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April 29, 2014
Via electronic filing

Elisabeth A. Shumaker
Clerk of the Court
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, Colorado 80257

Re: *Kitchen v. Herbert,* No. 13-4178
Rule 28(j) citation of supplemental authority, *Schuette v. Coalition to Defend Affirmative Action,* No. 12-682 (U.S. April 22, 2014), slip opinion attached hereto.

Dear Ms. Shumaker,

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court upheld the limited use of racial preferences in university admissions while making clear that its holding did *not* apply to states that banned preferences: "[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.* at 342 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). The Court elaborated on that principle in *Schuette*, which squarely held that a state's voters *can* ban preferences, and in so doing reinforced Utah's points about the importance of letting the people make difficult policy choices through democratic means. OB35-36,98-101; RB1-7,98-103.

Specifically, while acknowledging an individual's right "not to be injured by the unlawful exercise of governmental power," Justice Kennedy's plurality opinion emphasized that "[o]ur constitutional system embraces ... the right of citizens to debate so they can learn and

decide and then, through the political process, act in concert to try to shape the course of their own times...." *Schuette,* slip op. at 15-16. "Were the Court to rule that the question addressed by Michigan voters is … too delicate to be resolved [by the people] … , that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then … to act through a lawful electoral process." *Id.* at 16; *accord* concurrence of Breyer, J., at 6.

So too here. In *Windsor*, the Court held that the federal government lacked authority to override state laws redefining marriage in genderless terms. But the last sentence of Justice Kennedy's majority opinion clarified that it did *not* apply to states retaining the one-man, one-woman marriage definition: "This opinion and its holding are confined to . . . lawful [same-sex] marriages." Like *Schuette* (and consistent with *Baker*), this Court should hold that Utah's voters appropriately exercised their "fundamental right" to collective democratic action when they decided to preserve the man-woman definition that pre-dates government itself.

Respectfully submitted,

/s/ Gene Schaerr

Elisabeth A. Shumaker
April 29, 2014

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/s/ Gene Schaerr