MAGLEBY | GREENWOOD
ATTORNEYS AT LAW

T 801.359.9000 : F 801.359.9011 : www.mgpclaw.com
170 South Main Street, Suite 850, Salt Lake City, Utah 84101

April 30, 2014

Via Electronic Filing

Clerk of the Court
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Re: *Kitchen, et. al. v. Herbert, et. al.*, No. 13-4178
Response to Citation of Supplemental Authority

To the Clerk of the Court:

Pursuant to Fed. R. App. P. 28(j), Plaintiffs-Appellees respectfully offer this response to Defendants-Appellants' citation of *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, 2014 WL 1577512 (U.S. Apr. 22, 2014).

To the limited extent *Schuette* has any bearing on this case, it supports invalidation of Amendment 3 as a deprivation of "the constitutional rights of persons." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

The plurality decision in *Schuette* confirmed the fundamental distinction between questions of policy, where deference to the political process is generally warranted, and questions involving individual constitutional rights, where no such deference is permitted. *Schuette* upheld a state measure barring consideration of race in admissions to public universities. The plurality held that whether to adopt such a measure is a "policy question," not a question of constitutional law. *Id.* at *8 (opn. of Kennedy, J).

Schuette did not and could not hold that voters can deny constitutional rights. To the contrary, the plurality decision confirmed "the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Id*. at *16. "Searching judicial review . . . is necessary to guard against invidious discrimination." *Id*. (internal citations omitted). In a prior decision authored by Justice Kennedy, the Court applied this very principle to invalidate the measure challenged in *Romer v. Evans*, 517 U.S. 620 (1996), which like Amendment 3 in this case, expressly discriminated against gay and lesbian persons.

Schuette therefore does not alter the Supreme Court's holding that in regulating marriage, States "must respect the constitutional rights of persons." *United States v. Windsor*, 133 S. Ct. at 2691. That principle remains true whether marriage is regulated by state ballot initiatives or through ordinary legislation. For the reasons stated in the Brief of Plaintiffs-Appellees, Utah's constitutional and statutory marriage bans violate "basic due process and equal protection principles." *Id*. at 2693.

Respectfully submitted,

/s/ Peggy A. Tomsic

PAT/jfp