

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

DEREK KITCHEN, individually; MOUDI)
SBEITY, individually; KAREN ARCHER,)
individually; KATE CALL, individually;)
LAURIE WOOD, individually; and)
KODY PARTRIDGE, individually,)

Plaintiffs,)

v.)

Civil Case No. 2:13-cv-00217-RJS

GARY R. HERBERT, in his official)
capacity as Governor of Utah; JOHN)
SWALLOW, in his official capacity as)
Attorney General of Utah; and SHERRIE)
SWENSEN, in her official capacity as)
Clerk of Salt Lake County,)

Judge Robert Shelby

Defendants.)

**MOTION FOR LEAVE TO FILE MEMORANDUM OF LAW AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

The American Civil Liberties Union and the ACLU of Utah (collectively “*Amici*”), respectfully seek leave of the Court to file the attached memorandum of law as *amici curiae* in support of Plaintiffs’ motion for summary judgment.

Although there is no specific provision in the Federal Rules of Civil Procedure regarding filings by *amici curiae*, “District Courts have long been permitted to allow *amicus* appearances at their discretion.” *Vigil v. Am. Tel. & Tel. Co.*, Civil No. C-1476, 1969 WL 118, at *1 (D. Colo. Sept. 9, 1969). “Because an *amicus curiae* participates only for the benefit of the court, and is not a party to the litigation, the court has the sole discretion to determine the fact, extent, and manner of participation by the *amicus*.” *Kane County, Utah v. United States*, --- F. Supp. 2d ---, 2013 WL 1180387, at *2 (D. Utah Mar. 20, 2013) (internal quotation marks omitted).

“District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D.Cal.2005) (internal quotation marks omitted); *see also Hammond v. City of Junction City, Kansas*, No. 00–2146–JWL, 2001 WL 1665374 (D. Kan. Dec. 17, 2001) (granting leave to file as *amicus curiae* because “it is in the interest of the court and all parties to ensure that all arguments concerning [an important] issue are presented fully at this juncture”).

District courts in this district have frequently exercised their discretion to allow *amicus* filings. *See, e.g., Kane County*, 2013 WL 1180387, at *2; *Utah v. United States*, No. 2:05–CV–540, 2012 WL 1584370, at *1 (D. Utah May 4, 2012); *United States v. Moesser*, No. 2:09–CR–842 TS, 2010 WL 4811945, at *6–*7 (D. Utah Nov. 19, 2010); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1256 (D. Utah 2004); *Kennard v. Leavitt*, 246 F. Supp. 2d 1177, 1182 (D. Utah 2002).

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

Amici respectfully suggest that the attached memorandum of law may assist the Court in resolving the issues presented in this case. Although the parties have briefed the question whether sexual orientation classifications should be subjected to heightened scrutiny, *Amici’s*

memorandum of law provides a broader context to explain why such heightened scrutiny is not foreclosed by Tenth Circuit precedent and to explain how decisions from other circuits that rejected heightened scrutiny erroneously relied on precedent based on *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). As organizations with a long history of litigating these questions in courts across the country, *Amici* are well-positioned to provide this Court broader context to the Court about the case law from other courts developed in this area.

CONCLUSION

Wherefore, *Amici* respectfully request that this Court grant their motion for leave to file the *amici curiae* brief submitted herewith.

Dated: October 17, 2013

Respectfully Submitted,

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* *Pro hac vice motion pending*

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