-L., only one of the fathers was permitted to legally adopt I.J.-L. as a matter of North Carolina law. *Id.* ¶¶ 258, 260-262.

I.J.-L. has thrived in the stable, nurturing, and loving environment that his parents and his loving extended families provide. *Id.* ¶ 263. I.J.-L. is in better physical health and performs better in school since joining Mr. Johnson's and Mr. Long's family. I.J.-L. considers both Mr. Johnson and Mr. Long to be his equal parents. He calls Mr. Johnson "Dad" and Mr. Long "Pa." *Id.* ¶ 265. Mr. Johnson and Mr. Long both are deeply concerned that when I.J.-L. understands that his bond with Mr. Long is less legally secure, he will experience anxiety about the possibility of losing yet another parent. *Id.* ¶ 267.

Dana Draa and Lee Knight Caffery

Amici Dana Draa and Lee Knight Caffery have two children, a three- and a five-year-old. *Id.* ¶ 220. Ms. Draa and Ms. Caffery have been a committed couple for eight years, and had a formal commitment ceremony in 2007. *Id.* ¶ 222. Like Ms. Mejia, Ms. Draa is a veteran—she spent eight months in the Middle East as

part of Operation Desert Storm during the Gulf War, and served in the Alaska National Guard. *Id.* ¶ 221.

Ms. Draa and Ms. Caffery both always wanted children of their own, and initially discussed whether to adopt or have biological children. *Id.* ¶ 226. They decided together that Ms. Caffery would be the birth mother of their children. *Id.* While Ms. Draa was involved in all aspects of planning and birth, attending prenatal appointments, choosing names, and assisting with labor, she too is barred from having a legal relationship with her children. *Id.* ¶ 227. As a result, the family, like thousands of others in North Carolina, lives with increased vulnerability, solely because the parents are gay or lesbian.

Amici are just seven families. There are thousands of other same-sex couples raising children in North Carolina, and hundreds of thousands more children being raised by same-sex couples throughout the country. All of these families suffer uncertainty, second-class status, economic deprivation, and other daily harms solely because the parents' committed and loving relationship is between members of the same sex. While 17 states plus the District of Columbia now allow same-sex couples to marry, families like *amici* continue to suffer the harms from state-imposed discrimination. That harm is exacerbated for families raising children, who deserve to grow up with the security and protections that marriage and a legal parent-child relationship can provide. Imposition of discrimination and harm on loving families is not, under our Constitution, a matter of "community standards." As shown at least

by the 18 jurisdictions permitting same sex couples to marry and the unbroken line of cases since *Windsor* striking down discrimination, we respectfully submit the time has come to end in this Circuit the discrimination and harm imposed by laws such as those in Virginia and North Carolina, and end the stigma and deprivations that these laws bestow on innocent children—such as those of *amici*—who are being given by these couples their first, and much-deserved, chance to lead a life to which we all aspire.

CONCLUSION

For the reasons set forth in the briefs of Appellees, *amici* respectfully urge this Court to uphold the decision below and find that excluding loving, committed same-sex couples from marriage and refusing to respect the marriages of gay and lesbian couples married in the jurisdictions that allow them to marry, serves no compelling or even legitimate state interest. Far from protecting children, *amici* hope their stories have helped to show that the bans cause serious harms to children being raised by same-sex couples—harms exacerbated by adoption policies, like North Carolina's, that restrict adoption to married couples, while simultaneously preventing same sex couples from marrying and declaring their out-of-state marriages to be invalid.

Dated: April 18, 2014

New York, New York

Respectfully submitted,

By: /s/ Garrard R. Beeney

Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of April, 2014, I caused this Brief of Amici Curiae Marcie and Chantelle Fisher-Borne, Crystal Hendrix and Leigh Smith, Shana Carignan and Megan Parker, Terri Beck and Leslie Zanolio, Lee Knight Caffery and Dana Draa, Shawn Long and Craig Johnson, and Esmeralda Mejia and Christina Ginter-Mejia, Supporting Appellees and Affirmance to be filed electronically with the Clerk of the Court using the CM/ECF System, which will serve such filing electronically on all registered CM/ECF users.

Dated: April 18, 2014

/s/ Garrard R. Beeney
Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1167Caption: Timothy Bostic v. Janet Rainey**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

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(s) Garrard R. Beeney

Attorney for Amici Curiae

Dated: April 18, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: _____

_____ as the
(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s)

(signature)

Name (printed or typed)

Voice Phone

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I certify that on _____ the foregoing document was 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 serving a true and correct copy at the addresses listed below:

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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TIMOTHY B. BOSTIC, TONY C.	:
LONDON, CAROL SCHALL and	:
MARY TOWNLEY,	:
	:
Plaintiff-	:
Appellees	:
	:
v.	:
	:
JANET M. RAINEY, in her	:
official capacity as State Registrar	:
of Vital Records, and GEORGE E.	:
SCHAEFER, III, in his official	:
capacity as the Clerk of Court for	:
Norfolk Circuit Court,	:
	:
Defendant-	:
Appellants.	:
-----X	

NO. 14-1167(L), 14, 1169,
14-1173

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Rose A. Saxe
James D. Esseks
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004-2400
Telephone: (212) 549-2500
Facsimile: (212) 549-2646
rsaxe@aclu.org
jesseks@aclu.org

Garrard R. Beeney
David A. Castleman
C. Megan Bradley
W. Rudolph Kleysteuber
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
BeeneyG@sullcrom.com

Pursuant to Federal Rules of Appellate Procedure 27 and 29, Marcie
and Chantelle Fisher-Borne, Crystal Hendrix and Leigh Smith, Shana Carignan

and Megan Parker, Terri Beck and Leslie Zanolio, Lee Knight Caffery and Dana Draa, Shawn Long and Craig Johnson, and Esmeralda Mejia and Christina Ginter-Mejia respectfully submit this motion for leave to file the attached brief as *amici curiae* in support of the Plaintiff-Appellees. As set forth more fully in their brief, *amici* are seven same-sex couples who are raising children in North Carolina. The couples have challenged North Carolina's ban on marriage for same-sex couples in two actions that are currently pending before the United States District Court for the Middle District of North Carolina: *Fisher-Borne v. Smith* and *Gerber v. Cooper*. Both actions argue that North Carolina's prohibition on marriage for same-sex couples, and the State's refusal to recognize such marriages performed out of state violate the equal protection and due process clauses of the United States Constitution. A decision by this Court on whether the Constitution allows Virginia to deny same-sex couples the protections and benefits of marriage may have a substantial impact on *amici's* rights and the North Carolina litigation.

In their brief, *amici* show the harms that North Carolina's refusal to recognize same-sex marriage has caused them and the thousands of other same-sex couples who are raising children in North Carolina. North Carolina's marriage ban effectively prevents children (like those being raised by *amici*) with two loving parents from having a legal relationship with both their parents, and withholds important protections and benefits that these children would otherwise obtain. As

shown in the brief, these deprivations include access to insurance, medical care and other significant benefits. *Amici* and their families suffer the uncertainty of knowing that one parent does not have a legal relationship with his or her child, and consequently may not be allowed to make important parenting decisions, like consent to medical treatment. *Amici* also must suffer the degradation of knowing that their home state regards their families as unworthy of recognition, and must explain this fact to their children.

In the proceedings below, Defendant-Appellant attempted to justify excluding gay and lesbian couples from marriage in the name of advancing children's well-being. *Amici's* description of their families and the injuries inflicted by North Carolina law will assist the Court in determining whether a ban on marriage for same-sex couples really protects children. *Amici* therefore respectfully request that this Court grant their motion for leave to file the attached brief.

The parties have consented to the filing of *Amici's* brief.

Dated: April 18, 2014
New York, New York

Respectfully submitted,

SULLIVAN & CROMWELL LLP

By: s/ Garrard R. Beeney

*Attorney for Amici Curiae, Marcie
and Chantelle Fisher-Borne, Crystal
Hendrix and Leigh Smith, Shana
Carignan and Megan Parker, Terri
Beck and Leslie Zanolio, Lee
Knight Caffery and Dana Draa,
Shawn Long and Craig Johnson,
and Esmeralda Mejia and Christina
Ginter-Mejia*