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Brian M. Barnard, USB No. 00215
UTAH CIVIL RIGHTS & LIBERTIES
FOUNDATION, INC.
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531
ulcr2d2c3po@utahlegalclinic.com

Alan E. Schoenfeld (*pro hac vice* pending)
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, New York 10022
Telephone: (212) 230-8800
alan.schoenfeld@wilmerhale.com

Attorneys for Amicus Curiae
Immigration Equality

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Utah Coalition of La Raza, *et al.*, Plaintiffs, v. Gary R. Herbert, *et al.*, Defendants.	**BRIEF *AMICUS CURIAE* OF IMMIGRATION EQUALITY IN SUPPORT OF PLAINTIFFS** Case No.: 2:11-CV-401 CW Judge Clark Waddoups

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STATEMENT OF AMICUS' INTEREST

Immigration Equality is a national organization that works to end discrimination in immigration law against those in the lesbian, gay, bisexual, and transgender ("LGBT") community and immigrants who are living with HIV or AIDS. Incorporated in 1994, Immigration Equality helps those affected by discriminatory practices through education, outreach, advocacy, and the maintenance of a nationwide resource network and a heavily-trafficked website. Immigration Equality also runs a *pro bono* asylum program and provides technical assistance and advice to hundreds of attorneys nationwide on sexual orientation, transgender, and HIV-based asylum matters.

Immigration Equality is particularly concerned by Utah's Illegal Immigration Enforcement Act ("HB 497"), because it criminalizes the conduct of lesbian and gay United States citizens who "harbor" foreign-born same-sex spouses or partners. And unlike heterosexual couples, who are afforded the legal means to sponsor foreign-born spouses and partners, providing them a path to residency and U.S. citizenship through marriage, lesbian and gay citizens are deprived of the ability to affect the status of their same-sex partners, because they cannot sponsor a foreign-born spouse or partner to immigrate lawfully.

By recent estimates, nearly 260 families comprised of U.S. citizens and lesbian or gay non-citizen partners live in Utah,[1] many with children. HB 497 makes it likely that many of these families will suffer the inequitable effects of Utah's law that criminalizes many of the most routine aspects of a couple's intimate relationship, and, by its terms, demands that such families tear themselves apart, else the U.S. citizen be subject to criminal prosecution for "harboring" and "sheltering" an undocumented alien.

Immigration Equality supports the arguments of Plaintiffs Utah Coalition of La Raza *et al*. regarding the preemption of HB 497 by federal law. With this amicus brief, Immigration Equality supplies an additional reason why enforcement of Utah Code Ann. § 76-10-2901(2)(b)—the Utah alien harboring statute—raises troubling constitutional issues and should be permanently enjoined.

SUMMARY OF ARGUMENT

Immigration Equality submits this brief to draw the Court's attention to the singular and acute constitutional peril for same-sex binational couples[2] living in Utah posed by Section 10 of HB 497, which amended Utah Code Ann. § 76-10-2901. Section 76-10-2901(2)(b) threatens severe and irreparable harm to individuals in binational couples who may be subject to its

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[1] UCLA's Williams Institute estimates that in 2005, 4,307 same sex couples lived in Utah. Gary J. Gates, The Williams Institute, *Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey* (2006) App'x 1, *available at* http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf. Immigration Equality and Human Rights Watch estimate that roughly 6% of same sex couples in the U.S. include one non-U.S. citizen partner. Human Rights Watch & Immigration Equality, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law* (2006) 7, *available at* http://www.immigrationequality.org/uploadedfiles/FamilyUnvalued.pdf ("Family, Unvalued"). *See also* Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 Geo. Immigr. L.J. 147, 153 nn.31 & 32 and accompanying text (2010).

[2] Binational couples are couples in which one partner is a U.S. citizen or permanent resident, and the other is a foreign national.

enforcement. These individuals, as committed partners, have an interest recognized under the Due Process Clause of the United States Constitution in maintaining their "noble" association, "harmony in living," and "bilateral loyalty," free from unwarranted interference by the government. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (confirming "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person"). Under *Griswold*, *Eisenstadt*, and *Lawrence v. Texas*, 539 U.S. 558 (2003), the state may not criminalize the relationships of these couples, or the incidences of such relationships, absent the most compelling of reasons.

But Section 76-10-2901(2)(b) sweeps broadly, purporting to break apart a protected intimate relationship by criminalizing mere cohabitation with an alien spouse or partner who lacks legal status. As at least one United States Court of Appeals has recognized, harboring statutes such as Section 76-10-2901(2)(b) raise serious due process concerns because of the ways in which they interfere with family relations. *See United States v. Hill*, 279 F.3d 731, 736-37 (9th Cir. 2002) (because the federal fugitive-harboring statute reaches conduct that "is the norm in the context of marriage—indeed, it is expected and integral to the relationship," the statute "could conceivably operate directly on an intimate relation of a marriage and exert a maximum destructive impact upon it," such that "basing a harboring or accessory conviction on normal and expected spousal conduct might well violate *Griswold*"). Immigration Equality's clients are particularly vulnerable to the destructive force of Section 76-10-2901(2)(b) because, as same-sex couples, sponsorship by the citizen partner for the adjustment of immigration status of the non-citizen partner to lawful permanent residence is unavailable.

BACKGROUND

HB 497 includes a provision criminalizing the "conceal[ing], harbor[ing], or shelter[ing] from detection [of] an alien in any place within this state, including a building or means of transportation," if the accused knows or recklessly disregards the fact that the alien is in the United States in violation of federal law. HB 497 § 10 (amending Utah Code Ann. § 76-10-2901(2)(b) (the "Utah alien harboring statute")).[3] The provision appears to be modeled, at least in part, on the federal statute that criminalizes the harboring of undocumented immigrants. *See* 8 U.S.C. § 1324. The federal statute—and, presumably, its Utah analog—sweeps broadly, reaching any "conduct tending substantially to facilitate an alien's remaining in the United States illegally." *United States v. Lopez*, 521 F.2d 437, 440–441 (2d Cir. 1975) (internal quotation marks omitted); *see also, e.g.*, *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (same); *United States v. De Jesus-Batres*, 410 F.3d 154, 160 (5th Cir. 2005) (same); *but see United States v. Ye*, 588 F.3d 411, 416 (7th Cir. 2009) ("Whether that conduct 'tends substantially' to assist an alien is irrelevant, for the statute requires no specific quantum or degree of assistance.").

Harboring under the federal alien harboring statute is not limited to the affirmative conduct associated with smuggling aliens into the country, but rather includes assistance provided to aliens, even if they entered the country legally but they have remained here after the expiration of their lawful status. *See Lopez*, 521 F.2d at 439–441 (discussing legislative history and determining that non-smuggling activities like provision of housing and assistance in finding employment constitute harboring); *see also United States v. Acosta de Evans*, 531 F.2d 428, 430

[3] Section 76-10-2901(2)(b) includes a requirement that the conduct be committed "knowingly, with the intent to violate federal immigration law." It also specifies that any concealment, harboring or sheltering within "a building or means of transportation" be "for commercial advantage or private financial gain." As discussed below, neither of these limitations is sufficient to prevent the Utah alien harboring statute from infringing upon constitutionally protected behavior.

(9th Cir. 1976) (same). The federal provision covers a broad range of activities, including "shelter, transportation, direction about how to obtain false documentation, or warnings about impending investigations." *Ozcelik*, 527 F.2d at 99. The Ninth Circuit has held that the term "harbor" means simply "to give shelter to." *Acosta de Evans*, 531 F.2d at 430 (upholding conviction of defendant for housing undocumented immigrant relative for two months without requiring "clandestine sheltering").

As would be expected of any normal, loving couple, lesbian and gay binational couples living in Utah engage in precisely the kind of conduct described in the harboring case law: they give shelter to one another, and engage in conduct intended to keep both partners physically and emotionally proximate and safe from harm. This conduct has been recognized as "expected and integral" to the relationship of a committed couple. *Hill*, 279 F.3d at 763. Yet, Utah's Illegal Immigration Enforcement Act criminalizes this conduct. By failing to turn in the people that they have committed to sharing their lives with, lesbian or gay U.S. citizens in binational relationships could be arrested and criminally prosecuted for harboring an undocumented alien.

During its more than sixteen years of operation, Immigration Equality has counseled countless couples that would be subject to the Utah alien harboring statute. Across the country, an estimated 36,000 binational same-sex couples live together, with foreign-national partners from almost every nation in the world.[4] As a joint Immigration Equality and Human Rights Watch report states:

> [S]uch families face [crippling barriers] in pursuing a goal enshrined in America's founding document—happiness. Those barriers center around a simple fact. With only rare exceptions, a heterosexual couple where one partner is foreign [and] one [is] a U.S. citizen[] can claim the right to enter the U.S. with a few strokes of a pen. They need not even marry; they need only show to a U.S.

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4 *Family, Unvalued* 7.

> consulate abroad that they *intend* to do so and have met at least once before in their lives. . . .
>
> But a lesbian or gay couple cannot even claim basic rights. Their relationship—even if they have lived together for decades, even if their commitment is incontrovertible and public, even if they have married or formalized their partnership in a place where it is possible—is irrelevant for purposes of [obtaining lawful status] in the United States. Instead, they face a long limbo of legal indifference, harassment, and fear…. [This has a] devastating impact not only on their partnerships but on their careers, homes, children, livelihoods, and lives.[5]

Two couples' stories illustrate the peril these individuals confront. M., 54 years old, is a disabled veteran who served honorably in the United States Coast Guard for thirteen years. M.'s life revolves around his friends and family, including his partner B. M. and B. met and fell in love three years ago, when B., an Italian citizen, visited the United States as a tourist. B. returned later that year on a student visa and began studies in Utah. A short time later, however, B. was forced to abandon his visa status to travel to Italy following a death in his family. After being forced to live apart for some time, B. was able to secure a second student visa to study in the United States and again joined M. in Utah.

B. has always been in the United States legally, but fears that he could one day lose his student visa status. M. lives on a very limited income from his disability and restrictions on B.'s ability to work make it hard for them to make ends meet and to afford the tuition for B.'s school. When B.'s visa expires, he and M. will confront difficult options. First, the couple may immigrate to Italy and leave behind the life they have built together in the United States. For M., living abroad will make it difficult for him to access the care that he receives through his doctors at the Veterans Administration and will force him to separate from his adult son who also calls Utah home. Second, the couple may decide to stay in the United States, with B. residing here after his authorized stay expires. This scenario would expose M. to obvious legal peril under HB

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[5] *Id.* at 8.

497, and would expose B. to potential legal peril, as well, for conduct that he has engaged in without incident for years.

Another couple, T. and R. face an even more imminent risk of harm under HB 497 simply for continuing their relationship. T. and R. have been living together as a loving couple for two years. T., 30 years old, an American citizen. T.'s partner R. is a Peruvian citizen. R. entered the United States lawfully, but his authorized stay has expired. T. is a recent graduate of the University of Utah, where he earned a Masters in Social Work. R. finished most of medical school in his native Peru before coming to the United States and hopes to complete his medical education and to work as a physician one day. T. and R.'s hopes and dreams are much like those of many young couples—they hope to marry and build a life together. T. would like to marry R. and sponsor him for a lawful immigration status based on their relationship—but he cannot. The passage of HB 497 makes the couple feel even more vulnerable. They both worry that merely by virtue of their continued cohabitation T. may expose himself to criminal charges under HB 497. As a result of this uncertainty, T.— a lifelong resident of Utah—and R. are considering leaving the state.

For most binational couples like these, if the foreign partner goes undocumented, this means a life of "privation, immobility, and fear."[6] They choose this option not out of wanton disregard for the law or specific intent to violate federal immigration law, but because the law has left them no other way to keep their relationship alive and their family together.

ARGUMENT

The relationships shared by lesbian and gay binational couples, like all forms of intimate family association, are subject to the protection of the Due Process Clause of the United States

[6] *Id.* at 73.

Constitution. Utah's harboring statute unjustly and unconstitutionally forces the citizen spouse or partner to choose between violating state law or turning in his or her spouse or partner to the authorities for certain deportation. As the Ninth Circuit predicted in *Hill*, this statute, if enforced, would "operate directly on an intimate relation … and exert a maximum destructive impact upon it," 279 F.3d at 737. The statute thus also runs afoul of the Due Process Clause and the Supreme Court's decisions in *Griswold* and *Lawrence*, among others.

I. LESBIAN AND GAY BINATIONAL COUPLES ENJOY A CONSTITUTIONALLY PROTECTED, FUNDAMENTAL RIGHT TO INTIMATE ASSOCIATION

Although they are afforded no legal protection by the laws of the State of Utah, lesbian and gay couples living in Utah—regardless of their immigration status—are protected by the United States Constitution. As the Supreme Court held in *Lawrence*, these couples enjoy a "right to liberty under the Due Process Clause," which "gives them the full right to engage in their conduct" without undue or burdensome government intervention or intrusion. 539 U.S. at 578.

The Due Process Clause "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24 (1981). "Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 24-25. While superficially concerned only with fair procedures, the Due Process Clause "guarantees more than fair process." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The substantive component of due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*,

521 U.S. 702, 720 (1997); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[C]ertain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.").

Among the fundamental rights protected by the Due Process Clause is the right to intimate association, which includes the right to be free from unfair or undue government interference with ongoing family relations. The Court's protection of intimate association is grounded in a broad conception of privacy, which holds that there is a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). At the core of that realm is a couple's "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Accordingly, the Court has vigilantly protected against state actions that unduly or unfairly interfere with ongoing interpersonal relations. The Supreme Court's emphasis on the "integrity" of the home underscores its concern for an undisturbed family life. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (discussing the importance of "[t]he integrity of the family unit"). As Justice Harlan observed in his dissenting opinion in *Poe v. Ullman*, "The home derives its pre-eminence as the seat of family life. And the *integrity* of that life is something so

fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." 367 U.S. at 551-52 (emphasis added).[7]

In expounding the Due Process Clause in *Lawrence*, the Supreme Court held that choices made by consenting adults regarding their intimate, interpersonal existence are a matter of personal liberty beyond the reach of government. *See Lawrence*, 539 U.S. 558. Observing that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution," *id*. at 564, the Court answered the question affirmatively and held that "petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Id*. at 578.

Notably, the Court in *Lawrence* also explicitly adopted Justice Stevens's dissenting view in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Lawrence*, 539 U.S. at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."). In his dissent, Justice Stevens had opined that "individual decisions" made by adults "concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form

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[7] Marriage or some other form of state recognition of a personal or intimate relationship, is not, and has never been, the lynchpin of the Supreme Court's substantive due process analysis. The Court's treatment of foster families is instructive. In a case involving the protectable rights of foster parents and children despite the absence of any state-sanctioned relationship between the parties, the Court has recognized that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977); *see also Roberts v. United States Jaycees*, 468 U.S. at 609, 618 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.").

of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting). According to Justice Stevens, the Court's precedent—including *Griswold* and *Eisenstadt*—was animated by a "fundamental" concern for the individual's right to make such decisions, and a belief that state interference with such decisions could be an intolerable intrusion into the protected sphere of individual liberty:

> In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern . . . . These cases do not deal with the individual's interest in protection from unwarranted public attention, comment or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable.

Bowers, 478 U.S. at 217 (Stevens, J., dissenting) (internal quotation marks and citations omitted). Justice Stevens concluded that the "essential liberty that animated the development of the law … surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." *Id.*

Consistent with these bedrock principles, the Tenth Circuit has recognized that the right to intimate association is an "'intrinsic element of personal liberty.'" *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1188 (10th Cir. 1985) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984); *see also Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993) ("We believe the familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment.'" (citation omitted)). The circuit has held that this right protects individuals' "choices to enter into and maintain certain intimate human relationships," including "[f]amily relationships, [which] by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of

thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Trujillo*, 768 F.2d at 1188 (quoting *Roberts*, 468 U.S. at 619-20); *see also J.B. v. Washington County*, 127 F.3d 919, 927 (10th Cir. 1997). The Tenth Circuit has left no doubt that "freedom of intimate association protects associational choice as well as biological connection." *Trujillo*, 768 F.2d at 1188. Moreover, the court has cited *Lawrence* for the proposition that conduct between two adults who have chosen to be together is amongst "'the most private human conduct,'" with which the state should resist interfering. *Aid for Women v. Foulston*, 441 F.3d 1101, 1124 (10th Cir. 2006) (citation omitted).

Moreover, the Tenth Circuit has cited with approval an out-of-circuit case that reads *Lawrence* to prohibit the state from imposing unconscionable choices on lesbians and gays in the service of otherwise legitimate government interests. In *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (cited with approval in *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009)), the court considered a gay Lebanese man's application for asylum. The United States argued that he was removable, even though the Lebanese government might subject him to torture for engaging in homosexual conduct upon his return to Lebanon. The court rejected the United States' argument:

> [T]he Attorney General appears content with saddling Karouni with the Hobson's choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy. In our view, neither option is acceptable. As the Supreme Court has counseled, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567…. By arguing that Karouni could avoid persecution by abstaining from future homosexual acts, the Attorney General is essentially arguing that the INA requires Karouni to change a fundamental aspect of his human identity, and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that "ha[ve] been accepted as an integral part of human freedom in many other countries," *Lawrence*, 539 U.S. at 577.

Karouni, 399 F.3d at 1173. *Karouni* thus stands for the proposition that the government should not and cannot put lesbian and gay individuals to unconscionable choices that arise uniquely as a natural result of their intimate associations.

Yet by its terms, Section 76-10-2901(2)(b) does just that. Although the reach of the Act extends to heterosexual couples and other familial relationships, it has a uniquely all-or-nothing impact on same-sex couples—requiring the U.S. citizen partners in lesbian and gay binational couples either to break up their families, abandon the U.S. to live in exile with their noncitizen partners in his or her native country, or to honor their commitments to their partners or spouses and face the prospect of criminal prosecution.

II. THE APPLICATION OF SECTION 76-10-2901(2)(B) TO BINATIONAL COUPLES, INCLUDING LESBIAN AND GAY BINATIONAL COUPLES, IS UNCONSTITUTIONAL

The Utah alien harboring statute criminalizes conduct that is protected by the Due Process Clause as integral to spousal and intimate relationships. The statute criminalizes the constitutionally protected support and care that spouses and partners provide to each other on a regular basis, and does so without regard to whether such conduct is intended to frustrate law enforcement. The statute thereby impermissibly infringes upon constitutionally protected conduct, because an individual may violate the statute simply by providing support and care for a spouse or partner with knowledge of that spouse or partner's lack of legal immigration status—and it does so against a backdrop of legal rules that do not permit lesbian and gay couples, unlike their heterosexual counterparts, to regularize the non-citizen partner's status.

A. The Utah Alien Harboring Statute Imposes Criminal Liability For Providing Food, Shelter, And Other Physical Assistance

The Utah alien harboring statute makes it illegal for a person to "conceal, harbor, or shelter from detection an alien in a place within" Utah. Utah Code Ann. § 76-10-2901(2)(b). A defendant under Section 76-10-2901(2)(b) must know or recklessly disregard "the fact that the alien is in the United States in violation of federal law." *Id.* Section 76-10-2901(2)(b) also requires that the conduct be committed "knowingly, with the intent to violate federal immigration law." *Id.* Another subsection also provides criminal consequences for one who "encourage[s] or induce[s] an alien to come to, enter, or reside in this state, knowing or in reckless disregard of the fact that the alien's coming to, entry, or residence is or will be in violation of law." *Id.* § 76-10-2901(2)(c).

Although courts have yet to interpret the precise requirements of the Utah alien harboring statute, that statute closely resembles the federal statutes criminalizing the harboring of a fugitive, 18 U.S.C. § 1071, and the harboring of an undocumented alien, 8 U.S.C. § 1324(a)(1)(A)(iii). The federal fugitive harboring statute imposes liability on one who "harbors or conceals" a person for whom an arrest warrant or process has been issued "so as to prevent his discovery and arrest," after having notice or knowledge of the warrant or process. 18 U.S.C. § 1071. The federal undocumented alien harboring statute imposes liability on one who "conceals, harbors, or shields from detection," or attempts to do so with respect to an alien, with knowledge of or reckless disregard for the fact that the alien has "come to, entered, or remains in the United States in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iii).

These federal statutes have been interpreted to reach the acts of providing physical and economic support to fugitives or undocumented aliens. With respect to the federal fugitive harboring statute, "[a]ny physical act of providing assistance, including food, shelter, and other

assistance to aid the [fugitive] in avoiding detection and apprehension," can rise to the level of harboring a fugitive. *Hill*, 279 F.3d at 738 (quoting *United States v. Yarbrough*, 852 F.2d 1522, 1543 (9th Cir. 1988) (alteration in *Hill*)). The term "harbor" as used in the federal undocumented alien harboring statute has been held to mean "to give shelter to," and that statute has also been interpreted broadly to cover non-smuggling activities, such as provision of housing and assistance in finding employment. *See Acosta de Evans*, 531 F.2d at 428, 430; *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008) (conduct that "substantially facilitates an alien's remaining in the United States illegally" is sufficient to constitute harboring).

Given the broad interpretations of "harboring" and "concealing" in the federal fugitive harboring and undocumented alien harboring statutes, it is reasonable to expect that any person providing food, shelter, or other assistance to a spouse or partner who does not have legal status could very well be covered by the Utah alien harboring statute, and hence could be subject to prosecution thereunder. As courts have recognized in the context of the federal and state fugitive harboring statutes,[8] in certain circumstances prosecutions for such conduct would violate the constitutional protection due to intimate and spousal relationships. Even though the government clearly has a stronger interest in preventing individuals from harboring fugitives than preventing them from harboring undocumented aliens, in cases involving fugitive harboring statutes courts have still been reluctant to allow prosecutions that would intrude into the private sphere of familial relationships.

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[8] As discussed below, Congress has plenary authority over immigration and naturalization law. *See infra* Part II.D. The federal alien harboring statute accordingly must be analyzed under an entirely different rubric from Utah's law, balancing the federal government's undisputed interest in maintaining the integrity of our nation's borders with any competing interests. The lack of any compelling Utah state interest in enforcing federal immigration law only underscores the constitutional peril posed by Section 76-10-2901(2)(b).

B. Harboring Statutes As Applied To A Person Giving Food, Shelter, Or Other Physical Assistance To A Spouse Can Reach Constitutionally Protected Conduct

The fundamental right of intimate association arising under the Due Process Clause protects persons against prosecution for at least some acts that the state might otherwise criminalize. The Supreme Court's decisions in *Griswold*, *Eisenstadt*, and *Lawrence* make that much clear. Utah's harboring statute, as applied to a person giving ordinary support to a spouse or partner, reaches constitutionally protected conduct because the statute prohibits acts that are an integral part of an intimate association or relationship. Cohabitation, in particular, is a protected incident of a loving relationship, and the government may not forbid it absent compelling reasons and means narrowly tailored to advance state objectives. *See, e.g.*, *Roberts*, 468 U.S. at 618 ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."); *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (classification is subject to heightened scrutiny if it "directly and substantially interfere[s] with family living arrangements and thereby burdens a fundamental right").

In *Griswold*, for example, the Court struck down a Connecticut statute that criminalized the use of contraception. 381 U.S. at 480. The Court did not base its decision on a review of "the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.* at 482. Rather, it concluded that the law unnecessarily invaded an area of protected freedoms. *See id.* at 485. The State might have achieved its objectives by regulating the manufacture or sale of contraceptives, the Court reasoned, but erred in enacting a statute that "operates *directly* on an intimate relation of husband and wife." *Id.* at 482 (emphasis added); *see*

also id. at 485 (holding that the State cannot seek to achieve its goals through means that have an unnecessarily "destructive impact" upon a constitutionally protected relationship). State intervention in a couple's decision whether to use contraception (not to speak of state collection of evidence pertaining to such use) was undoubtedly disruptive and damaging to an intimate relationship. *See id.* at 485-86.

Just as a statute that operates directly on a couple's decision whether to use contraception is unnecessarily intrusive, a statute that operates directly on a person's decision whether to continue living with his or her intimate partner is unnecessarily destructive. The United States Court of Appeals for the Ninth Circuit, applying *Griswold*, has recognized this principle. In *Hill*, the Ninth Circuit considered a challenge to convictions under the federal fugitive harboring and accessory statutes based on the defendant's "rights of association, marriage, privacy, and due process." 279 F.3d at 736. The defendant there was found to have provided her fugitive husband with "food, shelter, and other assistance," after learning that a felony arrest warrant had been issued for him. *Id.* at 738. The *Hill* court observed that "[t]he problems in *Griswold* were that the anti-contraceptive statute operated 'directly on an intimate relation' of the marriage and sought to 'achieve its goals by means having a maximum destructive impact upon [the marital] relationship,' thus 'sweep[ing] unnecessarily broadly.'" *Hill*, 279 F.3d at 736 (quoting *Griswold*, 381 U.S. at 482) (alteration in *Hill*). The court noted that providing shelter and material support to a spouse "is the norm in the context of marriage—indeed, it is expected and integral to the relationship." *Id.* at 736-37. Thus, the court found that the fugitive harboring and accessory statutes "could conceivably operate directly on an intimate relation of a marriage and exert a maximum destructive impact upon it," such that "basing a harboring or accessory conviction on normal and expected spousal conduct might well violate *Griswold*." *Id*. at 737.

The *Hill* court ultimately determined, however, that as applied to the defendant the federal fugitive harboring and accessory statutes did not "sweep unnecessarily broadly" and were not unconstitutional because the defendant's provision of "shelter, employment, money, food and other material support" after her fugitive husband fled the country, and her attempt to orchestrate delivery of the couple's possessions abroad "was self-evidently intended to assist [her spouse] in evading discovery or apprehension by law enforcement officials." *Hill*, 279 F.3d at 737. Because the defendant so clearly intended to frustrate law enforcement, the *Hill* court found that it did not need to resolve "the core *Griswold* issue … [of] where lies the line between conduct that is normal spousal support and sharing of resources, and conduct that demonstrates an intent to frustrate law enforcement." *Id.* Nevertheless, the *Hill* court made it clear that "normal and expected spousal conduct" were subject to exacting constitutional protection, and further that prosecution of an intimate partner or spouse under the federal criminal harboring and accessory statutes could potentially run afoul of the mandates of the Due Process Clause.

In a similar vein, state legislatures have recognized that state laws criminalizing the harboring of fugitives can also be interpreted to criminalize the support or physical assistance integral to spousal or intimate relationships. A significant number of states have provided for exemptions to or reduced liability under their harboring statutes for family members, generally defined as spouses, parents, grandparents, children, grandchildren and siblings.[9] These exemptions have been justified by the belief that "it is unrealistic to expect persons to be deterred from giving aid to their close relations." *State v. Mobbley*, 650 P.2d 841, 842 (N.M. Ct. App. 1982); *see also State v. H.*, 421 So. 2d 62, 65 (Fla. Dist. Ct. App. 1982) (Florida's statutory exemption for family members properly balanced the state's interest in apprehending criminals

[9] *See* Dan Markel *et al.*, *Criminal Justice and the Challenge of Family Ties*, 2007 U. Ill. L. Rev. 1147, 1158-59 (2007).

against its interest in "safeguarding the family unit from unnecessary fractional pressures … by conferring immunity so that [close family members] need never choose between love of family and obedience to the law").

Federal courts, too, have recognized the significance of these family-member exemptions from state criminal harboring laws. For example, the Ninth Circuit determined that a conviction under the California accessory after the fact statute did not constitute a "crime of moral turpitude" as the term is used in the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(3). *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007). The court relied, in part, on the fact that "[m]any states, including one in this circuit, have recognized the difficult choices facing the family members of an escaping felon and have exempted family members from accessory after the fact liability." *Id.* at 1071-72. In concluding that a California accessory-after-the-fact conviction is not a crime "involving conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general," *id.* at 1068, the court observed, "It would be illogical to conclude that society in general would call the action of harboring one's son or daughter a crime that is inherently base or depraved when many states do not even consider such conduct criminal," *id.* at 1072. As shown by courts' recognition of family-member exceptions from fugitive harboring statutes, support or physical assistance provided to family members should not be subject to criminal prosecution, especially because family, spousal, and intimate relationships have been recognized as constitutionally protected.

C. The Utah Alien Harboring Statute Impermissibly Criminalizes Conduct That Is Not Intended To Frustrate Law Enforcement And Is Constitutionally Protected

Based on the generally accepted interpretations of the federal and state criminal harboring statutes, the Utah alien harboring statute would likely criminalize the "normal and expected" support that characterizes spousal and intimate relationships. The statute thus infringes on constitutionally protected conduct because it criminalizes normal spousal support that is not intended to frustrate law enforcement. *Hill* makes clear that only when conduct demonstrates an overt intent to frustrate law enforcement can the government's law enforcement interest trump an individual's constitutionally protected rights of privacy, association, and family life. *Hill*, 279 F.3d at 737 (declining to determine "where lies the line between conduct that is normal spousal support and sharing of resources, and conduct that demonstrates an intent to frustrate law enforcement" when defendant's actions were "self-evidently intended to assist [fugitive husband] from evading discovery or apprehension by law enforcement officials"). Indeed, an intent to prevent a fugitive's discovery and arrest is a required element for a conviction under the federal fugitive harboring statute, 18 U.S.C. § 1071. *See*, *e.g.*, *Hill*, 279 F.3d at 737 ("by their terms, the harboring and accessory statutes reach only conduct that is intended to frustrate law enforcement"); *see also United States v. Zabriskie*, 415 F.3d 1139, 1145 (10th Cir. 2005) (holding that intent "to prevent the fugitive's discovery or arrest" is an element of the crime); *United States v. Hudson*, 102 F. App'x 127, 132 n.1 (10th Cir. 2004); *United States v. Mitchell*, 177 F.3d 236, 238 (4th Cir. 1999); *United States v. Zerba*, 21 F.3d 250, 252 (8th Cir. 1994); *United States v. Lockhart*, 956 F.2d 1418, 1423 (7th Cir. 1992).

The Utah alien harboring statute is not limited to conduct that is intended to frustrate law enforcement, and thus it essentially criminalizes mere cohabitation with an alien spouse or

partner who lacks legal status. The statute does not require that the partner or spouse be convicted of a crime or be the subject of an arrest warrant. Rather, the Utah statute refers to a person's immigration status, a status that is not always easily determined or necessarily final. *See United States v. Arizona*, 703 F. Supp. 2d 980, 1005 (D. Ariz. 2010) (with respect to Arizona alien harboring law, finding that the determination of an alien's legal status requires reference to "the complicated scheme of determining removability," which is further complicated by federal officials' power to, "under certain circumstances … cancel or suspend the removal of an alien," as well as by the fact that "[u]ltimately, immigration court judges and federal appeals court judges determine whether an alien's offense makes an alien removable"), *aff'd*, No. 10-16645, 2011 WL 134694 (9th Cir. Apr. 11, 2011).

Although the Utah statute also requires that a defendant act "knowingly, with the intent to violate federal immigration law,"[10] this requirement does not limit the reach of the Utah statute

[10] Utah criminal law does not address what it means to act with "the intent to violate" a law. *See*, *e.g.*, *State v. Wallace*, 124 P.3d 259, 263 (Utah Ct. App. 2005) (Utah courts have held that willfulness "does not require an intent to violate the law") (internal quotation marks and citation omitted), *aff'd*, 150 P.3d 540 (Utah 2006). The harboring provision of the Utah alien harboring statute seems to require an "intent to violate" the federal alien harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii), or any other part of the federal immigration laws that a person offering support or assistance to an undocumented alien might violate. The federal alien harboring statute requires knowledge or reckless disregard of the fact that "an alien has come to, entered, or remains in the United States in violation of law," and reaches the essentially the same substantive conduct as the Utah alien harboring statute. 8 U.S.C. § 1324(a)(1)(A)(iii). An "intent to violate" that statute would seem to require an intent to provide the prohibited support with knowledge or reckless disregard of the fact that the alien who would receive such support lacks legal immigration status. An individual providing such assistance to his or her undocumented spouse or partner would thus easily satisfy the "intent to violate federal immigration law" requirement.

to "conduct that demonstrates an intent to frustrate law enforcement." *Hill*, 279 F.3d at 737. A person providing support to an undocumented spouse or partner with no criminal record and who is not subject to an arrest warrant can still be subject to prosecution under the Utah statute, simply by virtue of his or her awareness of the spouse or partner's immigration status.[11]

Support or physical assistance provided to a spouse or partner who lacks legal status is not necessarily, or even likely, to be given with the intent to thwart law enforcement, especially if there is no removal order or warrant with respect to the foreign spouse or partner. *Cf. Hill* 279 F.3d at 737 ("Harboring and accessory liability is limited to conduct intended to 'prevent [the fugitive's] discovery or arrest,' or 'to hinder or prevent [the fugitive's] apprehension, trial or judgment.'"). To hold otherwise is to hold that one intends to frustrate law enforcement unless he refuses to allow an undocumented person into his home—including a long-time partner whose

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However, a provision related to the federal alien harboring statute contains an analogous "in furtherance of" requirement. This provision criminalizes the transportation of an alien in "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law," and the conduct must be "in furtherance of such violation of law." 8 U.S.C. § 1324(a)(1)(A)(ii). The Tenth Circuit has held that this "in furtherance of" requirement "is sufficiently broad to encompass any person who acts . . . with knowledge or with reckless disregard of the fact that the person transported is an illegal alien and that transportation or movement of the alien will help, advance, or promote the alien's illegal entry or continued illegal presence in the United States." *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999) (*en banc*). The Utah alien harboring statute's "intent to violate federal immigration law" requirement would thus likely be satisfied by the mere knowledge that the support or assistance given to an undocumented alien will "help ... the alien's ... continued illegal presence in the United States." *Id.*

[11] Similarly, the statute's reference to concealment, harboring, or sheltering from detection in "a building or means of transportation for commercial advantage or private financial gain" does nothing to prevent the statute from infringing upon constitutionally protected behavior, because that scenario is offered as an example of conduct that violates the statute, and not a limitation on the reach of the statute. Even if the "commercial advantage or private financial gain" provision were interpreted as an element of the harboring provision that applies to all harboring activities, the provision would still fail to limit the reach of the statute to conduct meant to evade law enforcement. A person cohabiting with an undocumented spouse or partner can easily be interpreted to receive an economic benefit from the presence of that spouse or partner, particularly if the couple shares finances.

immigration status has changed. *See supra* pp. 6-7. Such a position conflicts with the reasoning in *Hill*, which relied on affirmative acts specifically intended to frustrate law enforcement in determining that the defendant's convictions for harboring a fugitive and being an accessory-after-the-fact were constitutional. *See Hill*, 279 F.3d at 737 (noting that defendant had provided material support to spouse while he was a fugitive in Mexico).

Lesbian and gay couples whose cohabitation would fall within the ambit of the Utah statute are especially vulnerable to prosecution, because federal law currently prevents an alien spouse from gaining legal permanent residence or citizenship through his or her spouse. The prohibited conduct thus results from the lack of a legal mechanism to adjust the foreign spouse or partner's immigration status to lawful permanent residence, rather than any intent to frustrate law enforcement. The provision of support or physical assistance to one's lesbian or gay spouse or partner therefore cannot reasonably be characterized as displaying an intent to frustrate law enforcement, and the Utah alien harboring statute as applied to an individual whose lesbian or gay spouse or partner lacks legal status thus infringes upon constitutionally protected conduct.

D. Utah Lacks A Compelling Interest In Enforcing Section 76-10-2901(2)(b) Absent Defendant's Intent To Frustrate Law Enforcement

Because enforcement of Section 76-10-2901(2)(b) infringes upon fundamental rights of privacy, association, and ongoing family relations, it is unconstitutional except in those cases in which Utah can demonstrate that (1) it has a compelling state interest in enforcing Section 76-10-

2901(2)(b), and (2) the statute is narrowly tailored to achieve that state interest.[12] *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (recognizing that substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"). Section 76-10-2901(2)(b) fails this test: Where the defendant does not act with an intent to frustrate law enforcement, the State has no compelling interest in prosecution. Utah's stated interest in enacting HB 497—to create what Governor Herbert dubbed the "Utah solution for immigration reform"[13] in light of the perceived "[a]bsen[ce of] any meaningful leadership from the federal government on this issue"[14]—is not compelling because while fashioning a "solution for immigration reform" is a potentially vindicable interest of the *federal government*, without more, the issue has no readily ascertainable effect on the public health, safety, or general welfare of citizens of Utah, *cf. Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("all … laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare"), let alone a substantial effect sufficient to justify infringement of a fundamental right. To be sure, Utah may argue that anyone who comes to or remains in the United States in

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[12] The right of intimate association, including cohabitation, is a fundamental right subject to strict scrutiny. *See supra* at Part I; *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (reviewing Court's history of substantive due process review and observing that strict scrutiny is appropriate standard for examining state action that interferes with the exercise of rights that are deeply rooted in "the traditions and conscience of our people" such as the right to "the sanctity of the family"); *cf. also Lawrence v. Texas*, 539 U.S. 558 (2003); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

[13] News Release, *Governor Herbert Signs Immigration Reform Legislation* (Mar. 15, 2011), *available at* http://www.utah.gov/governor/news_media/article.html?article=4435.

[14] News Release, *Governor Herbert Issues Statement on Illegal Immigration Reform* (Aug. 13, 2010), *available at* http://www.utah.gov/governor/news_media/article.html?article=3368. During the legislative debate, Senator Dayton stated, "What we have in this bill are federal laws put into state statutes so that we can enforce the federal laws since the federal government is not." Utah Senate Floor Debate on HB 497, Day 39, *available at* http://le.utah.gov/jsp/jdisplay/billaudio.jsp?sess=2011GS&bill=hb0497s01&Headers=true.

violation of its laws is inherently dangerous and detrimental to the public welfare. The Court should reject any such argument, just as it would invalidate any statute that purports to criminalize the exercise of constitutional rights by persons who associate with members of a disfavored group. *See, e.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (holding statute prohibiting members of communist party from applying for or using a passport was facially unconstitutional).

Even assuming that Utah has a compelling interest in prosecuting persons who give shelter to their undocumented family member, the harboring provision does not survive scrutiny because it is not narrowly tailored to accomplish Utah's objectives. To the contrary, the statute is extremely broad and covers a wide variety of conduct implicating associational rights. And as the other provisions enacted as part of HB 497 demonstrate—whether they are preempted by federal law or otherwise unlawful is a separate question—illegal immigration can be deterred without prosecuting family members who give ordinary familial support to their undocumented partners.

CONCLUSION

The Utah alien harboring statute threatens members of all families, including binational lesbian and gay couples, with criminal prosecution simply for engaging in the constitutionally-protected conduct that is central to any loving relationship. For the reasons above, and for the reasons given by Plaintiffs and their other amici, the Court should permanently enjoin enforcement of all provisions of H.B. 497, including Section 76-10-2901(2)(b).

Dated May 31, 2011

Respectfully submitted,

Brian M. Barnard, USB No. 00215
UTAH CIVIL RIGHTS & LIBERTIES
FOUNDATION, INC.
214 East Fifth South Street
Salt Lake City, Utah 84111-3204
Telephone: (801) 328-9531
ulcr2d2c3po@utahlegalclinic.com

Alan E. Schoenfeld (*pro hac vice* pending)
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, New York 10022
Telephone: (212) 230-8800
alan.schoenfeld@wilmerhale.com

Attorneys for Amicus Curiae *Immigration Equality*

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing, and transmittal of a Notice of Electronic Filing to the following ECF registrants:

UTAH ATTORNEY GENERAL'S OFFICE
Jerrold S. Jensen
jerroldjensen@utah.gov
Thomas D. Roberts
ThomRoberts@utah.gov
OFFICE (160-140857)
160 E 300 S
P.O. BOX 140857
SALT LAKE CITY, UT 84114-0857
(801) 336-0353
Attorneys for State Defendants Gary R. Herbert and Mark Shurtleff

ACLU OF UTAH
Darcy M. Goddard
dgoddard@acluutah.org
355 N 300 W STE 1
SALT LAKE CITY, UT 84103
(801)521-9862
Attorneys for Plaintiffs Centro Civico Mexicano, Coalition of Utah Progressives, Latin American Chamber of Commerce, Salt Lake City Brown Berets, Service Employees International Union, Utah Coalition of La Raza, Workers United Rocky Mountain Joint Board, Alicia Cervantes, Eliana Larios, and Milton Ivan Salazar-Gomex

NATIONAL IMMIGRATION LAW CENTER
Linton Joaquin
joaquin@nilc.org
Karen C. Tumlin
tumlin@nilc.org
Shiu-Ming Cheer
cheer@nilc.org
Melissa S. Keaney
keaney@nilc.org
3435 WILSHIRE BLVD STE 2850
LOS ANGELES, CA 90010
(213)639-3900
Attorneys for Plaintiffs Centro Civico Mexicano, Coalition of Utah Progressives, Latin American Chamber of Commerce, Salt Lake City Brown Berets, Service Employees International Union, Utah Coalition of La Raza, Workers United Rocky Mountain Joint

Board, Alicia Cervantes, Eliana Larios, and Milton Ivan Salazar-Gomex

AMERICAN CIVIL LIBERTIES UNION FOUNDATION (NY)
Omar C. Jadwat
ojadwat@aclu.org
Andre Segura
asegura@aclu.org
Elora Mukherjee
emukherjee@aclu.org
125 BROAD ST 18TH FL
NEW YORK, NY 10004
(212)549-2664
Attorneys for Plaintiffs Centro Civico Mexicano, Coalition of Utah Progressives, Latin American Chamber of Commerce, Salt Lake City Brown Berets, Service Employees International Union, Utah Coalition of La Raza, Workers United Rocky Mountain Joint Board, Alicia Cervantes, Eliana Larios, and Milton Ivan Salazar-Gomex

AMERICAN CIVIL LIBERTIES UNION FOUNDATION (SF)
Cecillia D. Wang
cwang@aclu.org
Katherine Desormeau
kdesormeau@aclu.org
39 DRUMM ST
SAN FRANCISCO, CA 94111
(415)343-0778
Attorneys for Plaintiffs Centro Civico Mexicano, Coalition of Utah Progressives, Latin American Chamber of Commerce, Salt Lake City Brown Berets, Service Employees International Union, Utah Coalition of La Raza, Workers United Rocky Mountain Joint Board, Alicia Cervantes, Eliana Larios, and Milton Ivan Salazar-Gomex

Esperanza Granados
355 N 300 W
SALT LAKE CITY, UT 84103
801-521-9862 ext. 113
egranados@acluutah.org
Attorneys for Plaintiffs Centro Civico Mexicano, Coalition of Utah Progressives, Latin American Chamber of Commerce, Salt Lake City Brown Berets, Service Employees International Union, Utah Coalition of La Raza, Workers United Rocky Mountain Joint Board, Alicia Cervantes, Eliana Larios, and Milton Ivan Salazar-Gomex

MUNGER TOLLES & OLSON LLP
Bradley S. Phillips
brad.phillips@mto.com
355 S GRAND AVE STE 3500
LOS ANGELES, CA 90071-1560
(213)683-9262

Attorneys for Plaintiffs Centro Civico Mexicano, Coalition of Utah Progressives, Latin American Chamber of Commerce, Salt Lake City Brown Berets, Service Employees International Union, Utah Coalition of La Raza, Workers United Rocky Mountain Joint Board, Alicia Cervantes, Eliana Larios, and Milton Ivan Salazar-Gomex

Dated May 31, 2011 Signed: /s/ Brian M. Barnard