UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

DEREK KITCHEN, individually; MOUDI SBEITY, individually; KAREN ARCHER, individually; KATE CALL, individually; LAURIE WOOD, individually; and KODY PARTRIDGE, individually, Plaintiffs, v. GARY R. HERBERT, in his official capacity as Governor of Utah; JOHN SWALLOW, in his official capacity as Attorney General of Utah; and SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County, Defendants.	)	Civil Case No. 2:13-cv-00217-RJS Judge Robert Shelby

MEMORANDUM OF LAW OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU OF UTAH AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Utah is one of its statewide affiliates. The ACLU and the ACLU of Utah advocate for equal rights of lesbian, gay, bisexual and transgender ("LGBT") people and the freedom to marry for same-sex couples in Utah and across the country.

None of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock; no party's counsel authored the brief in whole or in part; and no party, party's counsel, or other person contributed money intended to fund preparing or submitting this memorandum of law. This memorandum of law has been submitted together with a motion seeking this Court's leave to file.

INTRODUCTION

Plaintiffs challenge the constitutionality of Utah Code Ann. §§ 30-1-2(5), 30-1-4.1 and Utah Const. amend. 3 (collectively "Utah's marriage bans"), which prohibit same-sex couples from marrying under Utah law, deny recognition to the legally valid marriages of same-sex couples performed in other jurisdictions, and exclude same-sex couples from any legal status that provides rights, benefits, or duties that are substantially similar to marriage. Although *amici* agree with Plaintiffs that Utah's marriage bans are unconstitutional under any standard of review, *amici* submit this brief to explain why – under the controlling framework established by the Supreme Court – Utah's marriage bans and other laws that discriminate based on sexual orientation should be subjected to heightened scrutiny; to explain why such heightened scrutiny

is not foreclosed by Tenth Circuit precedent; and to explain how decisions from other circuits rejecting heightened scrutiny were based on erroneous precedent that relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). Under heightened scrutiny – or any standard of scrutiny – Utah's marriage bans are unconstitutional.

ARGUMENT

I. Under the Traditional Framework for Identifying Suspect or Quasi-Suspect Classifications, Sexual Orientation Classifications Must Be Subjected to Heightened Scrutiny.

"In considering whether state legislation violates the Equal Protection Clause" courts must "apply different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). At a minimum, non-suspect classifications are subject to rational-basis review and "must be rationally related to a legitimate governmental purpose." *Id.* On the other end of the spectrum, "[c]lassifications based on race or national origin" are suspect classifications and "are given the most exacting scrutiny." *Id.* "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." *Id.* Classifications receiving this intermediate level of scrutiny are quasi-suspect classifications that can be sustained only if they are "substantially related to an important governmental objective." *Id.*

In a long line of decisions, the Supreme Court has established a framework for determining when courts should receive some form of heightened scrutiny.

> The Supreme Court uses certain factors to decide whether a new classification qualifies as a [suspect or] quasi-suspect class. They include: A) whether the class has been historically "subjected to discrimination," B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," C) whether the class exhibits "obvious, immutable, or distinguishing

> characteristics that define them as a discrete group" and D) whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (citations omitted) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440-41 (1985)), *aff'd*, 133 S.Ct. 2675 (2013). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *accord Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012).

As the Second Circuit and several federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect classifications and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d. 1140 (9th Cir. 2013); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

II. Recognizing Sexual Orientation as a Quasi-Suspect Classification Is Consistent with Tenth Circuit Precedent.

The Tenth Circuit has held that sexual orientation is not a suspect classification receiving the most exactly level of scrutiny, but there is no binding precedent in the Tenth Circuit holding that sexual orientation classifications must be subjected to rational-basis review instead of the

intermediate scrutiny standard used for quasi-suspect classifications. The only cases to squarely address the standard of scrutiny for sexual orientation classifications were *National Gay Task Force v. Bd. of Educ. ("NGLT")*, 729 F.2d 1270 (10th Cir.1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985), and *Rich v. Sec'y of the Army*, 735 F.2d 1220 (10th Cir. 1984). Although those decisions held that sexual orientation is not a suspect classification that should receive strict scrutiny, they are fully consistent with the decisions of other courts that treat sexual orientation as a "quasi-suspect" classification that should be subjected to the "intermediate scrutiny" standard. *See, e.g.*, *Windsor*, 699 F.3d at 185 (concluding that sexual orientation classifications are "quasi-suspect (rather than suspect)" and receive intermediate scrutiny instead of "our most exacting scrutiny" (quoting *Trimble v. Gordon*, 430 U.S. 761, 767 (1977)); *Golinski*, 824 F. Supp. 2d at 993-94 (requiring that sexual orientation classification be "substantially related to an important governmental objective"); *Varnum*, 763 N.W.2d at 885-96 (invalidating state marriage ban under intermediate scrutiny without reaching issue of whether strict scrutiny would be appropriate); *Kerrigan*, 957 A.2d at 425-31 (same).

In *NGLT* the plaintiff organization challenged the constitutionality of a state law permitting school teachers to be fired for engaging in "public homosexual activity." *See NGLT*, 729 F.2d at 1272. The Tenth Circuit upheld the statute, but only after construing it to apply only to teachers who engage in sexual activity in public, not teachers who engage in private sexual activity. *Id.* at 1273. In doing so, the court held that "something less than a strict scrutiny test should be applied" to sexual orientation classifications but did not rule out the possibility of applying some lesser form of heightened scrutiny:

> Plaintiff also argues that the statute violates its members' right to equal protection of the law. We cannot find that a classification based on the choice of sexual

> partners is suspect, especially since only four members of the Supreme Court have viewed gender as a suspect classification. *Frontiero v. Richardson*, 411 U.S. 677 (1973). *See also Baker v. Wade*, 553 F. Supp. 1121, 1144 n. 58. Thus something less than a strict scrutiny test should be applied here. Surely a school may fire a teacher for engaging in an indiscreet public act of oral or anal intercourse. *See Amback v. Norwick*, 441 U.S. 68, 80 (1979).

Id. at 1273. The *NGLT* court did not hold that sexual orientation classifications are subject only to rational-basis review. To the contrary, by comparing sexual orientation classifications to sex-based classifications, the court's reasoning suggests the intermediate scrutiny test for quasi-suspect classifications would be the most appropriate standard.

A few months later in *Rich*, the Tenth Circuit again addressed the standard of scrutiny for sexual orientation classifications when it decided a constitutional challenge to the military's policy of prohibiting lesbians and gay men from serving in the military. The Tenth Circuit again stated that sexual orientation classifications are not "suspect," but did not hold that such classifications are subject to mere rational-basis review. Instead, *Rich* assumed that the classifications could be subjected to heightened scrutiny because they burdened the exercise of a fundamental right and held that even under that heightened scrutiny test, the military's policy was constitutional:

> A classification based on one's choice of sexual partners is not suspect. *E.g., National Gay Task Force v. Board of Education*, 729 F.2d 1270, 1273 (10th Cir.1984); *see also Hatheway v. Secretary of Army*, 641 F.2d 1376, 1382 (9th Cir.1981), *cert. denied*, 454 U.S. 864 (1981); *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir.1979). And even if heightened scrutiny were required in reviewing the Army Regulations because they restrict a fundamental right, *see, e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254, 262 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 634, (1969); *Hatheway v. Secretary of Army*, *supra*, 641 F.2d at 1382 n. 6 (9th Cir.1981), the classification is valid in light of the Army's demonstration of a compelling governmental interest in maintaining the discipline and morale of the armed forces. *Hatheway*, *supra*, 641 F.2d at 1382; *Beller*, *supra*, 632 F.2d at 810. Thus, we cannot sustain the plaintiff's equal protection claim

Rich, 735 F.2d at 1229 (footnote omitted). Like the panel in *NGTF*, the *Rich* court rejected the argument that sexual orientation classifications are subject to strict scrutiny as suspect classifications but did not address whether they should be subjected to intermediate scrutiny as quasi-suspect ones. Besides *NGTF*, the primary authority cited by *Rich* was the Ninth Circuit's decision in *Hatheway*, which subjected sexual orientation classifications to intermediate scrutiny under the assumption that classifications based on sexual orientation necessarily implicate a fundamental right to privacy. *See Hatheway*, 641 F.2d at 1382 ("[W]e apply an intermediate level of review. The classification can be sustained only if it bears a substantial relationship to an important governmental interest." (citations omitted)). Accordingly, *Rich* does not foreclose the possibility of sexual orientation being recognized as a quasi-suspect classification. To the contrary, recognizing sexual orientation classifications as quasi-suspect would simply require this Court to subject those classifications to the same intermediate-scrutiny test that *Rich* employed based on the classification's burden on a possible fundamental right.

Although *NGTF* and *Rich* never held that sexual orientation classifications are subject to rational-basis review, dicta in subsequent Tenth Circuit decisions has mischaracterized the holdings of those cases. *See Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992) (incorrectly stating that in *NGTF* and *Rich* "we twice applied rational basis review to classifications which disparately affected homosexuals"); *Walmer v. Dep't of Def.*, 52 F.3d 851, 854 (10th Cir.1995) (incorrectly stating that *Rich* established that "classifications which disparately affect homosexuals require rational basis review"); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008) (incorrectly equating Tenth Circuit precedent with decisions from other circuits applying rational-basis review). In each of those cases, however, the discussion of

rational-basis review was pure dicta. *Jantz* was a qualified-immunity case in which the court held that, as of 1988, it was not clearly established that sexual orientation classifications should receive more than rational-basis review. The court did not issue a new holding regarding the standard of scrutiny but merely held that "the general state of confusion in the law at the time[] cast enough shadow on the area so that any unlawfulness in Defendant's actions was not 'apparent' in 1988." *Jantz*, 976 F.2d at 630. Similarly, although *Walmer* mischaracterized *Rich* as applying rational-basis review, the actual holding of *Walmer* was that, under *Rich*, discharging service members based on their sexual orientation is justified by a compelling governmental interest that satisfies intermediate scrutiny. *See Walmer*, 52 F.3d at 854-55. And in *Price-Cornelison*, the plaintiff had asserted in the district court that strict scrutiny applies to sexual orientation classification but "d[id] not reassert that claim . . . on appeal." *Price-Cornelison*, 524 F.3d at 1113 n.9. Moreover, because the anti-gay discrimination in *Price-Cornelison* failed even rational-basis review, the court had no occasion to decide whether a higher standard of scrutiny would be appropriate. *Id.* at 1114.

To the extent that any of these cases implied that sexual orientation classifications are subject only to rational-basis review, those statements are nonbinding dicta because they are "'comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'" *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (quoting Black's Law Dictionary 454 (6th ed.1990)); *see also OXY USA, Inc. v. Babbitt*, 230 F.3d 1178, 1184 (10th Cir. 2000) (defining dicta as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding – that, being peripheral, may not have received the full and careful

consideration of the court that uttered it" (citation omitted)), *vacated on other grounds on reh'g en banc*, 268 F.3d 1001 (10th Cir. 2001) (en banc). The Tenth Circuit has explained that "a panel of this Court is bound by a holding of a prior panel of this Court but is not bound by a prior panel's *dicta*." *Bates v. Dep't of Corr.*, 81 F.3d 1008, 1011 (10th Cir. 1996) (brackets omitted). And the Tenth Circuit has not hesitated to disregard stray assertions in prior opinions that were not necessary to the outcome of a case. *See Wrenn ex rel. Wrenn v. Astrue*, 525 F.3d 931, 937 (10th Cir. 2008) ("This by-the-by footnote is dictum we are not obligated to follow."); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1123 (10th Cir. 2008) (statement in prior opinion "was dicta, and it does not control our determination here"); *United States v. Rogers*, 371 F.3d 1225, 1232 n.7 (10th Cir. 2004) ("The obiter in footnote five of [a prior decision] does not foreclose the result in this case."); *United States v. Neal*, 249 F.3d 1251, 1257 n.7 (10th Cir. 2001) (noting that an earlier panel erred in its characterization of an issue but "[b]ecause that mischaracterization was dicta, we are not bound by it").[1]

There is no conflict between Tenth Circuit precedent holding that sexual orientation is not a suspect classification and precedent from other courts holding that orientation classifications are quasi-suspect. Quasi-suspect classifications are judged by an "intermediate scrutiny" standard that lies "[b]etween the[] extremes of rational basis review and strict scrutiny." *Clark*, 486 U.S. at 461. For example, the Second Circuit in *Windsor* concluded that sexual orientation classifications are not suspect classifications that receive "our most exacting

[1] District courts in the Tenth Circuit have also recognized that they are not bound by dicta from panel opinions. *See, e.g.*, *Sawyer v. USAA Ins. Co.*, 912 F. Supp. 2d 1118, 1143 (D.N.M. 2012) ("As that particular issue was not before the Tenth Circuit, however, the Tenth Circuit's language is dicta."); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1227 (D. Wyo. 2006) (dicta in Tenth Circuit decisions are not binding authority).

scrutiny" but nevertheless held that they constitute quasi-suspect classifications that should receive an intermediate level of review. *Windsor*, 699 F.3d at 185. Adopting the analysis used by the Second Circuit in *Windsor* and subjecting sexual orientation classifications to intermediate scrutiny would thus be fully consistent with Tenth Circuit precedent that "something less than a strict scrutiny test should be applied" to such classifications. *NGLT*, 729 F.2d at 1273.

For all these reasons, Tenth Circuit precedent does not foreclose this Court from applying intermediate scrutiny and requiring that sexual orientation classifications be substantially related to an important governmental interest.

III. Decisions from Other Circuits Rejecting Heightened Scrutiny Were Based on Erroneous Precedent that Relied on *Bowers v. Hardwick*.

Now that *Lawrence* has overruled *Bowers*, lower courts without controlling post-*Lawrence* precedent on the issue must apply the framework mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny. *See Windsor*, 699 F.3d at 181. In most circuits, however, the courts never had the opportunity to conduct this analysis because from 1986 to 2003, traditional equal protection analysis for sexual orientation classifications was cut short by the Supreme Court's decision in *Bowers*, which erroneously held that the Due Process Clause does not confer "a fundamental right upon homosexuals to engage in sodomy." *Bowers*, 478 U.S. at 190. The Supreme Court overruled *Bowers* in *Lawrence* and emphatically declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. But in the meantime, the *Bowers* decision imposed a "stigma" that "demean[ed] the lives of homosexual persons" in other areas of the law as well. *Id.* at 575. As *Lawrence* explained, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject

homosexual persons to discrimination." *Id*. By effectively endorsing that discrimination, *Bowers* preempted the equal protection principles that otherwise would have required subjecting sexual orientation classifications to heightened scrutiny.

By the mid-1980s, judges and commentators had begun to recognize that, under the traditional equal-protection framework, classifications based on sexual orientation should be subject to heightened scrutiny. *See, e.g.*, *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *certiorari*; joined by Marshall, J.) (sexual orientation classifications should be "subjected to strict, or at least heightened, scrutiny"); John Hart Ely, *Democracy & Distrust: A Theory of Judicial Review* 162-64 (1980); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985); Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed.) (1988).

But after *Bowers,* the circuit courts stopped examining the heightened-scrutiny factors and instead interpreted *Bowers* to categorically foreclose gay people from being treated as a suspect or quasi-suspect class even if they would have received such protections under the traditional equal protection analysis. *See Jantz*, 976 F.2d at 630 (discussing other circuits' interpretation of *Bowers*). For example, in its first decision to consider the issue after *Bowers*, the D.C. Circuit reasoned:

> If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). Six other circuit courts quickly embraced the D.C. Circuit's analysis. *See, e.g.*, *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Richenberg v. Perry*, 97 F.3d. 256, 260 (8th Cir. 1996). To the extent that these courts discussed the four suspect-classification factors at all, they did so in a cursory fashion and with the assumption that the only characteristic uniting gay people as a class was their propensity to engage in intimate activity that, at the time, was allowed to be criminalized. *See, e.g.*, *Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464; *High Tech Gays*, 895 F.2d at 571.

In 2003, however, the Supreme Court overruled *Bowers* and declared that it "was not correct when it was decided and is not correct today." *Lawrence*, 539 U.S. at 578. By overruling *Bowers*, the Supreme Court in *Lawrence* necessarily abrogated decisions from other circuit courts that relied on *Bowers* to foreclose the possibility of heightened scrutiny for sexual orientation classifications. *See Pedersen*, 881 F. Supp. 2d at 312 ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'") (citations omitted); *Golinski*, 824 F. Supp. 2d at 984 ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.") Now that *Lawrence* has overruled *Bowers*, lower courts without controlling post-*Lawrence*

precedent on the issue must apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny.

Unfortunately, even after *Bowers* was overruled, some circuit courts continued to erroneously adhere to their pre-*Lawrence* precedent or adopt pre-*Lawrence* precedent from other circuits without conducting any independent analysis of the factors the Supreme Court has identified as relevant to heightened scrutiny. *See, e.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *see generally* Arthur S. Leonard, *Exorcising the Ghosts of* Bowers v. Hardwick*: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009). None of these decisions considered the traditional factors relevant for identifying suspect or quasi-suspect classifications. [2]

For all these reasons, this Court should not follow decisions from other circuits that adhered to pre-*Lawrence* precedent without conducting an independent analysis and should instead follow the well-reasoned analysis of the Second Circuit in *Windsor* and other courts that have actually analyzed whether sexual orientation classifications require heightened scrutiny under the Supreme Court's traditional equal-protection framework.

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[2] The Eighth Circuit in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), held that rational-basis review applies but did not consider the four heightened scrutiny factors in reaching that conclusion. The Fifth Circuit in *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004), held that in the context ruling on qualified-immunity that the level of scrutiny during the period from 2000 to 2002 was rational-basis review, but the court did not address what the standard of scrutiny should be after *Lawrence*. The Fourth, Seventh, and D.C. Circuits have not issued any decisions after *Lawrence* addressing the standard of scrutiny for sexual orientation classifications. And the Third Circuit has not issued any decisions on the issue either before or after *Lawrence*.

CONCLUSION

This Court should decide the case by recognizing sexual orientation classifications as quasi-suspect and subjecting marriage bans to heightened scrutiny. Under that heightened scrutiny – or any standard of scrutiny – Utah's marriage bans are unconstitutional.

Dated: October 17, 2013

Respectfully Submitted,

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