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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

KODY BROWN, MERI BROWN, JANELLE BROWN, CHRISTINE BROWN, ROBYN SULLIVAN, Plaintiffs, v. GARY R. HERBERT, in his official capacity as Governor of Utah; MARK SHURTLEFF, in his official capacity as Attorney General of Utah; JEFFREY R. BUHMAN, in his official capacity as County Attorney for Utah County, Defendants.	)	**PLAINTIFFS'MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Judge Waddoups Civil No. 2:11-cv-00652-CW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

SUMMARY OF ARGUMENT

Pursuant to the Court's order of August 17, 2012, the Plaintiffs Kody Brown, Meri Brown, Janelle Brown, Christine Brown, and Robyn Sullivan (hereinafter "the Brown family" or "the Browns") hereby respond in opposition to Defendant Jeffrey R. Buhman's Cross Motion for Summary Judgment.On June 29, 2012, the Defendant filed a roughly ten-page Cross Motion for Summary Judgment and a "Memorandum in Support of Defendant's Cross Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment." As ordered by the Court, the Plaintiffs previously filed their reply to the opposition to Plaintiffs' Motion for Summary Judgment. While Defendant makes no distinction in his filing between the arguments in opposition to Plaintiffs' motion and the arguments in favor of his own motion, Plaintiffs now respond to those same arguments in the context of the cross motion.

The Defendant does not offer arguments on any specific count as is generally required in a summary judgment motion. Instead, he has three sections entitled to address, not legal arguments, but two individual cases and the current stance of the Utah Supreme Court. *See* Def.'s Mem. at 4 ("*Reynolds* is Still Cited With Approval By the U.S. Supreme Court, and Both *Reynolds* and *Potter* Are Still Cited With Approval By the Tenth Circuit."); *id.*at 7 ("II. The Utah Supreme Court Continues to Uphold the Ban on Polygamy."); *id.*at 9 ("III. Lawrence v. Texas"). This leaves unanswered the actual arguments and authority for the various counts raised in the Complaint, including seven distinct claims: violations of due process, equal protection, free speech, free association, free exercise, the establishment of religion, and 42 U.S.C. § 1983. As such, the instant motion is a type of "Hail Mary" pass to try to avoid discussing the actual claims in the hope that a citation to a case in the nineteenth century will relieve the government from

any burden to substantiate a motion for summary judgment.

The government bases its claim for summary judgment primarily on the premise that *Reynolds v. United States*, 98 U.S. 145 (1878), is still good law and determinative in this action. This argument not only ignores that later precedent has undermined (if not gutted) *Reynolds*, but also fails to acknowledge that, even if still applicable, *Reynolds* is irrelevant to an array of claims not addressed by that decision. Given the failure of the Defendant to contest any factual assertions made by the Plaintiffs in their Complaint and his failure to advance specific arguments regarding virtually all of the counts contained in the Complaint, the instant cross motion should be denied as procedurally and substantially insufficient to support summary judgment.

FACTUAL BACKGROUND

While factual disputes are generally resolved in a summary judgment motion in favor of the non-moving party, the government's motion is notable in the degree to which it does not contest a single factual representation made by the Plaintiffs in their Complaint. Factual disagreements are limited to two objections to statements made in the Plaintiffs' Memorandum in Support of their Motion for Summary Judgment.

Defendant objects to parts of four paragraphs in the factual background section of Plaintiffs' Memorandum of Points and Authorities in Support of Summary Judgment. Def.'s Mem. at 2. Three of those paragraphs (3, 11, and 32) are objected to only to the extent that they "characterize" the drafters (or enforcers) of the Anti-Bigamy Law as targeting primarily religious plural families. The objection by the Defendant to this fact, however, is entirely conclusory and without cited support. Conversely, historical and academic works have long traced the anti-bigamy law and the conditions imposed by the Utah Enabling Act of 1894, Ch. 138, § 3, 28 stat.

107, to the opposition to religious polygamists in the state. Ironically, those works include the primary case relied upon by the Defendant in this filing and in oral arguments before the Court, *United States v. Reynolds*, 98 U.S. 145 (1878), which directly tied the prohibition to religious polygamy. The Supreme Court expressly stated that the prohibition was to combat what it viewed as a practice that has been abandoned by the West and, "until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Reynolds*, 98 U.S. at 164. As noted below, the Court's highly prejudiced analysis has long been ridiculed. For now it is enough to note that, legal analysis aside, the case contradicts the factual assertion that this prohibition was not directed at religious polygamists.

Utah courts have acknowledged "the reality" that the efforts of the federal government were directed at the Mormon church and the religious-based practice of polygamy.[1] *See generally* Sarah Barringer Gordon, *The Mormon Question* 206-08 (2002). The first anti-polygamy law in (pre-statehood) Utah was passed directly following, and in large part in response to, an armed conflict between Mormons and the United States government. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 Cornell J.L. & Pub. Pol'y 101, 116-19 (2006) (describing the "Mormon War" of 1857 and the subsequent passage of the Morrill Act in 1862).[2] The final pre-statehood anti-polygamy law, the Edmunds-Tucker Act, ch. 397, 24

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[1] Notably, while citing *Holm*, this point appears to have escaped the Defendant in reading the case. *See State v. Holm*, 2006 UT 31, ¶ 42, 137 P.3d 726, 734 ("We further concede that such an interpretation comports with the reality that the federal government harbored serious concerns about the possibility that the State of Utah could be ruled de facto by the LDS Church.").

[2] The Edmunds Act later further stripped polygamists of the right to vote, and has explicit references to targeting Mormons in its legislative history. *See* Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 Yale J.L. & Feminism 29,

Stat. 635 (1887) (codified at 28 U.S.C. § 633, 660) (repealed 1978), was even more clearly targeted at Mormons – including forfeiture provisions against the Church, § 14, property ownership limits for religious organizations, § 16, and denial of funding for the Church, §§ 13, 17.*See* Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887,* 13 Yale J.L. & Feminism 29, 51 (2001). The constitutional ban on polygamy and the criminal bigamy statute are simply the present incarnation of laws targeting religious polygamists. Putting aside the conflict with judicial and academic writings, the Defendant ignores the actual cases. Cases arising under the anti-bigamy law have overwhelmingly concerned members of religious groups who practice polygamy as an article of faith.[3]

Even more notable is that cohabitation is a common part of modern living with high rates of adultery, including procreation by married individuals with non-spouse partners. Cyra Akila

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44 (2001); 47 Cong. Record 13, 1207 (remarks of Senator Sherman of Ohio) ("the only remedy for this evil, which the people of the United States will grapple with and will end some of these days, is to place in power there a government that is not controlled by Mormon votes.").

[3] *See Bronson v. Swensen*, 500 F.3d 1099, 1103 (10th Cir. 2007) (plaintiffs sought multiple marriage licenses because they "subscribe[d] to the religious doctrine of plural marriages"); *State v. Holm*, 137 P.3d 726, 730 (challenge to Anti-Bigamy law arising out of "religious marriage ceremony"); *In re Steed*, 131 P.3d 231, 231 (Utah 2006) (removal of judge based on second wife "he believed himself to be married according to the traditions of their mutual religious faith"); *White v. Utah*, 41 F. App'x 325, 326 (10th Cir. 2002) (plaintiff challenged Anti-Bigamy law because he "ha[d] been a member of or [wa]s currently a member of a religion that espouses polygamy"); *State v. Green*, 99 P.3d 820, 825 (plaintiff challenged Anti-Bigamy law because it infringed on "his marital practices in violation of his right to freely exercise his religion"); *Barlow v. Evans*, 993 F. Supp. 1390, 1392 (D. Utah 1997) (plaintiffs challenged housing discrimination based on "defendants' belief that plaintiffs practice polygamy as a religious observance"); *In re Adoption of W.A.T.*, 808 P.2d 1083, 1083 (Utah 1991) (petition for adoption denied because Plaintiff was "also 'married' [to a second wife] in accordance with petitioners' religious belief and practice of plural marriage); *Potter v. Murray City*, 760 F.2d 1065, 1066 (10th Cir. 1985) (challenge to Anti-Bigamy law based on Free Exercise of religion).

Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India,* 83 U. Colo. L. Rev. 963, 1014 (2012) ("in the United States, there are increasing numbers of people in the majority community who are not Mormons with multiple sexual partners and children from those unions, resulting in a sort of de facto polygamy that, because of the lack of enforcement of fornication and adultery laws, goes largely unregulated.") (citing studies). Yet, the relatively small number of religious polygamists has been repeatedly subject to prosecutions far out of proportion to their percentage of the population.[4]

Finally, even accepting, contrary to fact, that the law did not target religious polygamists, it discriminates against religious minorities as applied in this case. The Browns have repeatedly argued that they are being targeted over other people cohabiting with multiple partners solely because they call themselves a family in the eyes of their church – and their exercise of free speech through their program.[5] Compl. ¶ 8.

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[4] As detailed in the Complaint, and also uncontested by the Defendant, it is estimated that approximately 30,000 polygamists live in the state of Utah. Compl. ¶ 54; Answer ¶ 33.The last state census showed 2,763,885 people living in Utah. *See* http://www.onlineutah.com/countypopulation.shtml. Thus, even using the highest figure given for polygamist population, the percent of the population is one percent but this population constitutes virtually all of the cohabitation cases. These cases cover a wide array of potential cases where a person "knowing he has a husband or wife or knowing the other person has a husband or wife . . . purports to marry another person or cohabits with another person." Utah Code Ann. § 76-7-101 (West 2010). That would include adulterous relationships involving cohabitation.

[5] The only fact contested by the Defendant is that "state officials publicly denounced the Browns as committing crimes every night on television." Defendant formally objects to this representation: "As he states in his Affidavit: 'I never stated publicly that I would or would not prosecute the Browns, though I am aware others in my office may have responded to the press to that effect (or at least the press reported that they did).'" Def.'s Mem. at 2. But that objection is not convincing. First, Plaintiffs' factual representation refers to "state officials," and thus is neither rebutted nor disproven by a representation concerning Mr. Buhman individually, even if

ARGUMENT

I. THE DEFENDANT DOES NOT SPECIFICALLY CONTEST THE SEVEN INDIVIDUAL COUNTS RAISED IN THE PLAINTIFS' COMPLAINT.

A. Defendant Does Not Address Plaintiffs' Claim Under The Due Process Clause.

The Defendant does not respond to Plaintiffs' challenge under the Due Process Clause of the Fourteenth Amendment, including the denial of the Brown's fundamental liberty interests in their familial living arrangements in their homes and romantic partnerships. The Due Process Clause circumscribes and in some cases virtually forbids state intervention in private relationships and conduct in the home. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*. 381 U.S. 479, 483-84 (1965). Intimate or familial relationships are at the center of the associational rights protected by the Constitution. *See Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984). Defendant does not respond to the argument that he is targeting a specific type of intimate relationship that is entitled to heightened constitutional protection. He also fails to address the heightened protection given intimate familial or quasi-familial ties when the state intervention takes the form of a broad criminal sanction. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (statute rendered homosexual sex a misdemeanor); *Moore*, 431 U.S. at 497 (ordinance rendered certain familial living arrangements criminal); *Griswold*, 381 U.S. at 480-81 (statute rendered dissemination of contraception a misdemeanor). Defendant does not specifically argue under a specific standard for constitutional review, let alone showing a compelling state interest using the

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accepted as true. Second, Mr. Buhman again tries to dismiss statements made by members of his staff despite hundreds of years of cases concerning respondeat superior and agency principles. Mr. Buhman is vicariously responsible for statements by his subordinates as the head of his "administration." *See* Def.'s Mem. in Support of Mot. to Dismiss at 5.

least restrictive means available. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155-56 (1973). The Defendant fails to explain how consenting adults living with each other as "spiritual" spouses have a cognizable impact on the marriage licenses or recognition of monogamous couples. Finally, the Defendant offers nothing on the vagueness challenge and the problem of delineating the limits and scope of the law in question. *See City of Chicago v. Morales*, 527 U.S. 41, 55 (1999); *United States v. Gaudreau*, 860 F.2d 357, 359 (10th Cir. 1988). It is unclear how the Defendant believes that he can achieve summary judgment without articulating a defense under a specific constitutional test. However, it is not the burden of the Plaintiffs, let alone the Court, to supply such arguments.

B. Defendant Does Not Address Plaintiffs' Equal Protection Claim.

The Defendant also ignores the count raising claims under the Equal Protection Clause of the Fourteenth Amendment. Again, the Defendant simply declines to respond to any of these arguments. Indeed, "equal protection" is mentioned just once in a passing description of one case.[6] Def.'s Mem. at 9. Thus, Defendant does not articulate a defense under a specific constitutional test, let alone under heightened scrutiny given such claims by the Supreme Court. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976), *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The Defendant does not even justify the law under the more lenient rational basis standard. Finally,

[6] The Defendant again ignores argument on the application of heightened scrutiny (or even the rational basis test) and does not contest the argument that the Browns should be considered members of a suspect class as part of a discrete and insular minority. The Defendant also do not contest that the law should be subject to more searching review because it implicates so many other constitutional provisions, nor does he contest that that he engaged in selective prosecution.

he does not address the tests for selective prosecution claims raised by the Browns. Again, there is nothing for the Plaintiffs to respond to in seeking to defend such claims from summary judgment.

C. Defendant Does Not Address Plaintiffs' Challenge Under The Free Exercise Clause.

The Defendant is again silent on Plaintiffs' free exercise claim. He does not offer any analysis under any specific constitutional test, instead merely describing the holdings of past cases. While conceding that the law can no longer be justified on the basis of upholding "good order and morals of society," the Defendant simply claims conclusorily that polygamy represents a social harm, all without addressing Plaintiffs' express refutation of this claim. [7] *Compare* Pls.' Mem. at 35-41,*with* Def.'s Mem. at 5. Defendant does not respond to the cited lack of a record of social harm posed by families like the Browns. Likewise, the Defendant leaves uncontested the specific arguments that social harms attributed to polygamy are found in equal or greater numbers among monogamous marriages. Since Defendant does not offer specific free exercise arguments, the case references will be addressed as presented by Defendant as part of his discussion of *Reynolds* and state cases.

D. Defendant Does Not Address Plaintiffs' Claim Under The Free Speech Clause.

The Defendant not only declines to respond to the claim that the statute violates the

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[7] Such social harm has not been documented and established by the state in the legislature, let alone this case. Such harm cannot be presumed since there are various academic studies contesting such general harm related to plural family structures. *See, e.g.*, Shayna M. Sigman, Everything Lawyers Know about Polygamy is Wrong, 16 Cornell J.L. & Pub. Pol'y 101, 173 (2006) ("'there is no evidence that polygamy per se creates abuse or neglect.").

guarantee of freedom of speech, he does not even mention free speech once in his filing, either in his supposed response to the instant motion or in support of summary judgment in his own favor. Once again, it is entirely unclear how the Defendant believes he can secure summary judgment on a claim that he does not even mention, let alone address the detailed account of how the Browns were singled out for public attacks and investigation due to their participation in the television program about their plural lifestyle. Plaintiffs again have nothing to respond to on the free speech claim since it is entirely ignored by the Defendant.

E. Defendant Does Not Address Plaintiffs' Free Association Claim.

The Defendant offers only one reference to "association" in the description of *State v. Holm*, 2006 UT 31, 137 P.3d 726. Defendant leaves uncontested the arguments that the statute violates both stated forms of association, including the factual assertions showing that the Browns were engaged in expressive association through their program. Likewise, the Defendant does not contest that the law prevents or punishes the types of intimate relationships. The *Holm* reference merely notes in passing that it had an associational claim.[8] The court dismissed such private relationships as "not encompassed within the ambit of the individual liberty protections

[8] The treatment of the associational claim in *Holm* was based on the federal constitution and is not binding on this Court. More importantly, the court in *Holm* dismissed the associational claim by simply denying the protection afforded intimate relationships as either a form of intrinsic and instrumental association. *Holm*, 2006 UT 31, ¶ 22, 137 P.3d at 734 (stressing that the law "does not require a party to enter into a second marriage (however defined) to run afoul of the statute; cohabitation alone would constitute bigamy pursuant to the statute's terms."). Not only did this not address the cohabitation aspect of the statute, but it ignores that families like the Browns are not "entering into" any claim of state-recognized marriage but merely private understandings between consenting adults.

contained in our federal constitution." *Id.* at ¶ 72, 137 P.3d at 746. This is in obvious contradiction with *Lawrence* and the modern cases protecting such lifestyle choices.

F. Defendant Does Not Address Plaintiffs' Establishment Claim.

The Defendant entirely ignores the Plaintiffs' claim under the Establishment Clause.While seeking both a denial of the instant motion and summary judgment in his favor, Defendant again makes no mention of the claim and does not even use the word "establishment" in his filing. The Defendant does not contest the application of the strict scrutiny test or the factual basis for the establishment challenge. As discussed above in the background section, the Defendant's denial that religious polygamists have been targeted under this Act ignores both the historical and statistical record.[9] The Defendant has chosen to remain silent on the relevant test or how it should apply in the case. As such, the Court should order summary judgment in favor of the Plaintiffs under the Establishment Clause of the First Amendment.

G. Defendant Does Not Address Plaintiffs' Challenge Under 42 U.S.C. § 1983.

The Defendant not only declines to respond to the claim but also fails to even mention § 1983 in his filing seeking summary judgment. There is no dispute that a prosecutor who enforces a state statute operates "under color of . . . statute" for the purposes of a § 1983 claim. *See, e.g.*,

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[9] While Defendant also notes that "one of the more recent cases" actually involved a man engaged in cohabitation for non-religious purposes, that case was a criminal case involving conventional bigamy with multiple marriage licenses, and thus does not raise the same issues as the instant case. *State v. Geer*, 765 P.2d 1, 2 (1988) (noting that Geer had been "married thirteen times."). The Defendant's reference to *Geer* is rather curious given his claim of a long policy of not prosecuting plural families absent some other collateral criminal offense. Yet, *Geer* is "one of the more recent cases" where the prosecutor "stated that he always has been and continues to be willing to prosecute persons under the bigamy statute regardless of whether those persons claim a religious basis for that practice and that his decision to prosecute is based solely on whether there is sufficient evidence to convict the person of bigamy." *Geer*, 765 P.2d at 7.

Boykin v. Bloomsburg Univ. of Pa., 893 F. Supp. 378 (M.D. Pa. 1995). The Browns incorporate their claims of constitutional violations into this section. The deprivation of their constitutional rights creates a separate basis for relief under § 1983. *See Snell v. Tunnell*, 920 F.2d 673, 701-02 (10th Cir. 1990). This claim stands uncontested by the Defendant.

II. *REYNOLDS* IS NEITHER CONTROLLING NOR DETERMINATIVE PRECEDENT ON ANY OF THE SEVEN COUNTS IN THIS CASE.

If this filing is best described as a "Hail Mary" pass, then the football is *Reynolds v. United States*, 98 U.S. 145 (1878). Defendant insists that *Reynolds* forecloses any Free Exercise Clause challenge to an anti-bigamy statute. He also makes a more general argument that the case constitutes a type of binding judicial recognition of a "social harm" posed by plural marriage that grants the state broad latitude in criminalizing unlicensed religious marriages. *See* Def.'s Mem. at 4-5. Neither proposition is valid, and both are based on a fundamental misunderstanding of *Reynolds* and later conflicting precedent. Indeed, the claim that *Reynolds* is still invoked by the Supreme Court and the Tenth Circuit fails to account for how the case has been cited. Even on the most relevant Free Exercise Clause claim, subsequent legal limits negate the very points raised by the Defendant. Moreover, *Reynolds* is inapplicable to a hybrid claim involving both the Free Exercise Clause and other constitutional provisions.

A. Defendant Exaggerates *Reynolds'* Current Vitality and Application.

With the exception of the now-outdated analysis of *Potter v. Murray City*, discussed *infra*, there has not been a substantive endorsement of *Reynolds*' specific holding by any federal appellate court. Indeed, Defendant advances an argument that finds little support after the nineteenth century. Defendant treats any citation to the case as proof that it is being cited in its entirety with approval – a hardly credible claim given the outdated and often prejudicial

language used in the opinion. The Supreme Court's decision in *Reynolds* is rife with open hostility for Mormons and racist elements. *Cf. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989) (holding that, while "history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.").[10] The mere citation of *Reynolds* in recent decades hardly constitutes the Supreme Court's endorsement of Defendant's specific claims that a ban on polygamy is immune to Free Exercise Clause challenges under modern precedent or that plural marriage presents special social harms that would somehow affect a Due Process or Equal Protection Clause analysis. For example, the Defendant points to citations of *Reynolds* at its highest level of generality – that religious motivation for otherwise unlawful conduct is not sufficient to invalidate a criminal law or bar its application in a given case. *See* Def.'s Mem. at 5-6.None of those recent authorities are specific endorsements of *Reynolds*' far more specific, and openly derogatory, discussion of a religious minority or its invocation of some nebulous "social harm" caused by polygamy. *See Reynolds*, 98 U.S. at 148-49 (denouncing practices as "contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world.").

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[10] Indeed, even conservative legal experts have denounced the use of *Reynolds* as precedent due to its questionable analysis. *See* Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. Rev. 1, 2 (1993). *Reynolds* is a sectarian screed against a religion and its claimed "odious" practices – citing majoritarian values in the very inverse of what is called for under the Constitution and its protection of the free exercise of religion against majority animus. *Reynolds* was handed down just four years before *Pace v. Alabama*, 106 U.S. 583 (1883), where the Court upheld Alabama's anti-miscegenation statute (including a majority of Justices who signed on to the *Reynolds* decision). That decision was later overturned in *Loving*. The Court expressly denied the sweeping suggestion that marriage ("one of the basic civil rights of man") is anything the majority says it is. *Loving*, 388 U.S. at 12.

Recent citations of *Reynolds* by the Supreme Court with respect to the First Amendment are removed from any analysis or discussion of that case's specific reasoning, and when it is cited it is done so for the most general proposition possible: that a facially neutral law is not invalidated solely because it impinges upon some religiously motivated conduct. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990); *see also United States v. Lee*, 455 U.S. 252, 257 (1982) (citing *Reynolds* simply for the proposition that "not all burdens on religion are unconstitutional"); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (citing *Reynolds* for recognizing that a facially neutral law may impinge upon some religious conduct). Notably, recent citations of *Reynolds* that actually rely on its specific facts or holdings do so for historical purposes,[11] its relevance to the Sixth Amendment,[12] or its relevance to juror disqualification.[13]

The Court's quotation of *Reynolds* in *Smith* merits some additional discussion, because while the Court gave *Reynolds* more attention in that opinion than in *Church of Lukumi Babalu Aye, Inc.*, it also highlighted an important limit on *Reynolds*' applicability to the instant case.

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[11] *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 599 n.1 (1992) (citing *Reynolds* for its language on separation of church and state); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 502 (1982) (citing *Reynolds* for its recognition of the oppressive nature of state support for churches).

[12] *See, e.g.*, *Giles v. California*, 554 U.S. 353, 366 (2008) (citing *Reynolds* for its holding under the Confrontation Clause); *Davis v. Washington*, 547 U.S. 813, 824-25 (2006) (same).

[13] *See, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2915 (2010) (citing *Reynolds* in discussion of juror bias); *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citing *Reynolds* in rejecting juror with a preexisting opinion cannot be impartial); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (same).

Notably, the *Smith* Court quoted *Reynolds* for the proposition that a facially neutral law is not invalidated merely by the assertion that a party has a religious duty to violate it. *Smith*, 494 U.S. at 879. The Court also acknowledged in *Smith* that a facially neutral law is still properly challenged in a hybrid claim – that the law not only impinges upon a religious practice but also violates other provisions of the Constitution, such as freedom of speech. *Id.* at 881-83. What the Court did not analyze in *Smith*, then, is what, if any, significance *Reynolds* would have in the face of such a hybrid claim. As discussed below, this wholly undercuts *Reynolds* as a basis for granting summary judgment to Defendant on any of Plaintiffs' claims.

The Tenth Circuit has only meaningfully analyzed the continuing vitality of *Reynolds* in one decision, *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985). Notably, the panel's conclusion that a broad criminal prohibition of plural marriage remained valid under *Reynolds* depended on more recent authorities which have been called into question by *Lawrence*. *See Potter*, 760 F.2d at 1069 (citing, *inter alia*, concurring opinions that asserted protecting "values" was a valid government interest and using prohibitions of homosexuality as an example). Moreover, the Tenth Circuit has not applied *Reynolds* to a privacy-interest analysis, as the Defendant concedes in its discussion of *Potter*. *See Potter*, 760 F.2d 1065, 1070-71 (1985); Def.'s Mem. at 6 (noting the *Potter* court's pre-*Lawrence* rejection of a privacy interest argument, but not linking that rejection to anything found in *Reynolds*). *Bronson v. Swensen* is not to the contrary, as its citation of *Reynolds* is dicta (which the Defendant concedes, Def.'s Mem. at 6) and the court did not engage in any substantive evaluation of whether *Reynolds* was in fact still valid precedent in a hybrid claim case, relying instead on the Supreme Court's citation of the case at its highest level of possible generality. *See Bronson v. Swensen*, 500 F.3d

1099, 1105-06 (10th Cir. 2007) (briefly discussing "insurmountable" barriers to plaintiffs on the merits before resolving the case, in its entirety, on standing grounds).

As noted above, those citations simply do not constitute either a statement that *Reynolds* has any salience whatsoever in a hybrid claim Free Exercise case or an endorsement of *Reynolds*' specific holding (as imagined by Defendant) by the Supreme Court, which is that the State of Utah is free to criminalize any relationship it deems "socially harmful."

B. *Reynolds* Has No Bearing on The Other Counts in Plaintiffs' Complaint.

Reynolds addressed a single constitutional challenge to an anti-bigamy statute,[14] and solely on the basis of the Free Exercise Clause. *See Reynolds*, 98 U.S. at 145; *see also District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (noting that *Reynolds* was an analysis of the Free Exercise Clause); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (observing that *Reynolds* was solely concerned with the Free Exercise Clause, not the Establishment Clause). Even if this Court were to accept Defendant's argument that citations to *Reynolds* establish that the case continues to fully represent the current law on the standard for Free Exercise challenges, it would not address the other counts that Defendant virtually ignores. As noted above, the Court clearly stated in *Smith* that the facial neutrality argument in defense of a statute loses its dispositive power when claims in addition to a Free Exercise challenge are brought.Following from that command, the Tenth Circuit requires only a "colorable" companion violation to invoke *Smith's* standard, which would render *Reynolds* inapplicable to this case. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 655 (10th Cir. 2006).

[14] Reynolds' other arguments were premised on trial procedure. See footnotes, *supra*.

Defendant does not claim a lack of a companion claim to Plaintiffs' Free Exercise argument, instead relying on *Reynolds* to conclusorily support summary judgment.

Defendant thus finds himself relying on a 19th century decision with virtually no significance in this case, and intervening precedent renders the limited endorsements the case has received virtually meaningless. Setting aside the reality that *Reynolds* is irrelevant to most of the claims set forth in this litigation, the mere facial neutrality of the Anti-Bigamy statute, upon which *Reynolds* depends, is not a valid basis for summary judgment on a Free Exercise challenge under the hybrid claim analysis expressly recognized in *Smith*.

As the Supreme Court has observed in a variety of contexts, a prior opinion can cease to function as controlling precedent due to new reasoning found in more recent cases.*See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 836 (2000). *Reynolds* is such a precedent, not only as a basis for analyzing Free Exercise claims, but also for Defendant's purpose of identifying judicially recognized "social harms." *Reynolds'* vision of purely "social harm," as the Defendant describes it, is no longer a valid government interest for intruding upon private social or religious conduct under the reasoning of *Lawrence* and its Due Process Clause precedents. Notably, the sole Supreme Court citation Defendant points to, *Church of Lukumi Babalu Aye, Inc.*, merely identifies "social harm" as a valid basis for regulating conduct – it does not delineate what the term means.[15] Indeed, Defendant shows the inherent conflict in relying on this rationale. The

[15] Notably, the *Reynolds* Court acknowledges that "[a]n exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it." *Reynolds*, 98 U.S. at 166. Thus, the Court acknowledged that a given plural family or even a community could exist without "harming" a monogamous community.

Defendant conceded that a law can no longer be justified on the basis of upholding "good order and morals of society." Def.'s Mem. at 5. Yet he then offers only vague claims that plural families cause "social harm" even though the Browns are not accused of any crime or abuse outside of general accusations of bigamy.

Virtually every claim made by the Defendant about why unlicensed "marriages" are different and still properly criminalized pursuant to *Reynolds*, post-*Lawrence* – that they involve children, economic implications for participants, and some degree of "public" behavior, Def's Mem. at 10-11 – would require contrary outcomes in a half-century's worth of major constitutional decisions about personal autonomy and privacy that predated *Lawrence*. *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (establishing a fundamental interest in familial organization); *Griswold v. Connecticut*. 381 U.S. 479, 483-84 (1965) (establishing a fundamental right of marital privacy in procreation); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (extending *Griswold* to unmarried individuals). Each of those cases concerned state efforts to regulate procreation or familial cohabitation, undoubtedly arenas of social life that have economic consequences for all involved, concern raising children, and involve some degree of "public conduct" insofar as the relationships involved are publicly visible. Yet in each decision, the individual's liberty interests trumped the state's regulatory interest. *Reynolds* would demand contrary outcomes in all of those cases, in addition to *Lawrence*, if its expansive language of state social power was still considered good law. Thus, *Reynolds'* "social harms" discussion does not have precedential effect on a privacy interest-based claim, and *Reynolds* is not a viable basis for summary judgment.

III. *POTTER* HAS NO BEARING ON THE MAJORITY OF COUNTS AND DOES NOT DICTATE DISMISSAL OF THE FREE EXERCISE CLAIM AND THE DUE PROCESS CLAIM.

The Defendant's reliance on *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985), is equally misplaced. As a threshold matter, *Potter* does not address the majority of the Browns' claims. The plaintiff in *Potter* also challenged Utah's proscription against bigamy only on grounds that it "violated his rights to the free exercise of his religion and his right to privacy."*Potter*, 760 F.2d at 1066. Thus, if *Potter* has any bearing on this case, it can only relate to the Browns' challenge under the Free Exercise Clause and the privacy claims under the Due Process Clause. However, even on those claims, the case holds no precedential or determinative weight.

Much like his reliance on *Reynolds*, Defendant's reliance on *Potter* is telling given its facially outmoded analysis. The central method for discerning a fundamental liberty interest, in addition to those already recognized under existing precedent, is a historical inquiry based on the nation's history and traditions, with the additional question of the asserted right's scope. *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). Under *Lawrence*, the historical inquiry may encompass patterns of nonenforcement, and this bolsters the assertion of a private liberty interest. *Lawrence*, 539 U.S. at 569-71 (detailing a lack of enforcement of anti-sodomy laws over the preceding half century as probative of recognition of sexual privacy).[16] As a threshold matter, the Tenth

[16] Although Plaintiffs contend that *Lawrence* actually identified a fundamental liberty interest in intimate sexual conduct, at present the Tenth Circuit has concluded that *Lawrence* only provides for a form of rational basis review. *See Seegmiller v. Laverkin City*, 528 F.3d 762, 770 (10th Cir. 2008). However, other Circuits have divided over this issue. *Compare Lowe v.*

Circuit's conclusion nearly three decades ago that no specific privacy interest in plural marriage existed is no longer applicable in light of intervening changes in Supreme Court precedent. *See Potter v. Murray City*, 760 F.3d 1065, 1070-71 (10th Cir. 1985). *Potter* found that no fundamental privacy interest existed with respect to plural marriage, *id*., but the Supreme Court's subsequent decision in *Planned Parenthood of Southeastern Pennsylvania v. Case*y, 505 U.S. 833 (1992), rejected such a narrow, specific method of inquiry.[17] *Lawrence* clarified and built on the *Casey* holding, explaining that at the core of substantive due process's liberty protections are private individual decisions about procreation, cohabitation, and romantic relationships. 539 U.S. at 574-75. In light of *Lawrence's* explanation of the appropriate spectrum of specially protected interests and the Utah Supreme Court's construction of the statute in *Holm*, *Potter* does not defeat Plaintiffs' assertion that they have a fundamental liberty interest in choosing to cohabit and maintain romantic and spiritual relationships, even if those relationships are termed "plural marriage."

With regard to the free exercise claim, the panel in *Potter* claimed that the "fundamental values" of monogamy gave the state a "compelling interest" to infringe upon the plaintiff's free

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Swanson, 663 F.3d 258, 260 (6th Cir. 2011) (concluding that *Lawrence* dictates rational basis review), *and Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 815-16 (11th Cir. 2004) (same), *with Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (concluding that *Lawrence* found a fundamental liberty interest in intimate sexual behavior).

[17] *See Casey*, 505 U.S. at 847-88 (observing that one could "suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . But such a view would be inconsistent with our law." (internal citation omitted)).

exercise of religion.[18] *Potter*, 760 F.2d at 1070. However, this analysis is obsolete. *See* Pls.' Mem. at 41. The dissent in *Lawrence* made a similar argument in support of the criminalization of homosexual relations. This argument was rejected by the Court:

> The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.

Lawrence, 539 U.S. at 571. The Supreme Court answered that question in the negative. *Id*. Decided nearly 20 years before *Lawrence*, *Potter* did not consider this proposition. Thus, as it relates to the State's interests in criminalizing bigamy and infringing upon the Browns' free exercise rights, *Potter* has little precedential value to this Court.

IV. DEFENDANT FUNDAMENTALLY MISCONSTRUES *LAWRENCE* AND FALLS TO APPLY IT TO THE SPECIFIC COUNTS IN THE COMPLAINT.

The Defendant's analysis of *Lawrence v. Texas* is the most enigmatic section of the filing. The Defendant appears to recognize that he cannot secure summary judgment (or block summary judgment for the Plaintiffs) without flipping the meaning of *Lawrence*. Accordingly, the Defendant insists that *Lawrence* actually reaffirmed the ability to criminalize private relations between

[18] By relying on *Potter*, Defendant does not contest Plaintiffs' position that strict scrutiny applies as standard of review for the Free Exercise claim. *Potter* found that any serious infringement of a person's Free Exercise rights is only justified by a state's compelling interest. *See Potter*, 760 F.2d at1068-9 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a court must consider whether the law targets religious practice. If so, the court applies strict scrutiny and asks whether the State has a compelling interest. *See id.* While Plaintiffs believe that *Lukumi* controls, they agree with the Defendant that strict scrutiny applies to the Free Exercise claim.

consenting adults. This is akin to reading *Brown v. Board of Education* as affirming a state's right to segregate in areas other than schools. This interpretation is made all the more extreme by the suggestion that it is *Reynolds*, not *Lawrence*, that reflects the current law on privacy.

Adults have fundamental liberty interests in their familial living arrangements in their homes, including romantic partnerships.This fundamental liberty interest is often based on a historical inquiry into the nation's history and traditions. *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).The historical inquiry may encompass patterns of nonenforcement. *Lawrence*, 539 U.S. at 569-71. *Lawrence* was the latest iteration in a long series of constitutional decisions amplifying a core principle: the Due Process Clause circumscribes and in some cases virtually forbids state intervention in private relationships and conduct. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Moore v. City of East Cleveland*, 431 U.S. at 503; *Griswold v. Connecticut*. 381 U.S. 479, 483-84 (1965). The intimate or familial relationships are at the center of associational rights under the Constitution. *See Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984). Nor does this protected relationship exist solely in cases of blood relation and legal marriage. *See, e.g.*, *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844-46 (1977) (foster children); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (unmarried individuals).

The protection of intimate familial or quasi-familial ties operates with its greatest force when the state intervention takes the form of a broad criminal sanction. *See Lawrence*, 539 U.S. at 575 (statute rendered homosexual sex a misdemeanor); *Moore*, 431 U.S. at 497 (ordinance rendered certain familial living arrangements criminal); *Griswold*, 381 U.S. at 480-81 (statute

rendered dissemination of contraception a misdemeanor). The broad sweep of the Utah law, together with the precedential and historical recognition of privately organized families and intimate relationships, means that it must be analyzed under strict scrutiny. The statute criminalizes not only relationships that might somehow "redefine" a single monogamous marriage by permitting an additional, "unlicensed" spouse, *Holm*, 2006 UT 31, ¶ 63, 137 P.3d at 744, but also intrudes upon those situations where not even an informal or religious marriage has occurred between any of the adults involved, *see* Utah Code § 76-7-101. If the state's principal concern is protecting state-sanctioned marriage, the cohabitation prong of the statute is dramatically overbroad, particularly when it impinges so directly on private adult conduct in the home. Once strict scrutiny is applied, the law's unconstitutionality is evident.

Even were this Court to conclude that the interests asserted by Plaintiffs do not qualify for protection as "fundamental," the interest in private adult relationships in the home is protected by *Lawrence* through its more exacting form of rational basis review. *Lawrence* constitutes the Due Process Clause counterpart to the modified rational-basis analysis of *Romer v. Evans*, 517 U.S. 620 (1996), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985): the burden for a state's interference in intimate, consensual adult conduct in the home is more demanding than typical rational basis review.[19] The state of Utah offers no interest to

[19] Construing *Lawrence* as providing for heightened rational basis review also reconciles the conflicting interpretations of the Circuits on both the opinion's reliance on rational-basis language and its summary dismissal of morality-based justifications. *Compare Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008), *with Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005).

support the broad criminalization of private conduct even under a rational basis test. *See Seegmiller v. Laverkin City*, 528 F.3d 762, 770 (10th Cir. 2008).[20]

The Defendant does not actually apply any standard of analysis under these cases in its discussion of *Lawrence*. While acknowledging that the statute does regulate "intimate sexual conduct" of consenting adults, Def.'s Mem.at 9, the Defendant insists that (unlike homosexuality) marriage involves minors and "public conduct." *Id.* He does not explain the meaning of public conduct or the distinction between the public conduct of a homosexual couple as opposed to a cohabitating couple. Since the statute criminalizes simple cohabitation, the law would apply to a wide range of adulterous relations. The public conduct rationale is also odd given how many plural families struggle to hide such relationships in fear of harassment or prosecution. Moreover, this rationale suggests that *Lawrence* might support criminalization of homosexuality if a gay or lesbian couple were open or public in their relationships. Just as homosexual couples function in public and often acknowledge their relationship in contracts and public dealings, the same is true of cohabitating adults.

The reference to minors by the Defendant is also immaterial. The Defendant has not put forward any data to suggest that the Browns are harming their children or that children are harmed by adults who cohabitate under the law. Indeed, the same unsupported argument was once used against homosexuals, suggesting that their relationships undermined families and

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[20] In *Seegmiller*, the invalidity of an abstract morality interest was not at issue given the state interest in regulating the conduct of police officers. *Seegmiller,* 528 F.3d at 771-72. That regulatory interest is precisely the sort of "abuse of an institution" that *Lawrence* distinguished from criminalizing purely private conduct. *Lawrence*, 539 U.S. at 567.

corrupted the youth. The Defendant is merely repeating the same conclusory and unfounded claims that were used and rejected with respect to the criminalization of homosexuality.

The Defendant also argues that "Plaintiffs try to equate private sexual conduct in the home with marriage. They are not the synonymous." *Id.* This final statement in the Defendant's filing is the most inexplicable. It is, of course, the state that has equated private sexual conduct with marriage. Once again, Utah Code Ann. § 76-7-101(1) makes it a crime when a person "knowing he has a husband or wife or knowing the other person has a husband or wife . . . purports to marry another person or cohabits with another person." Utah Code Ann. § 76-7-101 (West 2010). Thus, if a person merely cohabits with someone "knowing he has a husband or wife or knowing the other person has a husband or wife," he is guilty of a felony of cohabitation. This is not even claimed to be a marriage but it remains criminal – just as was the case in *Lawrence.* Notably, the state ignores the cohabitation prong in the law entirely – arguing to uphold a law by referring to only half of its criminalized conduct. Likewise, when that same person simply "purports to marry another person" in a non-legal private relationship, he is guilty of a felony. In the latter cases, the person has not claimed to be legally married. It is the state that is treating the relationship as a form of marriage and prosecuting on that basis. In either situation (both of which are challenged by the Complaint), the state is criminalizing the private consensual relations of adults.

Finally, the Defendant's argument serves to highlight the inherent absurdity of the law. Defendant simply ignores that fact that the statute criminalized cohabitating adults – even without purporting to marry. Instead, he prefers to focus entirely on those who purport to be married on a private or spiritual level. Yet, Defendant's abridged analysis magnifies the equal protection, free

exercise, establishment, and other constitutional problems discussed above. It would suggest that Kody Brown would have avoided any criminal exposure if he had simply maintained relations with multiple women, had children by them, but never expressed a belief in being spiritually bonded to them. Since he committed to these women and his children, the case is treated as undermining marriage by the Defendant and justifying criminalization under the statute.

It is the state that is defining cohabitation and plural relationships as marriage and then criminalizing those private relationships as inimical to the institution of marriage. The Browns have not questioned the right of the state to limit its recognition of marriage and to prosecute those citizens who secure multiple marriage licenses from the state. Rather they are challenging the right of the state to declare either cohabitation or plural relationships between consenting adults a felony. It is a claim that resonates with *Lawrence*, which goes on to state after the Defendant's cited passage to stress:

> The 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. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence v. Texas, 539 U.S. 558, 578 (2003).

CONCLUSION

In light of the foregoing, the Plaintiffs respectfully request that the Court deny Defendant's Cross Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Reply Memorandum of Points and Authorities for Summary Judgment was served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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