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On Certiorari to the Colorado Court of Appeals (Opinion by Judge Freyre), Case No. 2017CA001484
Arapahoe County District Court (Judge Bonnie McLean), Case No. 2016DR030820

In re the Marriage of:

Petitioner:

EDI L. HOGSETT,

v.

Respondent:

MARCIA E. NEALE.

▲ Court Use Only ▲

Case No. 2019SC000044

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BRIEF OF AMICI CURIAE COLORADO LGBT BAR ASSOCIATION; COLORADO WOMEN'S BAR ASSOCIATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF NEITHER PARTY

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. I certify the following:

The brief complies with the applicable word limits set forth in C.A.R. 29(d).

The brief contains 4512 words.

The brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that this brief may be struck if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Mark D. Gibson
Mark D. Gibson

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Colorado LGBT Bar Association is a voluntary professional association of lesbian, gay, bisexual, and transgender attorneys, judges, paralegals, and law students, and allies, who provide an LGBT presence within Colorado's legal community. The LGBT Bar Association promotes recognizing civil and human rights, encourages sensitivity to legal issues facing the LGBT community, and ensures the fair and just treatment of members of the LGBT community. The LGBT Bar Association has an interest in ensuring that Colorado courts apply the test and factors for common-law marriage in a way that aligns with the realities of same-sex relationships.

The Colorado Women's Bar Association ("CWBA") is an organization of more than 1200 Colorado attorneys, judges, legal professionals, and law students dedicated to promoting women in the legal profession and the interests of women generally. The CWBA has an interest in this case because its members are committed to protecting women's rights, including the marital and property rights of women in same-sex relationships.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of les-

bian, gay, bisexual, and transgender people, and those with HIV, through impact litigation, education, and public-policy work. Lambda Legal has participated as party counsel or amicus in cases across the country addressing the rights of same-sex couples to equal recognition of their relationships. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013).

The National Center for Lesbian Rights ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public-policy advocacy, and public education. NCLR has participated as party counsel or amicus in cases across the country addressing the right of same-sex couples to marry and be recognized as married. *See, e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075 (2017); *Obergefell*, 135 S. Ct. 2584; *Windsor*, 570 U.S. 744.

ARGUMENT

In *People v. Lucero*, 747 P.2d 660 (Colo. 1987), this Court announced a two-part test for establishing a common-law marriage: (1) the parties mutually agreed to marriage; and (2) the parties' conduct corroborates that agreement. In *Obergefell*, the Supreme Court held that states must grant same-sex couples access to marriage "on the same terms as accorded to couples of the opposite sex." 135 S. Ct. at 2607.

This case presents the Court with the opportunity to consider how same-sex couples might satisfy the *Lucero* test.

But the Court need not reinvent the wheel; it need only refine *Lucero* to account for the realities of same-sex relationships. To that end, the Court should clarify how *Lucero* applies to same-sex relationships in three ways:

- *Lucero* requires a showing that the same-sex couple agreed to a permanent relationship of mutual support with the same degree of commitment as spouses in a ceremonial marriage. It does not require that they agreed to be legally married.
- *Lucero* does not demand complete openness from same-sex couples in every aspect of their lives. That is because openness historically exposed, and still exposes, same-sex couples to harassment, discrimination, and violence.
- Some factors that make sense for different-sex couples do not make sense for same-sex couples.

Having refined *Lucero* to align with the realities of same-sex relationships, the Court should then provide guidance to the lower courts and litigants about what factors will often help clarify whether a same-sex couple had a common-law marriage.

1. Courts should apply *Lucero* in a way that aligns with the realities of same-sex relationships.

In *Lucero*, this Court held that a common-law marriage exists when two elements are present: (1) the parties mutually agreed to marriage; and (2) the parties' conduct corroborates that agreement. 747 P.2d at 663. The party seeking to establish a common-law marriage must prove these elements by a preponderance of the evidence. *Id.* at 664 n.6.

On the first element, the Court explained that "the very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist." *Id.* at 664. As a result, the parties' agreement "need not have been in words." *Id.* If no verbal agreement exists—or if a party denies the agreement, as in this case and most cases—a court can infer the parties' agreement from their conduct. *Id.* at 664 & n.5.

On the second element, the Court explained that the parties' conduct must corroborate their agreement to marriage. *Id.* at 663. The Court thus recognized that conduct can do double duty: it can show that the parties agreed to marriage, and it can corroborate their agreement to marry. *Id.* at 663–64.

The Court then identified specific factors that might show, or corroborate, the parties' agreement to marriage:

- Did the parties maintain joint banking or credit accounts?
- Did the parties buy property together?
- Did the parties jointly own property?
- Did the woman take the man's surname?
- Did the parties have children that took the man's surname?
- Did the parties file joint tax returns?

Id. at 665.

Though the test and factors set down in *Lucero* are sensible for different-sex relationships, the Court should refine the test and factors to render them sensible for same-sex relationships. *See Gill v. Nostrand*, 206 A.3d 869, 877 n.9 (D.C. 2019) ("Some provisions [of law] may need substantial modification merely in order to make sense in their application to same-sex couples."). As the court below aptly put it, *Lucero* "should be applied consistently with the realities … of a same-sex relationship, particularly during the period before same-sex marriages were legally recognized in Colorado." *In re Marriage of Hogsett*, No. 17CA1996, 2018 WL 6564880, at *1 (Colo. App. Dec. 13, 2018).

To ensure that courts apply *Lucero* in a way that aligns with the realities of same-sex relationships, the Court should make three things clear. First, *Lucero* re-

quires a showing that the same-sex couple agreed to a permanent relationship of mutual support with the same degree of commitment as spouses in a ceremonial marriage. *See Gill*, 206 A.3d at 875. But *Lucero* does not require that the same-sex couple agreed to be *legally married*. Second, *Lucero* does not require a same-sex couple to have an open and public relationship in all respects, because same-sex couples historically have faced, and continue to face, harassment, discrimination, and violence. And third, some factors are not appropriate considerations when determining whether a common-law marriage exists between a same-sex couple.

1.1 *Lucero* requires an agreement to a permanent relationship of mutual support with the same degree of commitment as spouses in a ceremonial marriage. It does not require an agreement to be *legally married*.

The argument was raised below that "because the parties could not legally marry during their relationship, they could not have agreed—as *Lucero* requires—that they were married." *Hogsett*, 2018 WL 6564880, at *1. The Court should reject this argument.[1] Because the laws that once barred same-sex couples from legally marrying were struck down as unconstitutional in *Obergefell*, those laws "cannot

[1] As explained in more detail below, *see infra* Section 2.8, the Court should also reject any notion that to establish a common-law marriage, a same-sex couple had to refer to each other using terms like "spouse," "husband," "wife," or "married."

preclude the recognition" of common-law marriages that occurred before marriage equality. *In re Estate of Carter*, 159 A.3d 970, 974 (Pa. Super. Ct. 2017). The court below got it right: "[R]etroactive application of *Obergefell* means that same-sex couples must be accorded the same right as opposite-sex couples to a prove common law marriage *even when the alleged conduct establishing the marriage pre-dates Obergefell*." *Hogsett*, 2018 WL 6564880, at *4 (emphasis added).

If the Court were to accept the argument that a same-sex couple cannot establish *Lucero*'s first element if the purported common-law marriage occurred before marriage bans were struck down, then the Court would be adopting the view that *Obergefell* does not apply retroactively. That view would collide head-on not only with the court of appeals' holding below but also with the great weight of authority. *Id.* (recognizing that *Obergefell* applies retroactively and collecting authorities). Worse, that view would effectively reinstate the very exclusion of same-sex couples from marriage that *Obergefell* found unconstitutional. *See* 135 S. Ct. at 2607.

1.2 Courts should apply *Lucero*'s openness requirement to account for the harassment, discrimination, and violence historically and presently faced by same-sex couples.

Lucero holds that a couple's relationship cannot amount to a common-law marriage unless the relationship is open and public. 747 P.2d at 663–64. But courts

should apply *Lucero*'s openness requirement in a manner that accounts for the historical and continuing realities of same-sex relationships.

The LGBT community has endured a long history of harassment, discrimination, and violence. As the Supreme Court noted in *Obergefell*, well into the 20th century, "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." 135 S. Ct. at 2596. This limited ability of many LGBT individuals to live completely openly or to publicly acknowledge their relationships carried forward through the 20th century and beyond:

> Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

Id. In 1986, the Supreme Court upheld state laws criminalizing same-sex sexual conduct. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). In 1992, Colorado voters approved a constitutional amendment that prohibited local governments from recognizing LGBT people as a protected class. *See* Colo. Const. art. II, § 30b (struck down as unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996)). And Colorado's antidiscrimination laws did

not extend employment, housing, or public-accommodation protections to LGBT residents until 2007 and 2008. Colo. Rev. Stat. § 24-34-401 (employment); *id.* § 24-34-501 (housing); *id.* § 24-34-601 (public accommodations).

The fear of harassment, discrimination, and violence still exists. Well into the late 2000s, for example, the majority of LGBT Americans hid their LGBT identity from some or all of their coworkers, often for fear of discrimination or harassment. Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, *in* Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide at 40-13 to 40-14 (2014), https://perma.cc/2X6N-RY2B. In 2010, 27% of surveyed lesbian and gay Coloradans, and 52% of surveyed transgender Coloradans, reported they had experienced employment discrimination. *Id.* at 40-6 to 40-7. And between 2011 and 2015, more than 20% of the estimated 250,000 hate crimes in the United States each year were motivated by sexual orientation. Bureau of Justice Statistics, U.S. Dep't of Justice, *Hate Crime Victimization, 2004–2015*, at 2 (2017), https://perma.cc/G23D-LYVP.

Simply put, because complete openness has historically exposed, and still exposes, same-sex couples to the risk of harassment, discrimination, and violence, some couples might have been uncomfortable, or might still be uncomfortable, ac-

knowledging their same-sex relationship to everyone in their communities or to their family members. Peter Nicolas, *Common Law Same-Sex Marriage*, 43 Conn. L. Rev. 931, 941 (2011).

Courts should apply *Lucero*'s openness requirement to account for these realities. It should instruct the courts that just because a same-sex couple was less open and public about their relationship than one might expect from a different-sex couple, that should not preclude a finding that the couple had a common-law marriage.

1.3 Some factors are inappropriate to consider in determining whether a same-sex couple had a common-law marriage.

The following factors are ill-suited to the realities of same-sex relationships:

Joint Tax Returns. In *Lucero*, the Court stated that whether the parties filed joint tax returns is conduct that could help establish or corroborate the parties' intent to be married. 747 P.2d at 665. But same-sex couples could not file joint federal tax returns before 2013. And they could not file joint state taxes until 2014. *See Burns v Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 5312541 (D. Colo. Oct. 17, 2014). Courts should thus give no weight to the fact that a same-sex couple did not file joint tax returns at a time when the law barred them from doing so.

Surnames. *Lucero* also directs the lower courts to consider "the use of the man's surname by the woman." 747 P.2d at 665. That factor does not make sense for same-sex couples. Instead, a court should consider whether the parties took a common surname. But even if the parties did not, the court should not give much weight to that. Same-sex couples adopt a common surname less often than different-sex couples. *See Hogsett*, 2018 WL 6564880, at *3. And taking a common surname could subject a same-sex couple to harassment, discrimination, or violence.

Children. *Lucero* also looks to "the use of the man's surname by children born to the parties." 747 P.2d at 665. This factor, too, does not make sense for same-sex couples. Instead, a court should consider whether the parties tried to, or did, create a family that included children by adoption or assisted reproduction. *Cf. Ranolls v. Dewling*, 223 F. Supp. 3d 613, 624 (E.D. Tex. 2016) (concluding that a genuine dispute existed over whether a same-sex couple had a common-law marriage, in part, because the couple raised a child together).

Attempts at Ceremonial Marriage in Another State. The court of appeals upheld the trial court's finding that no common-law marriage existed, in part, based on "the absence of conduct showing an attempt to be married in a state where same-sex marriage was legal." *Hogsett*, 2018 WL 6564880, at *4. But that is not an

appropriate consideration. As one appellate court has explained, even if a same-sex couple did not seek to have a ceremonial marriage in another state, that is "fully consistent with an existing common law marriage." *Carter*, 159 A.3d at 982. Whether the couple sought a ceremonial marriage in a state that allowed same-sex couples to marry "does not undermine, or in any way affect" whether the couple had a common-law marriage. *Id.*

2. Many factors may help clarify whether a same-sex couple had a common-law marriage.

This Court recognized in *Lucero* that "there is no single form that any such evidence must take," and that "any form of evidence that openly manifests the intention of the parties" to be in a permanent marital relationship "will provide the requisite proof from which the existence of their mutual understanding can be inferred." 747 P.2d at 665. So in any given case, the parties should be free to present any admissible evidence relevant to the two key inquiries: (1) whether the parties agreed to a permanent relationship of mutual support with the same degree of commitment as spouses in a ceremonial marriage; and (2) whether the parties' conduct corroborates that agreement. In short, courts should consider the totality of the circumstances, applying an all-things-considered approach.

That said, to provide guidance to courts and litigants, the Court should highlight the following factors as appropriate considerations. But in doing so, it should provide two critical instructions. First, courts should not give dispositive weight to any one factor. Second, in any given case, how these factors apply, and how much weight they should receive, will depend on how open the couple believed they could be. For example, though courts should consider the couple's reputation within the community, they should bear in mind that some same-sex couples have unaccepting families, coworkers, and communities. For such a couple, not attending family, work, and other social events as a couple should not cut against a finding that they had common-law marriage. The same goes for the other factors: a court should apply them while bearing in mind that the couple may not have been able to be completely open about their relationship.

2.1 Party Testimony

A court should consider a party's testimony on whether the party agreed to be in a permanent relationship of mutual love, support, and commitment. *See Gill*, 206 A.3d at 875 (stating that the "best evidence" of whether the parties agreed to enter into a relationship akin to marriage "is the testimony of the parties"); *Hogsett*, 2018 WL 6564880, at *3–4.

2.2 Proposal

The court should consider whether one party proposed to the other. *Cf. Carter*, 159 A.3d at 972 (one party's proposal to same-sex partner with a diamond ring supported conclusion that common-law marriage existed). But same-sex proposals may differ from different-sex proposals. The proposal, for instance, may not involve an engagement ring; the couple may choose some other symbol of commitment. In *Windsor*, for example, "[t]o avoid unwelcome questions about the identity of Ms. Windsor's 'fiance' from co-workers, Dr. Spyer proposed with a diamond brooch, instead of a diamond ring." Brief for Respondent at 2–3, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

2.3 Reputation

A court should consider the testimony of third-party witnesses about whether they understood the couple to be in a committed long-term relationship like marriage. *Cf. In re Estate of Yudkin*, No. 17CA1996, 2019 WL 989251, at *1 (Colo. App. Feb. 21, 2019) (concluding that a common-law marriage existed, in part, because 12 witnesses "testified that they understood that decedent and putative wife were married"), *cert. granted*, No. 2019SC000234 (Colo. Sept. 30, 2019). The court should consider, for example, whether any of the couple's friends or family recognized the

parties as in a permanent relationship of mutual love, support, and commitment. And it should consider whether the parties told any friends or family about the relationship. *See Obergefell*, 135 S. Ct. at 2597 (noting that some same-sex couples want to "affirm their commitment to one another before their children, their family, their friends, and their community"); *Gill*, 206 A.3d at 879 (concluding that no common-law marriage existed, in part, "because neither party told their friends or family about the alleged marriage"); *In re Estate of Giessel*, 734 S.W.2d 27, 30 (Tex. App. 1987) (concluding that a common-law marriage existed even though neither the wife nor the husband told any of the husband's relatives that they were married).

As part of the couple's reputation, a court should also consider other aspects of the couple's social life—e.g., whether they entertained friends and family together; whether they attended parties, family holidays, or other social events together; and whether they traveled and vacationed together.

2.4 Ceremony

A court should consider whether the parties commemorated their agreement with a ceremony or a honeymoon. *See Obergefell*, 135 S. Ct. at 2595 (noting that two of the petitioners "celebrated a commitment ceremony to honor their permanent relation in 2007"); *Gill*, 206 A.3d at 880. If the parties did not have a ceremony, the

court should not give that too much weight, because "same-sex couples, prior to the legalization of same-sex marriage, might have been less likely to have a public ceremony or honeymoon than different-sex couples who could legally celebrate their wedding." *Gill*, 206 A.3d at 879 (alterations omitted).

2.5 Domestic Partnership

A court should consider whether the parties registered as domestic partners with their employers for employment benefits or with a municipality that offered a registry. Registering often required the couple to swear under oath that they were in a permanent relationship of mutual love, support, and commitment.

2.6 Anniversary

A court should consider whether the parties celebrated an anniversary. *Cf. Carter*, 159 A.3d at 972 (same-sex couple's celebration of their anniversary every year for 16 years supported finding of common-law marriage).

2.7 Symbols of Commitment

A court should consider whether the parties wore rings or other symbols signifying a permanent relationship of mutual love, support, and commitment. *Cf. Ranolls*, 223 F. Supp. 3d at 624 (concluding that a genuine dispute existed over

whether a same-sex couple had a common-law marriage, in part, because the couple wore wedding bands to symbolize the marriage).

2.8 References to One Another

A court should consider whether the parties called each other husband, wife, spouse, partner, or another term signifying a permanent relationship of mutual love, support, and commitment. *Cf. Ranolls*, 223 F. Supp. 3d at 624 (concluding that a genuine dispute existed over whether a same-sex couple had a common-law marriage, in part, because the parties represented themselves as spouses at work and social events).

But even if the parties did not call themselves married, husband, wife, spouse, or partner, that should not necessarily cut against a finding that the parties had a common-law marriage.

The parties may not have used those terms because, before marriage equality, people rarely used them to describe people in same-sex relationships. *See* The William Institute, UCLA School of Law, *United States Census Snapshot: 2010* (2011). As the court below noted, people in same-sex relationships "often called each other 'partners' rather than 'spouses' or 'husband' and 'wife.' " *Hogsett*, 2018 WL 6564880, at *3.

The parties may not have used these terms for other reasons too. The parties may not have used them because they were precluded from doing so. Many banks, for example, would not allow same-sex couples to list themselves as married on mortgage documents. Other times, same-sex couples avoided these terms because others would harass them or discriminate against them for doing so. Even after marriage equality, some same-sex couples may not have known that they could represent themselves as married. Some same-sex couples do not embrace terms historically associated with marriage, because they reflect heterosexual norms. And for some same-sex couples, these terms were difficult to get used to because marriage was denied them for so long.

2.9 Living Together

A court should consider whether the parties lived together. If so, the court might also consider whether the parties decorated and furnished their home together, whether they placed mementos and photographs of their lives together in their home, and whether they used the same mailing address. The court should also consider how long the parties lived together. *Cf. Yudkin*, 2019 WL 989251, at *1 (concluding that a common-law marriage existed, in part, because the parties lived together for eight years).

But even if the parties did not live together, they still may have had a common-law marriage. Couples sometimes maintain two households, for any number of reasons. For example, each party might have their own children. Or the parties might not have wanted to create the appearance of being in a same-sex relationship to avoid harassment and discrimination. And if one of the parties was a service member, separate residences may have been necessary to avoid dishonorable discharge under the military's former Don't Ask Don't Tell policy.

2.10 Financial Planning

A court should consider whether the couple did long-term financial planning. *Cf. Carter*, 159 A.3d at 972 (concluding that a common-law same-sex marriage existed, in part, because the parties had joint investment accounts). This factor draws from common sense: generally, only people in a permanent relationship of mutual love, support, and commitment intertwine their long-term financial goals.

2.11 Intertwined Finances

A court should consider whether the parties had joint bank accounts, credit cards, or other financial accounts. *Lucero*, 747 P.2d at 665 (considering "maintenance of joint banking and credit accounts"); *cf. Gill*, 206 A.3d at 881 (concluding

that no common-law marriage existed, in part, because "the parties maintained largely separate finances"); *Carter*, 159 A.3d at 972 (concluding that a common-law marriage existed, in part, because the parties had joint banking accounts).

But when weighing this factor, the court should bear in mind that "in this day and age, couples make varying arrangements regarding finances," so "maintenance of largely separate finances is a far less salient consideration than it might have been in years past." *Gill*, 206 A.3d at 882.

2.12 Mutual Financial Contributions

A court should consider whether both parties contributed financially to one another. *Cf. Pertile v. Gen. Motors, LLC*, No. 15-cv-0518-WJM-NYW, 2017 WL 2559218, at *3 (D. Colo. June 13, 2017) (applying Colorado law and concluding that a genuine dispute existed over whether a common-law marriage existed, in part, because the parties had a joint automobile insurance policy). The court could consider, for example, whether both parties contributed to household expenses. *Cf. Yudkin*, 2019 WL 989251, at *1 (concluding that a common-law marriage existed, in part, because both parties "contributed financially to the household—including mortgage payments on the house").

2.13 Joint Ownership of Real and Personal Property

A court should consider whether the parties jointly owned real or personal property. *Cf. Carter*, 159 A.3d at 972 (joint mortgage supported conclusion that same-sex couple had a common-law marriage).

2.14 Beneficiary Designations

A court should consider whether the parties designated each other as beneficiaries on health-insurance policies, life-insurance policies, individual retirement accounts, and other financial products. *Cf. Pertile*, 2017 WL 255218, at *3 (applying Colorado law and concluding that a genuine dispute existed over whether a common-law marriage existed, in part, because one party had listed the other on an employer-based health-insurance policy, and one party was named as the beneficiary of the other's life-insurance policy); *Yudkin*, 2019 WL 989251, at *1 (concluding that a common-law marriage existed, in part, because the putative wife "was also listed as an insured spouse/domestic partner on decedent's dental insurance plan").

2.15 Other Documentary Evidence

A court should consider other documents treating the parties as committed partners—such as wills, estate-planning documents, and powers of attorney. *Cf.*

Carter, 159 A.3d at 972 (same-sex couple's mutual wills and healthcare powers of attorney supported conclusion that common-law marriage existed).

But even if the parties did not draw up wills, powers of attorney, or similar documents, that may simply reflect that the parties lacked knowledge about these instruments, or lacked resources to have them created. It may also reflect that many estate-planning attorneys were not skilled in estate planning for same-sex couples before marriage equality, and many were homophobic and discouraged same-sex couples from accessing estate-planning services.

The court should also consider whether the parties exchanged messages that described their relationship, love, support, and mutual commitment to one another. And it should consider whether the parties sent or received holiday cards, sympathy cards, anniversary cards, or other correspondence that acknowledged the parties' relationship.

CONCLUSION

The Court should ensure that Colorado courts apply *Lucero* to same-sex couples in a way that tracks the realities of same-sex relationships. The Court should clarify that *Lucero* demands an agreement between the same-sex couple to a permanent relationship of mutual support with the same degree of commitment as spous-

es in a ceremonial marriage. It should instruct the lower courts to apply *Lucero*'s openness requirement with sensitivity to the fact that same-sex couples often could not (and still cannot) openly acknowledge their relationships without significant risk of harassment, discrimination, and violence. It should underscore that some factors do not make sense for same-sex couples. And it should provide guidance to the lower courts and litigants about what factors will often help clarify whether a same-sex couple had a common-law marriage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 17, 2019, I used the E-System to serve this document on all counsel of record.

/s/ Mark D. Gibson
Mark D. Gibson