Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, ET AL.,

Plaintiffs-Appellees,

v.

GARY R. HERBERT, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Utah (No. 2:13-cv-00217)

MARY BISHOP, ET AL.,

Plaintiffs-Appellees,

v.

SALLY HOWE SMITH, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Oklahoma (No. 4:04-cv-00848)

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF UTAH, AND ACLU OF OKLAHOMA; THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; BAR ASSOCIATIONS; AND PUBLIC INTEREST AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

JOSHUA A. BLOCK
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2627
Facsimile: (212) 549-2650
Email: jblock@aclu.org

JOHN MEJIA (USB No. 13965)
LEAH FARRELL (USB No. 13696)
American Civil Liberties Union of Utah Foundation
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9863
Facsimile: (801) 532-2850
E-mail: jmejia@acluutah.org
E-mail: lfarrell@acluutah.org

(Additional counsel listed on inside cover)

RYAN D. KIESEL
BRADY R. HENDERSON
American Civil Liberties Union of Oklahoma Foundation
3000 Paseo Drive
Oklahoma City, OK 73103
Telephone: (405) 524-8511
Email: rkiesel@acluok.org
Email: bhenderson@acluok.org

CORPORATE DISCLOSURE STATEMENT

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.

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STATEMENT OF INTEREST

Amici are a coalition of bar associations, civil and human rights groups, and public interest and legal service organizations committed to preventing, combating, and redressing discrimination, and protecting the equal rights of women and minorities in the United States, including African-Americans, Latinos, Asian Americans and Pacific Islanders, and lesbian, gay, bisexual, and transgender people. *Amici* have a vital interest in ensuring that the Constitution's guarantee of equal protection effectively protects all people from invidious discrimination and have filed this brief to address an issue of overriding importance in this case: the proper standard for reviewing governmental action that discriminates on the basis of sexual orientation.

Amici include the following organizations: The American Civil Liberties Union, ACLU of Utah, and ACLU of Oklahoma; The Leadership Conference on Civil and Human Rights; 9to5, National Association of Working Women; API Equality—LA; Asian Americans Advancing Justice, Asian Americans Advancing Justice –Asian Law Caucus, Asian Americans Advancing Justice—Chicago; Asian Americans Advancing Justice—Los Angeles; Cimarron Alliance, Hispanic National Bar Association, Human Rights Campaign; NAACP Salt Lake Branch & NAACP Tri-State Conference of Idaho, Nevada and Utah; National Action Network; National Council of La Raza; National Gay and Lesbian Task Force, National Organization for Women Foundation; Oklahomans for

Equality; Public Advocates, Inc.; and The Equality Network. Descriptions of the *amici* are set forth in the Attachment to this brief.

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. All parties have consented to the filing of this brief.

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; *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688, *14-*18 (S.D. Ohio Dec. 23, 2013); *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); *Griego v. Oliver*, 316 P.3d 865, 879-84 (N.M. 2013); *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).

A. Lesbians and Gay Men Have Suffered a Long History of Discrimination.

There can be no doubt that lesbians and gay men historically have been, and continue to be, the target of purposeful and often grievously harmful discrimination because of their sexual orientation. For centuries, the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, Sex and Reason 291 (1992); *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1015 (1985) (Brennan, J., dissenting from denial of cert.) (gay people "have historically been the object of pernicious and sustained hostility"). As the Second Circuit concluded, "It is easy to conclude that homosexuals have suffered a history of discrimination. Windsor and several amici labor to establish and document this history, but we think it is not much in debate." *Windsor*, 699 F.3d at 182; *see Pedersen*, 881 F. Supp. 2d at 318 ("The long history of anti-gay discrimination which evolved from conduct-based proscriptions to status or identity-based proscriptions perpetrated by federal, state and local governments as well as private parties amply demonstrates that homosexuals have suffered a long history of invidious discrimination."); Brief of the Organization of American Historians and the American Studies Association as Amici Curiae in Support of Respondent Edith

Windsor, *United States v. Windsor*, No. 12-307, 2013 WL 838150. (summarizing history of discrimination against gay people in America).

B. Sexual Orientation Is Irrelevant to an Individual's Ability to "Contribute to Society."

The other essential factor in the Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that "frequently bears [a] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 440-4 (citation omitted); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

Courts discussing this factor have agreed with near unanimity that homosexuality is irrelevant to one's ability to perform or contribute to society. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor*, 699 F.3d at 182; *accord Golinski*, 824 F. Supp. 2d at 986 ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society."); *Pedersen*, 881 F. Supp. 2d at 320 ("Sexual orientation is not a distinguishing characteristic like mental retardation or age which undeniably impacts an individual's capacity and ability to contribute to

society. Instead like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."); *see also* Am. Psychiatric Ass'n, Position Statement On Homosexuality and Civil Rights, 131 Am. J. Psychiatry 436, 497 (1974). In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Cleburne*, 473 U.S. at 440.

C. Lesbians and Gay Men Lack Sufficient Political Power to Protect Themselves Against Invidious Discrimination.

Lack of political power is not essential for recognition as a suspect or quasi-suspect class. *See Windsor*, 699 F.3d at 181. But the limited ability of gay people as a group to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate based on sexual orientation. In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id.* at 184.

The political influence of lesbians and gay men today stands in sharp contrast to the political power of women in 1973, when a plurality of the Supreme Court concluded in *Frontiero* that sex-based classifications required heightened scrutiny. *Frontierio*, 411 U.S. at 688. After all, Congress had already passed Title VII of the Civil Rights Act of

1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *See id.* at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and twenty-nine states have no such protections either. *See Golinski*, 824 F. Supp. 2d at 988-89; *Pedersen*, 881 F. Supp. 2d at 326-27. As political power has been defined by the Court for purposes of heightened scrutiny analysis, lesbians and gay men do not have it.[1]

Moreover, while there have been recent successes in securing antidiscrimination legislation (and even marriage equality) in some parts of the nation, those limited successes do not alter the conclusion that lesbians and gay men "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997); *see also* Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res.

[1] Similarly, while there has been some improvement in recent years, lesbians and gay men remain "vastly under-represented in this Nation's decisionmaking councils." *Frontiero*, 411 U.S. at 686 n.17. No openly gay person has ever served in the United States Cabinet. In 2008, of the more than half a million people who then held political office at the local, state, and national levels in this country, only about 400 were openly gay. *See Kerrigan*, 957 A.2d at 446; *see also Windsor*, 699 F.3d at 184-85 (underrepresentation of lesbians and gay men in positions of power "is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private – which, for our purposes [assessing their political power], amounts to much the same thing").

Q. 304 (2007). This history of popular referendums to roll back the or prevent legal protections for lesbians and gay men "demonstrates that the members of the LGBT community do not have sufficient political strength to protect themselves from purposeful discrimination." *Griego*, 316 P.3d at 884.

Indeed, the notion that gay people are too politically powerful to warrant applying heightened scrutiny is particularly misplaced because, by enshrining Utah's marriage bans in the state constitution, Utah has effectively locked gay people out of the normal political process. Having disabled gay people from remedying discrimination through the normal legislative process, Utah can hardly argue that this discrimination is likely "to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440.

D. Sexual Orientation Is An "Immutable" Or "Defining" Characteristic.

The heightened scrutiny inquiry sometimes also considers whether laws discriminate on the basis of "'immutable . . . or distinguishing characteristics that define [persons] as a discrete group.'" *Bowen*, 483 U.S. at 602 (citation omitted). This consideration derives from the "basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 626; *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting that undocumented immigrant children "have little control" over that status). But there is no requirement that a characteristic be immutable in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and legitimacy, even though "[a]lienage and

illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable).

To the extent that "immutability" is relevant to the inquiry of whether to apply heightened scrutiny, the question is not whether a characteristic is strictly unchangeable—it is whether the characteristic is a core trait or condition that one cannot or should not be required to abandon. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("[S]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. . . . the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

Under any definition of immutability, sexual orientation clearly qualifies. There is now broad medical and scientific consensus that sexual orientation is immutable. *See Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an

individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24; *see also* Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults*, 7 Sex Res. Soc. Policy 176 (2010); Brief of *Amicus Curiae* GLMA: Health Professionals Advancing LGBT Equality (Gay and Lesbian Medical Association) Concerning the Immutability of Sexual Orientation in Support of Affirmance on the Merits, *United States v. Windsor*, No. 12-307, 2013 WL 860299.

Even more importantly, as the Supreme Court has acknowledged, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom"); *see also In re Marriage Cases*, 183 P.3d at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Kerrigan*, 957 A.2d at 438 ("In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents

the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution.").[2]

Sexual orientation discrimination accordingly meets not only the two essential criteria for receipt of heightened scrutiny, but *all* considerations the Supreme Court has identified, and thus defendants must sustain their burden to justify the Utah's marriage bans.

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

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

[2] In the past, some courts have asserted that sexual orientation is not immutable by arguing that sexual orientation refers merely to the conduct of engaging in sexual activity. *See*, *e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (arguing that homosexuality "is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."). But the Supreme Court has now rejected that artificial distinction between the conduct of engaging in same-sex activity and the status of being gay, explaining that "[o]ur decisions have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *see Pedersen*, 881 F. Supp. 2d at 325 ("Supreme Court precedent has since rejected the artificial distinction between status and conduct in the context of sexual orientation. Consequently, the precedential underpinnings of those cases declining to recognize homosexuality as an immutable characteristic have been significantly eroded." (citations omitted)).

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"); *Griego*, 316 P.3d at 884 (applying intermediate scrutiny to sexual orientation classifications while noting that "intermediate scrutiny [does not] require the same level of extraordinary protection from the majoritarian political process that strict scrutiny demands");*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." *NGLT*, 729 F.2d at 1272. This Court 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). This Court 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 this Court 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").

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 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*, 895 F.2d at 571; *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); *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).[3] None of these decisions considered the traditional factors relevant for identifying suspect or quasi-suspect classifications.[4]

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

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[3] The Ninth Circuit in *Witt v. Dep't of the Air Force*, 527 F.3d 806, 817 (9th Cir.2008), initially held that *Lawrence* did not overrule prior circuit precedent applying rational-basis review to sexual orientation classifications, but concluded after *Windsor* that *Witt* was wrongly decided and that heightened scrutiny must be applied. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

[4] 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*.

other courts that have actually analyzed whether sexual orientation classifications require heightened scrutiny under the Supreme Court's traditional equal-protection framework.

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: March 4, 2014

Respectfully Submitted,

/s/ John Mejia

John Mejia (USB No. 13965)
Leah Farrell (USB No. 13696)
ACLU OF UTAH FOUNDATION,
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9863
Facsimile: (801) 532-2850
jmejia@acluutah.org
lfarrell@acluutah.org

Joshua A. Block
ACLU FOUNDATION
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2600
Facsimile: (212) 549-2650
jblock@alcu.org

Ryan D. Kiesel
Brady R. Henderson
AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA FOUNDATION
3000 Paseo Drive
Oklahoma City, OK 73103
Telephone: (405) 524-8511
Email: rkiesel@acluok.org
Email: bhenderson@acluok.org

Attorneys for Amici Curiae

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). An attachment titled "**FURTHER DESCRIPTION OF *AMICI CURIAE***" has been filed with a Motion for Leave to Include an Attachment. The attachment has 2,604 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Leah Farrell

John Mejia (USB No. 13965)
Leah Farrell (USB No. 13696)
ACLU OF UTAH FOUNDATION,
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9863
Facsimile: (801) 532-2850
jmejia@acluutah.org
lfarrell@acluutah.org

Joshua A. Block
ACLU FOUNDATION
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2600
Facsimile: (212) 549-2650
jblock@alcu.org

Ryan D. Kiesel
Brady R. Henderson
AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA FOUNDATION
3000 Paseo Drive
Oklahoma City, OK 73103
Telephone: (405) 524-8511
Email: rkiesel@acluok.org
Email: bhenderson@acluok.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2013, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE*** using the court's CM/ECF system, which will send notification of such filing to the following:

Ms. Christy L. Anderson: christy.anderson@bryancave.com,
Ms. Sarah Elizabeth April: sarah.april@bryancave.com,
Ms. Meghan Bailey: meg.bailey@bingham.com
Mr. Carmine D. Boccuzzi, Jr.: cboccuzzi@cgsh.com
Mr. Troy L. Booher: tbooher@zjbappeals.com
Ms. Courtney Bowman: cbowman@proskauer.com
Mr. David Boyle: dbo@boyleslaw.org
Mr. Gerard Vincent Bradley: Bradley.16@nd.edu
Ms. Jennifer L. Bursch: jbursch@tylerbursch.com
Mr. John J. Bursch: jbursch@wnj.com
Ralph E. Chamness: rchamness@slco.org
Mr. David C. Codell: dcodell@nclrights.org
Mr. Stephen M. Crampton: court@lc.org
Mr. Andrew John Davis: ddavis@folgerlevin.com
Ms. Kathryn R. DeBord: katie.debord@bryancave.com
Mr. William C. Duncan: duncanw@marriagelawfoundation.org
Mr. Alexander Dushku: adushku@kmclaw.com
Mr. John C. Eastman: jeastman@chapman.edu
Mr. Stephen Kent Ehat: stephen@ehat.org
Felicia H. Ellsworth: felicia.ellsworth@wilmerhale.com
Mr. Thomas Molnar Fisher: tom.fisher@atg.in.gov
Mr. Steven W. Fitschen: nlf@nlf.net
Mark C. Fleming: mark.fleming@wilmerhale.com
Ms. Darcy Marie Goddard: dgoddard@slco.org
Richard Shawn Gunnarson: sgunnarson@kmclaw.com
Stephen D. Gurr: steve.gurr@bryancave.com
Ms. Dani Hartvigsen: danihartvigsen@hotmail.com
Mr. Jacob Harris Hupart: JHupart@paulweiss.com

Ms. Jaren Janghorbani: jjanghorbani@paulweiss.com
Mr. Lawrence John Joseph: ljoseph@larryjoseph.com
Ms. Roberta A. Kaplan: rkaplan@paulweiss.com
Mr. Joshua Kaye: JKaye@paulweiss.com
Ms. Kathryn Kendell: kkendell@nclrights.org
Ms. Sarah Kroll-Rosenbaum: skroll-rosenbaum@proskauer.com,
Mr. Daniel McNeel Lane, Jr.: nlane@akingump.com
Mr. Shawn Scott Ledingham, Jr.: sledingham@proskauer.com
Ms. Jiyun Cameron Lee: jlee@folgerlevin.com
Mr. Aaron Lindstrom: LindstromA@michigan.gov
Leah M. Litman: leah.litman@wilmerhale.com
Mr. Philip S. Lott: phillott@utah.gov
Mr. James E. Magleby: magleby@mgpclaw.com
Mr. Christopher Dowden Man: cman@chadbourne.com
Ms. Susan Baker Manning: susan.manning@bingham.com
Ms. Mary Elizabeth McAlister: court@lc.org
Mr. John V. McDermott: jmcdermott@bhfs.com
Ms. Lori Ann Alvino McGill: lori.alvino.mcgill@lw.com
Mr. John M. Mejia: jmejia@acluutah.org
Mr. Shannon Price Minter: SMinter@nclrights.org
Ms. Dina Bernick Mishra: dina.mishra@wilmerhale.com
Mr. Alan B. Morrison: abmorrison@law.gwu.edu
Mr. Frank D. Mylar, Jr.: mylar-law@comcast.net
Ms. Jennifer Fraser Parrish: parrish@mgpclaw.com
Mr. Nicole Susan Phillis: Nicole.Phillis@mto.com
Mr. Anthony R. Picarello, Jr.: apicarello@usccb.org
Mr. Stanford E. Purser: spurser@utah.gov
Eric C. Rassbach, Attorney: erassbach@becketfund.org
Mr. Bernard Eric Restuccia: restucciae@michigan.gov
Mr. Clifford J. Rosky: clifford.rosky@gmail.com
Mr. Jerome Cary Roth: Jerome.Roth@mto.com
Mr. Kenneth Lee Salazar: ken.salazar@wilmerhale.com
Mr. Gene C. Schaerr: gschaerr@gmail.com

Ms. Lauren Schmidt: lschmidt@bhfs.com
Mr. Alan E. Schoenfeld: alan.schoenfeld@wilmerhale.com
Mr. Arthur Andrew Schulcz, Sr.: art@chaplainscounsel.com
Ms. Margaret Sheer: margaret.sheer@bingham.com
Mr. Michael Francis Smith: smith@smithpllc.com
Mr. Paul March Smith: psmith@jenner.com
Mr. Robert Theron Smith: theronsmith1@gmail.com
Mr. Kevin Trent Snider: ksnider@pji.org
Mr. Justin W. Starr: jstarr@kmclaw.com
Ms. Anita Staver: court@lc.org
Mr. Mathew D. Staver: court@lc.org
Mr. Monte Neil Stewart: stewart@stm-law.com
Mr. Geoffrey R. Stone: gstone@uchicago.edu
Mr. D'Arcy Winston Straub: dstraub@ecentral.com
Ms. Peggy Ann Tomsic: tomsic@mgpclaw.com
Asma Uddin: auddin@becketfund.org
Mr. David Robert Upham: davidrupham@yahoo.com
Mr. David C. Walker: dwalker@bbdfirm.com, ppeak@bbdfirm.com
Mr. Lynn Dennis Wardle: wardlel@law.byu.edu
Mr. Richard D. White, Jr.: rwhite@barberbartz.com
Mr. Michael Louis Whitlock: michael.whitlock@bingham.com
Mr. Paul Reinherz Wolfson: paul.wolfson@wilmerhale.com
Mr. Paul Benjamin Linton: PBLCONLAW@AOL.COM
Mr. Brett Gilbert Scharffs: scharffsb@law.byu.edu

CERTIFICATE OF DIGITAL SUBMISSION

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March 4, 2013

s/ Leah Farrell

Leah Farrell
lfarrell@acluutah.org
ACLU of Utah
355 N 300 W
Salt Lake City, UT 84103
(801) 521-9862