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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ANGELA ROLANDO and TONYA ROLANDO; CHASE WEINHANDL and BENJAMIN MILANO; SUSAN HAWTHORNE and ADEL JOHNSON; and SHAUNA GOUBEAUX and NICOLE GOUBEAUX, Plaintiffs, v. TIM FOX in his official capacity as Attorney General of the State of Montana; MICHAEL KADAS, in his official capacity as the Director of the Montana Department of Revenue; and FAYE McWILLIAMS, in her official capacity as Clerk of Court of Cascade County, Defendants.	Cause No. 4:14 CV 00040-BMM **DEFENDANTS' BRIEF IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Defendants submit this brief in response to Plaintiffs' motion for summary judgment.

INTRODUCTION

Although Defendants concede that *Latta* is binding authority in the Ninth Circuit at the present time, the three-judge decisions in *Latta* and *SmithKline* are contrary to Supreme Court and Circuit precedent.[1] Supreme Court precedent requires the federal courts to treat *Baker v. Nelson*, 409 U.S. 810 (1972), as binding because the Supreme Court has never overruled *Baker* or told the lower federal courts not to follow it. Circuit precedent also holds that lower courts may not decline to follow binding Supreme Court precedent by treating it as implicitly overruled. However, based upon a misreading of *United States v. Windsor*, 133 S. Ct. 2675 (2013), and contrary to precedent, the panel in *SmithKline* overruled prior Ninth Circuit precedent which had held that alleged sexual orientation discrimination is subject to rational basis review. Then, after having ruled in *SmithKline* that the Supreme Court's *Batson* jurisprudence must be extended to include peremptory strikes based upon sexual orientation, the panel in

[1] *See Latta v. Otter*, 2014 U.S. App. LEXIS 19152 (9th Cir. Oct. 7, 2014) (Plaintiffs' Ex. A). *See also SmithKline Beecham v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014), *reh'g en banc denied*, 759 F.3d 990 (9th Cir. 2014).

Latta applied the panel decision in *SmithKline* to strike down Idaho's and Nevada's marriage laws.

The panels in *SmithKline* and *Latta* have misread *Windsor*. The discrimination at issue in *Windsor* involved the federal government's unusual decision to disregard a State's sovereign decision to grant same-sex couples the right to marry under state law. That discrimination was of an "unusual character" precisely because it is the province of the states to define marriage and it is therefore the obligation of the federal government to accord equal respect to a State's decisions defining marriage or conferring enhanced liberties on its citizens. *Windsor*, 133 S. Ct. at 2692-93. Contrary to *SmithKline* and *Latta*, *Windsor* did not direct the federal courts to apply heightened scrutiny to all forms of alleged sexual orientation discrimination.

The proper standard for testing the constitutionality of a State's marriage laws is the rational basis test. Montana law satisfies that deferential standard. Even the panel in *Latta* held that the State's interests in encouraging marriage between men and women who have the biological capacity to create new life "makes some sense." *Latta*, 2014 U.S. App. LEXIS 19152 at 35. To be fair, encouraging opposite-sex marriage to promote the welfare of natural offspring makes a great deal of sense because the State's interest is actually compelling. And, exercising its sovereign authority to define and regulate marriage, a State is

not required to accomplish its objectives perfectly. Rather, under rational basis review States are permitted to enact over-inclusive and under-inclusive laws. Montana's marriage laws are rationally related to legitimate and indeed compelling governmental objectives. Consequently, Montana's marriage amendment and statutes are constitutional.

Though *Latta* is binding authority in the Ninth Circuit until it is vacated, reversed or overruled, Defendants cannot under these circumstances concede that Montana's Constitution and statutes actually violate the Equal Protection Clause of the Fourteenth Amendment.

NATURE OF THE CASE

Since territorial days, Montana law has assumed that marriage is between one man and one woman. 1879 Mont. Laws, ch. 43, § 855. Section 48-102 of the Revised Code of Montana (1947) provided: "Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of sixteen years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage." This statute dates back to at least 1895. Montana law has always supported marriage as historically understood and defined. Same-sex marriage, on the other hand, is of recent vintage. *Windsor*, 133 S. Ct. 2689 ("[M]arriage between a man and a woman no doubt had been thought of by most

people as essential to the very definition of that term and to its role and function throughout the history of civilization.")

Following the ratification of the 1972 Constitution, the Legislature adopted the Uniform Marriage and Divorce Act, which defined marriage as "a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential." Rev. Codes Mont. 1977, § 48-304 (1975).

Montana, like other states, has long expressly prohibited some marriages between consenting adults, *e.g.*, polygamous marriages or marriages between persons closely related to one another by blood or by law. In 1997, the Montana Legislature added a prohibition on "a marriage between persons of the same sex." Mont. Code Ann. § 41-1-401(1)(d). Finally, in 2004 Constitutional Initiative 96 (CI-96) qualified for the ballot and passed with the support of nearly 67 percent of the electors. Consequently, the Montana Constitution now provides in article XIII, section 7: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." These legal developments simply reaffirmed Montana's longstanding marriage policy.

On May 21, 2014, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief, pursuant to 42 U.S.C. § 1983, contending that article XIII, section 7 of the Montana Constitution and related statutory provisions violate Due Process and Equal Protection.

UNDISPUTED FACTS

The parties' undisputed facts are delineated in Plaintiffs' Brief at 5-6 and in the parties' Statement of Stipulated Facts. ECF No. 24.

JURISDICTION AND VENUE

On May 19, 2014, the Clerk of Court's Office in Cascade County denied the Rolando Plaintiffs a marriage license. Consequently, venue in this district is proper. (Answer PP 9-10, 26.)

Defendants, however, have raised a jurisdictional objection based upon *Baker*, as well as *Windsor* and other Supreme Court precedent holding that the definition and regulation of marriage is the province of the States.

ARGUMENT

I. ACCORDING TO SUPREME COURT PRECEDENT AND THE NINTH CIRCUIT'S OWN PRECEDENT, THE PANEL IN *LATTA* SHOULD HAVE FOLLOWED *BAKER V. NELSON*, WHICH HOLDS THAT A STATE'S DECISION TO DEFINE MARRIAGE AS BETWEEN ONE MAN AND ONE WOMEN COMPORTS WITH EQUAL PROTECTION.

During oral argument in *Latta*, plaintiffs' counsel argued that Idaho's marriage amendment was the most "sweeping and draconian" in the Ninth Circuit because it states that "[m]arriage between a man and a woman is the only domestic

legal union" permissible in Idaho. 9/8/14 Oral Argument, 26:50-17:43; Idaho Const. Art. III, § 28. Montana's marriage amendment, on the other hand, would not foreclose the Legislature or the people from sanctioning civil unions. This difference distinguishes Montana law from Idaho law. *Latta*, however, holds that Nevada's policy of allowing domestic civil unions actually rendered Nevada law even less defensible because such a "regime" sends only "a message of disfavor." *Latta*, at 24 n.7. Although *SmithKline* and *Latta* have misread *Windsor* to require heightened scrutiny, measured against that standard Montana law fairs no better than the laws of Idaho and Nevada. Accordingly, Defendants are obliged to concede that *Latta* is binding for purposes of Montana law. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).[2]

Ironically, *Latta* is binding because the panel in *Latta* declined to follow *Baker*, in accordance with the Ninth Circuit's principle that "[a] decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it." *Hart,* 266 F.3d at 1171. While the Supreme

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[2] A petition for en banc review is pending in *Sevcik v. Sandoval*, 12-17668. Alaska is also seeking initial en banc review in *Hamby v. Parnell*, 14-35856. But even if these petitions are not granted, forthcoming decisions by the Fifth and Sixth Circuits could create a circuit split. The First Circuit has already ruled that *Baker* is binding. *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012). *See also Conde-Vidal v. Garcia-Padilla,* 2014 U.S. Dist. LEXIS 150487 at 19 ("If anything, *Windsor* . . . reaffirms the States' authority over marriage, buttressing *Baker's* conclusion that marriage is simply not a federal question.")

Court's recent denials of certiorari came as a surprise to many, they do not have precedential weight and, therefore, must not be viewed as signaling how the Court will rule on the merits. The Supreme Court's practice is to wait for well-reasoned rulings on both sides of an issue.

The plaintiffs in *Baker* were two gay men who appealed to the Supreme Court, claiming that Minnesota law and a Minnesota Supreme Court decision preventing them from marrying violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Five years after *Loving v. Virginia*, 388 U.S. 1 (1967), a unanimous Supreme Court held that the appeal in *Baker* did not raise a substantial federal question. It is well-established that a "[s]ummary disposition of an appeal . . . either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quotation omitted). The holding in *Baker* is that the appeal did not raise a substantial federal question. The decision on the merits is that a State's decision to limit marriage to opposite-sex couples does not violate equal protection or infringe upon a constitutional right.

The panel in *Latta* declined to apply *Baker*, holding that its precedential weight was eroded by subsequent doctrinal developments. The federal courts, however, have no authority to declare that a ruling of the Supreme Court has in effect been overruled absent the Supreme Court saying so. *See*

Rodriquez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 484 (1989). ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the [Supreme] Court the prerogative of overruling its own decisions."); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (same). This, of course, is also the law of the Ninth Circuit. *Hart*, 266 F.3d at 1171.[3]

Baker "directly controls" the outcome in this case because it involved the same issues raised by the Plaintiffs here. The equal protection holding in *Latta* conflicts with the Supreme Court's determination in *Baker*. *Latta* also conflicts with Supreme Court and Ninth Circuit precedent holding that the lower federal courts may not take it upon themselves to hold that a Supreme Court precedent has been implicitly overruled. But even if post-*Baker* doctrinal developments permitted the Ninth Circuit to treat *Baker* as nonbinding or overruled, the Supreme Court's subsequent decisions actually reinforce *Baker*, specifically including *Windsor*.

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[3] In *United States v. Leyva-Martinez*, 632 F.3d 568, 570 (9th Cir. 2011), the Ninth Circuit held that it must follow *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), until it is "expressly" overruled. After the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it was widely believed that the Court was poised to overrule *Torres*. The Supreme Court, however, has never overruled *Torres* and it no longer shows any inclination to do so.

"[W]hen the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Windsor*, 133 S. Ct. at 2691-92 (citation omitted). *Windsor* emphasized the need to safeguard the States' "historic and essential authority to define the martial relation" free from "federal intrusion." 133 S. Ct. 2692. The Court in *Windsor* viewed DOMA's refusal to recognize New York's decision to permit same-sex marriage as a "federal intrusion on state power" because marriage and domestic relations laws are the "virtually exclusive province of the States." *Id.* at 2680, 2692 (internal quotation marks omitted). The invalidity of DOMA was very clearly due to the federal government's intervention into an area of "state power and authority over marriage as a matter of history and tradition." *Windsor*, 113 S. Ct. at 2691. And the "unusual character" of the discrimination at issue in *Windsor* was a function of the equal respect Congress owes to a right "sanctioned" or a dignity "conferred" by a state in the exercise of its sovereign power to define and regulate marriage. *Windsor*, 113 S. Ct. at 2693-94.[4]

The panel decisions in *SmithKline* and *Latta* seem to reflect a prediction (in light of *Windsor*) about how the Supreme Court or an individual justice will decide

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[4] Though Plaintiffs are not requesting summary judgment on Due Process grounds, a right recently "sanctioned" or an enhanced liberty or dignity recently "conferred" cannot be one "deeply rooted in this Nation's history and tradition" for purposes of the Due Process Clause or *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation omitted).

the merits. Such prognosticating is not the business of the federal courts. "The Supreme Court . . . is free to overrule itself as it wishes. But unless and until it does, lower courts are bound by the Supreme Court's summary decisions. . . ." *Conde-Vidal,* 2014 U.S. Dist. LEXIS 150487 at 13. In *Hicks* the Court reiterated that the federal courts must follow summary dispositions until the Supreme Court "informs" the lower courts that they are no longer binding. 422 U.S. at 34 (citations and internal quotes omitted). As the First Circuit Court held in *Massachusetts v. Health and Human Servs.*, 682 F.3d at 8, "*Baker* is precedent binding on us unless repudiated by subsequent Supreme Court precedent . . . . *Baker* . . . limit[s] the arguments to ones that do not presume to rest on a constitutional right to same-sex marriage." (citations omitted). *See also Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (per curiam) "([A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

Again, while the State is obliged to concede that *Latta* is for present purposes binding, Supreme Court and Ninth Circuit precedent required the Ninth Circuit to follow *Baker*.

II. THE NINTH CIRCUIT PANELS IN *SMITHKLINE* AND *LATTA* SHOULD HAVE FOLLOWED THE LAW OF THE CIRCUIT HOLDING THAT SEXUAL ORIENTATION DISCRIMINATION IS NOT ENTITLED TO HEIGHTENED SCRUTINY.

Montana's marriage laws should be subject to rational basis review. The holdings in *Latta* and *SmithKline* that sexual orientation discrimination is categorically entitled to heightened scrutiny conflict with long-established law of the circuit. *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 573-74(9th Cir. 1990) ("homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny"); *see also Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (finding that *High Tech Gays* was controlling and rejecting heightened scrutiny).[5] The first panel to address an issue establishes the law of the Circuit, which subsequent panels cannot contravene unless "the reasoning or theory of [] prior circuit authority *is clearly irreconcilable* with the reasoning or theory of intervening higher authority. . . ." *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc) (emphasis added). Because *High Tech Gays* was the first panel to address the level of scrutiny applied to claims of sexual orientation discrimination, it set the law of the circuit. *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (emphasizing that

[5] The Ninth Circuit's conclusion was consistent with that of every other circuit to consider the issue. *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 n.9 (10th Cir. 2008) (citing cases).

circuit precedent established that rational basis applies to claims of sexual orientation discrimination). Thus, a subsequent panel could come to a different conclusion only if *High Tech Gay's* rationale was "clearly irreconcilable" with an en banc decision of the Ninth Circuit or Supreme Court precedent.

The *SmithKline* and *Latta* panels erred in holding that *High Tech Gays* was "clearly irreconcilable" with Supreme Court precedent. The Ninth Circuit premised its new equal protection standard entirely on *Windsor*. *See SmithKline*, 740 F.3d at 840 (noting that *Windsor* "is dispositive of the question of the appropriate level of scrutiny"). But *Windsor* did not categorically establish that all laws impacting same-sex couples warrant heightened scrutiny. Rather, it recognized the basic and longstanding principle that "'a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." 133 S. Ct. at 2693 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-535 (1973)). The Court noted that "discriminations of an unusual character require careful consideration," and found that DOMA was "an unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" thus requiring a "careful consideration" analysis. *Id.* In short, the Court in *Windsor* was not creating a new standard of scrutiny for sexual orientation discrimination. It was simply applying the same standard it had applied

for decades. *Id.* at 2692-93 (citing *Moreno* and *Romer v. Evans,* 517 U.S. 620 (1996)).

As discussed above, Montana's definition of marriage as a union of a man and a woman has been consistent since statehood, so there is no basis to conclude that maintaining that definition constitutes an "unusual deviation" or "discrimination of an unusual character." If anything, *Windsor* reaffirmed the States' authority to regulate marriage and to define its contours. 133 S. Ct. 2692 (recognizing the States' "historic and essential authority to define the marital relation."). Thus, *Windsor* does not dictate that heightened scrutiny applies in this case and the *SmithKline* and *Latta* panels were in error in departing from clearly established circuit precedent.

Indeed, the Ninth Circuit's decision in *High Tech Gays* has gained an even stronger foothold than when it was decided in 1990 because of the vast political power gays and lesbians have garnered. To qualify for the "extraordinary protection from the majoritarian political process" accorded suspect or quasi-suspect classes (*San Antonio Indep. Sch. Dist. v. Rodriquez*, 411 U.S. 1, 28 (1973)), plaintiffs must show, among other things, that gays and lesbians as a group are "politically powerless." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). Part of the Ninth Circuit's rationale for rejecting heightened scrutiny was that "homosexuals are not without political power," which was clear from "the

passage of anti-discrimination legislation." *High Tech Gays*, 895 F.2d at 574. Since then, gay and lesbian political power has grown exponentially, as evidenced by the growing number of extraordinary political successes in recent years.

Finally, Montana's marriage laws should not be subject to heightened scrutiny because they do not classify based on sexual orientation. By its own terms, *SmithKline* requires heightened scrutiny only "when state action discriminates on the basis of sexual orientation." 740 F.3d at 483. Montana's marriage laws are facially neutral. All citizens are subject to the same definition of marriage, regardless of sexual orientation. The marriage laws may have a disparate impact on gays and lesbians, but that alone is not enough to trigger scrutiny under equal protection. *Washington v. Davis*, 426 U.S. 229, 242 (1976).[6]

III. MONTANA'S MARRIAGE POLICY IS RATIONALLY RELATED TO THE STATE'S COMPELLING INTEREST IN PROMOTING THE WELFARE OF CHILDREN BORN TO COUPLES WHO HAVE THE BIOLOGICAL CAPACITY TO HAVE CHILDREN.

Rational basis review is a "paradigm of judicial restraint," *Federal Communications Comm'n and United States v. Beach Communications,* 508 U.S. 307, 313-14 (1993), which reflects "the Court's awareness that the drawing of

[6] The Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), is not to the contrary. The Court rejected an "equal application" argument because in that case the government had made explicit classifications based on race. *Id.* at 9.

lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). The Ninth Circuit has repeatedly emphasized the deference required by rational basis review:

> Rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. . . . [A] statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. In addition, the government has no obligation to produce evidence to sustain the rationality of a statutory classification; the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.

Aleman v. Glickman, 217 F.3d 1191, 1200-01 (9th Cir. 2000) (citations omitted).

And because "marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). As the Supreme Court has made clear, "where a group possesses distinguishing characteristics relevant to interests the State has authority to implement, a State's decision to act on the basis of those differences does not

give rise to a constitutional violation." *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001).

The "distinguishing characteristic" between opposite-sex and same-sex couples is the biological reality that opposite-sex couples naturally procreate. The Supreme Court's various decisions regarding marriage have recognized that state regulation of marriage has been inextricably linked to the biological complementarity between men and women. *See, e.g., Loving v. Virginia*, 388 U.S. at 12 ("Marriage is . . . fundamental to our very existence and survival."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the [human] race.").

"The binary nature of marriage--its inclusion of one woman and one man--reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female." *Hernandez v. Robles*, 855 N.E. 2d 1, 15 (N.Y. 2006) (Graffeo, J., concurring). As the Eighth Circuit has recognized, "a host of judicial decisions" have relied on the unique procreative capacity of opposite-sex relationships to conclude that "the many laws defining marriage as the union of one man and one woman . . . are rationally related to the government interest in steering procreation into marriage." *Citizens for Equal Protection*, 455 F.3d at 867-68.

The fact that the State's marriage policy may be overinclusive in some respects by allowing infertile and deliberately childless couples to marry does not undermine its constitutionality. Rational basis review does not require a perfect fit between means and ends. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("[A] state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."). For the same reason, it is irrelevant that some same-sex couples may produce children through assisted reproduction technology. "[T]he fact remains that the vast majority of children are conceived naturally through sexual contact between a man and a woman." *Hernandez*, 855 N.E. 2d at 15 (Graffeo, J., concurring).

It is rational, then, for the state to act on the basis of the biological complementarity between men and women by steering that procreation into marriage. Regulation of opposite-sex relationships through marriage increases the likelihood that children will be born into stable environments where they will be raised by both their mother and father. And that distinguishing characteristic between opposite-sex and same-sex couples should easily be enough to satisfy rational basis review.

Respectfully submitted this 5th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, using cm/ecf system.

Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Dated: November 5, 2014

/s/ Mark W. Mattioli
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,558 words, excluding certificate of service and certificate of compliance.

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