No. 14-4117

In the United States Court of Appeals
For the Tenth Circuit

KODY BROWN, MERI BROWN, JANELLE BROWN, CHRISTINE BROWN, ROBYN SULLIVAN,
Plaintiffs/Appellees.
v.
JEFFREY BUHMAN, in his official capacity,
Defendant/Appellant.

On Appeal from the United States District Court
For the District of Utah,
The Honorable Clark Waddoups presiding,
Case No. 2:11-CV-00652-CW

BRIEF OF APPELLEES

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ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR OR RELATED CASES

There are no known prior or related appeals to this matter.

ISSUES PRESENTED

1. Whether The Free Exercise Clause of the First Amendment Renders Utah's Cohabitation Law Unconstitutional.

2. Whether the Due Process Clause under the Fourteenth Amendment Renders Utah's Cohabitation Law Unconstitutional.

3. Whether the District Court Erred by Finding That Plaintiffs Were Entitled to Recovery of Fees Under § 1983.

INTRODUCTION

This matter comes before the Court after the United States District Court for the District of Utah ruled that the criminalization of cohabitation under Utah Code Ann. § 76-7-101 (hereinafter the "Utah cohabitation provision") was unconstitutional. In the first summary judgment opinion, the lower court found that the Utah cohabitation provision violated both the Free Exercise Clause of the First Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment. *See Brown v. Buhman*, 947 F. Supp. 2d 1170, 1204-21, 1222-26 (D. Utah 2013). (J.A. at 560-650).[1] In the second summary judgment opinion, the lower court ruled that the defendant also violated 42 U.S.C. §1983. *See Brown v. Herbert*, 43 F. Supp. 3d 1229, 1232 (D. Utah 2014) (J.A. at 726-730).

As discussed below, the government does not present arguments on either the "hybrid" constitutional or void for vagueness rulings and those issues should be deemed as waived for purposes of appeal. Finally, the government also waived all defenses to the § 1983 claim before the lower court.

STATEMENT OF THE CASE

The lower court presented the facts of this case, but the Appellees wish to

[1] Citations to the Joint Appendix will denoted as "J.A. at xx." Citations to Appellant's second errata brief will be denoted as "App. Br. at xx."

note a few salient facts missing from Appellant's brief. Plaintiffs filed their Motion for Summary Judgment, presenting detailed arguments on seven constitutional claims including due process, equal protection, free speech, free association, free exercise, the Establishment Clause, and 42 U.S.C. § 1983. (Dkt. No. 49.) During the argument over summary judgment, the court noted that it "was intrigued by the sheer lack of response in Defendant's filing to Plaintiffs' seven detailed constitutional claims."[2] *Buhman*, 947 F. Supp. 2d at 1176-77. Indeed, the Court expressed sympathy for the Plaintiffs who objected that they were "in the awkward position of replying to a non-response." *Id.* at 1177. It was only in Appellant's Reply that he "for the first time, provided academic discussion about 'social harms' arising from religious cohabitation in Utah, though no admissible evidence was proffered with his Cross-Motion, Response, or Reply, or in oral argument on the motions held on January 17, 2013." *Id.*

As a result, the factual record in this appeal is largely uncontested, as noted by the lower court. *See Buhman*, 947 F. Supp. 2d at 1177-78. The Browns presented at summary judgment thirty-two critical facts that were accepted or waived without objection by the Appellants. Indeed, in oral argument, Appellant

[2] For example, the Court noted that "Defendant's memorandum supporting his Cross-Motion and Response contained merely seven pages of total Argument both in support of his own Cross-Motion for Summary Judgment and in response to Plaintiffs' 50 pages of detailed Argument in support of their Motion for Summary Judgment on seven substantive constitutional claims." *Buhman*, 947 F. Supp. 2d at 1177 n.1.

again affirmed that "[w]e referenced a couple of facts that we took some issue with, but the overall thrust of it there's no dispute." (J.A. at 826). The lower court then distilled those facts down to twenty:

1. The Statute covers not only polygamy but "cohabitation"—a term that encompasses a broad category of private relations in which a married person "purports to marry another person or cohabits with another person."
2. The practice of married individuals cohabiting with other people can include adulterous relations.
3. The Browns are members of a religious group that believes polygamy is a core religious practice.
4. The Brown family does not have multiple marriage licenses.
5. There is only one recorded marriage license in the Brown family—that of Kody and Meri Brown.
6. Prosecutions under the Statute have been rare and published cases in the last three decades only involve religious polygynists.
7. Utah government officials are aware of thousands of polygamist families in the state and regularly interact with such families as part of the "Safety Net" program and other governmental programs.
8. "The Sister Wives" is a reality show that explores the daily issues and realities of a plural family.
9. The content of "The Sister Wives" program includes the defense of plural families and discussion of the Browns' religious beliefs in polygamy.
10. Utah government officials were aware that the Brown family was a plural or polygamist family for years before the first episode of "The Sister Wives" aired on TLC Network.
11. The investigation of the Browns occurred only [after] the first episode of "The Sister Wives" aired.

12. State officials have acknowledged that "The Sister Wives" program triggered their investigation.

13. State officials publicly denounced the Browns as committing crimes every night on television.

14. One official connected to the investigation publicly stated the program made prosecution "easier."

15. The prosecutors stated that the Brown family moving to Nevada would not prevent them from prosecuting the family.

16. The Defendant admitted, through counsel in the December 16, 2011 hearing, that prosecutors gave interviews discussing the Brown family, their alleged crime of polygamy, and the public investigation;

17. The Defendant has found no evidence of any crime by the Browns though he maintains future prosecutors can charge them as a matter of discretion and policy. . . .

18. The Defendant has said that there is no guarantee that the Browns will not be prosecuted in the future for polygamy.

19. There has been no allegation of child or spousal abuse by members of the Brown family.

20. No member of the Brown family has ever been charged with a crime

Buhman, 947 F. Supp. 2d. at 1178-79. In addition, the District Court rejected the only two objections made by the government. First, the government objected to the factual background of the Utah law "to the extent that they 'characterize' the drafters (or enforcers) of the Anti-Bigamy Law as targeting primarily religious plural families." *Buhman*, 947 F. Supp. 2d at 1177. The District Court noted that the express targeting or reference to religious plural families is replete in the

historical record and uncontestable.[3] *See id.* at 1777 n.2.

The government was repeatedly asked by the lower court if it wanted to submit additional evidence before the record was closed, particularly on the question of harm. *See id.* at 1177, 1191, 1216; J.A. at 839 (Tr. Hrg. Jan. 17, 2013, at 17: 14-25) (noting that the State "chose not to present any evidence to support any harm" to which the State responded that it had "pointed out stories of harm"). The State, however, repeatedly declined to offer such evidence.

SUMMARY OF THE ARGUMENT

This case is about the criminalization, not recognition, of plural relationships. From the very outset of the case, the Brown family maintained that it was not challenging the right of any state to criminalize bigamy or the possession of multiple state marriage licenses by individuals. The Browns also consistently asserted that they were not arguing for the state recognition of plural marriage. The Browns only challenged the cohabitation language, and it is only that language that was struck by the lower court, making the current Utah law virtually identical to the bigamy laws of other states.

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[3] In his other objection, Appellant insisted that he never threatened criminal prosecution *personally*. The District Court explained that Buhman is responsible for such actions by his office. *Buhman,* 947 F. Supp. 2d at 1179. Buhman conceded "I am aware that others in my office may have responded to the press to that effect (or at least the press reported that they did)." *Id.*

While accepting the record below, the government again raises unspecified and emotive claims of harm against polygamy. Not only do these claims not address the full range of cohabitation under the statute, they invite the Court to dispense with requirements of proof in favor of a biased presumption of harm against an insular, minority group.[4] The government would have this Court ignore the trial court record and assume harm in a way that is not applied to monogamous unions. It would also have this Court ignore that fact that the statute extends to any and all plural relationships involving a person who is married, including adulterous relationships.

The very notion of a state today criminalizing the right of consenting adults to maintain certain private relationships is a regression to a prior century of state-enforced morality codes. Not surprisingly, the government relies on cases like *Reynolds v. United States*, 98 U.S. 145 (1878), which has been widely condemned for its openly prejudiced and ill-tempered rhetoric against social, racial, and religious minorities. Modern cases have consistently rejected the criminalization of private relationships, see *Lawrence v. Texas*, 539 U.S. 558 (2003), as well as

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[4] The claims of harm associated with cohabitation or polygamy as the basis for criminalization has been contested as unsupported. *See generally* Ronald C. Den Otter, *Three May Not Be A Crowd: The Case For A Constitutional Right to Plural Marriage*, 64 Emory L.J. 1977 (2015); Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 Emory L.J. 1905 (2015) (hereinafter "*The Loadstone Rock*"); *see also* Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory To Polygamy and Same-Sex Marriage*, 64 Emory L.J. 2047 (2015).

rejected barriers based on moral and social bias, see *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). By only striking the cohabitation provision, the District Court left Utah with the same law maintained by most states in the Union prohibiting bigamy. What was lost to the state is precisely what is denied to all states: the right to impose criminal morality codes on citizens, compelling them to live their lives in accordance with the religious or social values of the majority of citizens.

STANDARD OF REVIEW

The Court reviews *de novo* a grant of summary judgment, *Christian Heritage Acad. v. Okla. Secondary Sch. Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007), in determining that there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

ARGUMENT

I. THE STATE ADVANCES A NEW STATUTORY INTERPRETATION IN CONFLICT WITH PRIOR REPRESENTATIONS TO THE LOWER COURT AND THE EXPRESS LANGUAGE OF THE STATUTE.

Appellant seeks to introduce a new argument on appeal that the statute means something completely different from what it expressly states and what the

government expressly told the Browns, the public, and, most importantly, the lower court. In addition to accepting the record created below with just two minor objections, the government did not contest the obvious reading of the state law as criminalizing cohabitation. Now, the government insists that the only responsible thing for a court to do is to actually change the language of the statute and substitute an "and" for a critical "or" in the provision. This requested judicial amendment of the state law would violate core principles of the separation of powers by allowing courts to rewrite or "improve" laws. It is not the province of federal courts to "rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). It would also produce absurd results.

Judge Waddoups minimized the impact of his decision by excising the unconstitutional language and, through constitutional avoidance principles, adopting a "reasonable construction . . . in order to save [the] statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Ironically, the State in its brief advocates a far more intrusive role for the courts—a role that could lead to the entire statute being struck down or a narrowing of the law to bar the prosecution of many conventional bigamy crimes.

The language of the statute is clear on its face: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person *or* cohabits with another person." Utah Code Ann. § 76-7-101(1) (emphasis added). This language is materially different from other bigamy laws in other states due to the inclusion of the cohabitation clause.[5]

The government repeatedly was asked by the lower court about the meaning of the statute and did not object to the following finding:

> The Statute covers not only polygamy but "cohabitation"—a term that encompasses a broad category of private relations in which a married person "purports to marry another person or cohabits with another person."

Buhman, 947 F. Supp. 2d at 1178. In addition, the State conceded that the cohabitation clause was indeed added as a separate provision to allow for a broader scope of prosecutions:

> MR. JENSEN: . . . [I]t's not marriage but they know the other person is married. So they're cohabiting. That is different than just cohabitation. Two people can go out and cohabit, and let's admit, it goes on all the time. But in this situation under the statute they're not prosecuted unless the one cohabiting knows that person is married. It's the same as with marriage.
>
> THE COURT: So it applies to an adulterous relationship? By definition,

---

[5] These laws define bigamy as "having a husband or wife living, who marries any other person." Cal. Penal Code § 281(a) (West 2015); *see also* 720 Ill. Comp. Stat. 5/11-45 (2011); Md. Code Ann. Crim. Law § 10-502(b) (LexisNexis 2014); Miss. Code Ann. § 97-29-13 (2013); Nev. Rev. Stat. § 201.160 (1995); N.M. Stat. Ann. § 30-10-1 (1963); N.Y. Penal Law § 255.15 (McKinney 2015); Or. Rev. Stat. § 163.515 (2013); Wash. Rev. Code § 9A.64.010 (1975).

> adultery is a person who is married and has intimate relationships with another person to whom he is not married. That's what you've just described.
>
> MR. JENSEN: All right, Your Honor. But let's look at how this really works in practice. *In practice there is the marriage, it may not be recognized by the state, but it is a marriage, it's performed, there is a wedding ceremony performed, there are vows exchanged. The problem is proving it* . . . . The problem was proving that they were married, so they have added cohabitate, but the person has to cohabitate knowing that other person is married . . . .
>
> THE COURT: So tell me what's different between adultery and what you've just described.
>
> MR. JENSEN: The one is that they claim to be married. But just because the state can't prove it doesn't mean it hasn't happened. That's what's happening in the [religious] polygamist communities.
>
> THE COURT: So it's the expression of the fact that the person is a wife that makes it illegal.
>
> MR. JENSEN: Yes.

Id. at 51:17-53:22 (emphasis added). Thus, the State wanted to guarantee that it could prosecute both bigamy and cohabitation—hence the use of the word "or" in the statute.

Finally, the State's new argument would produce a particularly bizarre result. If the State succeeded in convincing this Court to substitute "or" with "and," it would mean that bigamy could not be prosecuted in the state of Utah absent cohabitation. Thus, a person could hold two, six, or ten marriage licenses with the state but not commit a crime under the statute unless they cohabitated. Rather than

expand the scope of prosecutable cases, it would reduce the scope below virtually any other state. Moreover, if the two clauses were inextricably linked, the unconstitutionality of the cohabitation language would result in the entire law being struck down on the same grounds of due process and free exercise discussed in the lower court's opinion and below.

II. THE GOVERNMENT ERRONEOUSLY RELIES ON *REYNOLDS* AND STATE JUDGMENTS AS THE BASIS OF HIS APPEAL.

The government leads its brief with a long discussion of pre-*Lawrence* precedent and state judgments as "binding [or] pursuasive [sic] authority." App. Br. at 18. The reliance on the decision in *Reynolds v. United States*, 98 U.S. 145 (1878) is especially misplaced as well as the equal reliance on the pre-*Lawrence* decision of *Potter v. City of Murray*, 760 F.2d 1065 (10th Cir. 1985). Appellant's analysis proves to be something of a legal period piece that seeks to apply a Supreme Court precedent from the 19th century and treats constitutional analysis as effectively frozen in analytical amber after the now-over-turned decision in *Bowers v. Hardwick,* 478 U.S. 186 (1986).

Of course, whatever the ruling of this Court on the protection of intimate or religious interests in this case, the basis of such a decision is entirely a matter of federal interpretation. *Standard Oil Co. of Cal. v. Johnson*, 316 U.S. 481, 483 (1942) ("Since this determination of a federal question was by a state court, we are

not bound by it."); *see also United States v. Madden*, 682 F.3d 920, 927 (10th Cir. 2012); *Indus. Consultants, Inc. v. H. S. Equities, Inc.*, 646 F.2d 746, 749 (2d Cir. 1981)). Not only did the cited state cases predate important federal rulings cited below, but the interpretation of constitutional rights or their underlying tests by state courts are not controlling precedent for federal courts.

A. *Reynolds v. United States* Does Not Control in Light of Subsequent Rulings By the Supreme Court.

The government commits a sizable amount of its brief to arguing that the decision of *Reynolds* should be controlling precedent despite a litany of subsequent cases by the Supreme Court rejecting its analysis. This includes cases just this year like *Obergefell* that clearly do not subscribe to the long-abandoned analysis and offensive language of *Reynolds*. To put it simply, *Reynolds* is a legal relic that is widely condemned by academics and rarely cited by the Supreme Court[6] as a basis

[6] The questionable foundation for *Reynolds* is also reflected in the Supreme Court's opinions. *See, e.g.*, *D.C. v. Heller*, 554 U.S. 570, 635 (2008) ("But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds*, our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.") (citation omitted); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) ("the Court has not explored the history of the Clause since its early attempts in 1879 and 1890, see *Reynolds v. United States* and *Davis v. Beason*, attempts that recent scholarship makes clear were incomplete.") (citations omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) (noting that the majority's departure from *Reynolds* "promises that in time *Reynolds* will be overruled.")

for substantive constitutional analysis. *See* Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. Rev. 1, 2 (1993) (criticizing *Reynolds*); Peter Nash Swisher, *"I Now Pronounce You Husband and Wives": The Case for Polygamous Marriage After* United States v. Windsor *and* Burwell v. Hobby Lobby Stores, 29 BYU J. Pub. L. 299, 325 (2015) ("[T]he archaic and moralistic Victorian rationale of *Reynolds* is no longer supportable"); Casey E. Faucon, *Polygamy After* Windsor*: What's Religion Got to Do with It?*, 9 Harv. L. & Pol'y Rev. 471, 496 (2015) ("The law and scholarship on marriage policy in America has expanded from the archaic policies that informed the *Reynolds* decision . . . ."); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 Ga. St. U. L. Rev. 691, 710 (2001) ("*Reynolds v. United States* demonstrates the degree to which even the Supreme Court was in the grip of anti-Mormon hysteria and was willing to ignore constitutional concepts of fundamental fairness in trials against Mormons."). Indeed, it is ironic to see Utah relying heavily on such a decision that is replete with offensive and prejudiced statements directed at religious and racial minorities, particularly Mormons.

The original purpose of the criminalization of plural relationships was the view that such relationships were immoral. *See Reynolds*, 98 U.S. at 166

(upholding state's right to dictate conditions "of social life under its dominion."). This same analysis led the Court (with most of the same justices), just four years later in *Pace v. Alabama*, 106 U.S. 583 (1883), to uphold Alabama's anti-miscegenation statute. That decision was later overturned in *Loving v. Virginia*, 388 U.S. 1 (1967). The Supreme Court ultimately rejected this type of morality based analysis in *Lawrence v. Texas*, 539 U.S. 558 (2003), overturning *Bowers v. Hardwick*, which held that morality alone could be the basis for the criminalization of private consensual homosexual relations. The Court clearly established in *Lawrence* that the mere objection to the morality of private relations was not a compelling state interest. If it were, a majority in a state could still prohibit interracial marriage. Even the Defendant acknowledged that *Reynolds* preceded the Court's recognition of such rights and that "good order and morals in society" is no longer considered a valid basis for laws.[7] (J.A. at 413).

Any person reading *Reynolds* would recoil from its venomous and biased language. *See Reynolds*, 98 U.S. at 164 ("[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."). A little over a decade later, the Court expressly vented its

[7] Moreover, as the District Court noted, even if *Reynolds* were still found to be a viable precedent, it is not controlling for the cohabitation prong under the 1973 statute. *Buhman*, 947 F. Supp. 2d at 1204.

prejudice against Mormons and "the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter- Day Saints." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48-49 (1890) (denouncing practices "contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world."). Even setting aside such sectarian and racial animus, the Court insisted that the government had the power to abrogate the most basic rights of marriage and social life, see *Reynolds*, 98 U.S. at 166, a position that is clearly no longer good law. Obviously, the Court has repeatedly held that states do not dictate "social life under its dominion" and, as recently as this year, the Court reaffirmed that intimate affairs are protected from such state dominion. *See Obergefell*, 135 S. Ct. at 2599 ("Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."). Additionally, *Reynolds* has been cited directly by the Supreme Court in reference to the criminalization of *bigamy*: the very part of the state law that was *preserved* by Judge Waddoups. *See, e.g.*, *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 68 n.15 (1973). This is in line with the facts of *Reynolds*, which concerned *actual plural marriage*—not the mere practice of cohabitation at issue in this case.[8]

[8] Indeed, the first cohabitation law was written after reversals based on the

The government also places great emphasis on the decision in *Potter v. City of Murray*, 760 F.2d 1065 (10th Cir. 1985). However, *Potter* was decided roughly two decades before *Lawrence* (and roughly one decade before *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)) and involved the highly distinguishable context of a polygamous police officer accused of violating the laws that he was sworn to uphold. In a single paragraph, this Court cited *Reynolds* and ruled against any privacy claim. *See Potter*, 760 F.2d at 1070-71. At that time, the criminalization of homosexual relations was still considered constitutional in this country under *Bowers v. Hardwick*, 478 U.S. 186 (1986) and the decision came before the landmark decision in *Emp't Div., Dep't of Human Res. of Oregon. v. Smith*, 494 U.S. 872 (1990). Indeed, in *Potter*, this Court noted the shared constitutional basis for the criminalization of bigamy and homosexuality. *Potter*, 760 F.2d at 1069 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring in the judgment)).

Recently, the Supreme Court offered a stark contrast to the analysis found in *Reynolds* and articulated the basis for protecting liberty interests of social and religious minorities. The Court explained that the line between due process and

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absence of official proof of a successive marriage in cases like *Miles v. United States*, 103 U.S. 304, 314-15 (1881) (reversing conviction for bigamy). In a case citing its recent *Reynolds* decision, the Court noted that state law required proof of traditional bigamy of person "having a husband or wife living, who marries another." *Id.* at 305, 310; *see also* Swisher, *supra*, 29 BYU J. Pub. L. at 305.

equal protection sometimes merge in the protection of such liberty interests and that "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way . . . the two Clauses may converge in the identification and definition of the right." *Obergefell*, 135 S. Ct. at 2602-03. From the rejection of morality legislation in *Lawrence* to the expansion of the protections of liberty interests in *Obergefell*, it is clear that states can no longer use criminal codes to coerce or punish those who choose to live in consensual but unpopular unions. This case is about criminalization of consensual relations and there are 21st century cases rather than 19th century cases that control.

B. The State Decisions Cited By Appellant Address Federal Rights and Tests That Are Not Binding Precedent.

The Appellant argues that this Court should follow a couple rulings of the Utah State Supreme Court on the interpretation of federal rights and their underlying tests. As noted earlier, federal courts are not bound by such rulings, and the rulings in *State v. Green*, 99 P.3d 820, 828 (Utah 2004) and *State v. Holm*, 137 P.3d 726 (Utah 2006) are particularly problematic as precedent of any kind for a federal court.

Green involved a bigamist who fathered twenty-five children by at least six women and held multiple marriage licenses. *Green*, 99 P.3d at 822. In addressing a free exercise challenge, the Utah Supreme Court applied *Reynolds* even though it

admitted that "its reasoning may not necessarily comport with today's understanding of the language and apparent purpose of the Free Exercise Clause." *Id.* at 825. The court wrongly assumed that the mere fact that *Reynolds* is cited for any proposition, it must be binding precedent for its original use in upholding such criminal laws in all cases. The government insists that this Court is somehow bound by that fact that "[t]he *Green* court found the Statute was neuetral [sic] and generally applicable." App. Br. at 25. However, federal courts are free to make these legal judgments for themselves in determining if a state law violates federal constitutional law. The mere fact that the words used in the statute are not "religious" was deemed sufficient to find a neutral and generally applicable law. As discussed below, this is an incorrect reading of the precedent and, moreover, the law would not satisfy even the lowest standards of review. The *Green* court refused to consider the legislative history behind the provision that shows an intent to target religious cohabitation. *Green*, 99 P.3d at 828. The court also declined to consider privacy, free speech, and other constitutional claims (including "hybrid" claims) due to technical deficiencies found in the appellate brief of the defendant. *Id.* at 829. The court was also mistaken in its understanding of other states with cohabitation laws, citing three states that also criminalize cohabitation. However the comparison to those states is entirely superficial.[9] Finally, the court referred to

[9] For example, in Colorado, the state has long recognized that "there must be

the case (involving multiple licenses) as threatening the institution of marriage and creating a legitimate concern of government benefit fraud. *Id.* at 830. Those issues are not present in the instant case.

The decision in *State v. Holm*, 137 P.3d 726 (Utah 2006), is even more problematic. As a starting point, Rodney Hans Holm was convicted of not just bigamy but unlawful sexual conduct with a minor. In stark contrast to the dispassionate analysis of Judge Waddoups, Utah Justice Ronald Nehring wrote an opinion that was as shocking as *Reynolds* in its open acknowledgement of personal animus and bias against polygamists. *State v. Holm*, 137 P.3d 726, 753 (Utah 2006) (Nehring, J., concurring) ("No matter how widely known the natural wonders of Utah may become, no matter the extent that our citizens earn acclaim for their achievements, in the public mind Utah will forever be shackled to the practice of polygamy."). Nehring was remarkably frank in admitting that this hostility "has been present in [his] consciousness, and [he] suspect[s] has been a brooding presence . . . in the minds of [his] colleagues, from the moment [they]

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proof of an actual marriage" to violate the criminal law. *See Stark v. Johnson*, 43 Colo. 243, 245 (1908). Likewise, the Appellees could not find any case of cohabitation being treated itself as a crime in Texas under its bigamy statute. In the third state, Rhode Island, the courts have expressly said the opposite of what the Utah Supreme Court claimed and long rejected the view of the Utah Supreme Court in the prosecution of cohabitation. Indeed, shortly after the *Reynolds* case, the Supreme Court of Rhode Island quashed an indictment based on cohabitation in *In re Watson*, 19 R.I. 342 (1896) (requiring a second marriage in order to secure a conviction under the statute).

opened the parties' briefs." *Id*. Rather than overcome that prejudice, Nehring warned all Utah judges that "I have not been alone in speculating what the consequences might be were the highest court in the State of Utah the first in the nation to proclaim that polygamy enjoys constitutional protection." *Id.*

Holm stands in sharp contrast to the analysis found in *Lawrence*, which the Utah Supreme Court itself admits is "sweeping." *Id.* at 734. Yet, under the opinion, the state retains the right to declare private relationships to be undeclared marriages and thus criminal acts. The case preceded the rulings in *Windsor* and *Obergefell* and the rejection (in the later case) of the right of states to limit marriages to fit a narrow definition of marriage. In the main opinion, the court was still enforcing what it viewed as an unchallengeable right of states to limit marriage as well as intimate relationships to further social order and mores. *Id.* at 743. The pre-*Obergefell* analysis is clear in the court's insistence that "[t]he State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful." *Id.* at 744. The same logic was used to declare same-sex marriages to be inimical to public order and the institution of marriage.

The *Holm* court adopted a sweeping view of plural families as "attempt[ing] to extralegally redefine the acceptable parameters of a fundamental social

institution like marriage." *Id*. Yet, given that plural religious marriage is itself a purely private living arrangement, centered around the home, the state interest is of precisely the sort that *Lawrence* invalidates: it criminalizes consensual intimate relationships on the theory that their public acknowledgment alone undermines a state institution. On such a theory, the legislature could proscribe sodomy because homosexuals' public statements about their sexual or romantic relationships somehow undermine heterosexual norms.[10] Other than stating the legislature "deemed harmful" plural marriage, the *Holm* Court provides not one explanation as to why the protection of a monogamous legal marriage requires the criminalization of a broad swath of private relationships. It necessarily follows from *Lawrence* that heterosexual conduct is also protected when it occurs in the context of an intimate relationship in the home—particularly when coupled with familial organization and religious values. *Lawrence*, 539 U.S. at 574-75; *see also Christensen v. Cty. of Boone*, 483 F.3d 454, 463 (7th Cir. 2007); *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004).

Notably, the one aspect of *Holm* that may be controlling is the scope of the bigamy statute as found by the state court, the very issue that the government tries

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[10] Justice Scalia made precisely this point in *Lawrence*: "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

to evade in its brief by attempting to distinguish some cases of adultery. The Utah Supreme Court stressed that the statute "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." *Holm*, 137 P.3d at 735; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1982) ("[W]e are bound by the construction given to [the statute] by the [state] court.").

III. THE DISTRICT COURT CORRECTLY FOUND THAT UTAH'S CRIMINALIZATION OF COHABITATION VIOLATED THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT.

There are two protected interests denied by the cohabitation provision: cohabitation and religious cohabitation.[11] Both interests or rights should be afforded protection under principles of due process, and the State failed to establish a record of any harm that would support even the lowest standard of review in this case. It cannot now satisfy that burden by referring to generalized statements from earlier decisions or a judicial presumption of harm from consensual relationships.

A. The Cohabitation Provision Should Be Struck Down Under A Strict or Heightened Scrutiny Test.

A substantive due process claim has "two primacy features": (1) an asserted

[11] The District Court added a third interest in polygamy. *Buhman*, 947 F. Supp. 2d at 1194. However, for the purpose of constitutional analysis, polygamy can be subsumed under the broader class of "religious cohabitation."

"fundamental right" or "fundamental liberty" that is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" and (2) "a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Seegmiller v. Laverkin City*, 528 F.3d 762, 769 (10th Cir. 2008).

Cohabitation. The Browns presented a detailed description of the right to privacy and intimate relations that have been recognized and protected by the Supreme Court as central to our concepts of fundamental rights and liberty. *See Obergefell*, 135 S. Ct. at 2599. While the lower court found that the right to cohabitate was denied protection under this Court's ruling in *Seegmiller*, the Browns disagree that the case establishes a sweeping denial of protection over the most intimate relationships in our society. If it does, they respectfully submit that the decision should be reexamined in light of the instant case and recent controlling precedent.

While the District Court found that the Brown family had made the required "careful description" of a fundamental right and advanced a "very persuasive" case for heightened scrutiny, it ultimately decided that the language in *Seegmiller* militated against the application of the higher standard. *Buhman*, 947 F. Supp. 2d at 1201. It did so despite its agreement

with the Browns that *Seegmiller* was "factually distinguishable" given the involvement of a police officer who was disciplined for violating a law that he was sworn to uphold. *Id*. at 1202. In the end, the outcome was unchanged since the law could not satisfy the lower standard. However, at a minimum, this Court should limit the *Seegmiller* case to claims of protected sexual acts as opposed to "private consensual relationships" between adults choosing the structure of their family and personal lives. It is not polygamy as such that is protected as a fundamental right but the choice of having single or multiple partners in a private consensual relationship. Otherwise, decades of rulings protecting private consensual relations—e.g., *Lawrence* and other cases—make little sense if they are viewed only through a historical lens. Homosexuality was a crime for centuries in this and other countries. Adultery and fornication were long considered crimes.[12] It was the recognition of choice generally, not the specific form of sexual relationships, that is the foundation for these decisions.

While the Court in *Lawrence* was ambiguous at points, it was clearly applying a heightened form of scrutiny in striking down the criminalization

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[12] Adultery statutes have been struck down, rescinded, or treated as presumptively unconstitutional in light of *Lawrence*. *See, e.g.*, *State ex rel. Golden v. Kaufman*, 760 S.E.2d 883, 893 (W. Va. 2014); *Fleming v. State*, 455 S.W.3d 577, 600 (Tex. Crim. App. 2014); *Torabipour v. Cosi, Inc.*, No. 1:11-CV-1392 GBL/TCB, 2012 WL 2153168, at *6 (E.D. Va. June 12, 2012).

of private sexual relations. Lawrence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1917 (2004) ("The strictness of the Court's standard in *Lawrence*, however articulated, could hardly been more obvious."). The Court found a fundamental liberty interest in the "right [of] homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67. Notably, at issue in the *Lawrence* case was a liberty interest in sexual relations, not the more substantial interest in maintaining a private family union (as with the Brown family). Nevertheless, liberty required the protection of that private sexual conduct:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Id. at 562. The Court rejected the same type of generalized claims of harm to support the criminalization of "the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 567. This liberty interest was further amplified in the very first line of *Obergefell*: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Obergefell*, 135 S. Ct. at 2593. It is the same liberty interest described in *Lawrence*

that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." *Lawrence*, 539 U.S. at 567. Heterosexual adults are entitled to no less protection when they are not simply engaged in "sexual practices common to [their] lifestyle" but maintaining families and long-term relations in their private lives.

Religious Cohabitation. Even if the Court does not believe that non-religious cohabitation is protected as a fundamental right, religious cohabitation is based on such a fundamental right when established through consensual private relations. The lower court acknowledged that the Brown family was not (as argued by the State) demanding the recognition of polygamous unions. *Buhman*, 947 F. Supp. 2d at 1195. Indeed, the Browns have repeatedly stated that they do not question the right of the state to limit the scope of recognized marriages or to prosecute those individuals with multiple marriage licenses. *Id.* (citing prior filings). The issue is whether there is a fundamental right not only to maintain the type of private consensual relations protected under *Lawrence* but also to maintain such relations in conformity with long-standing, recognized religious principles. *See*, *e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. at 503 (establishing a fundamental interest in familial organization in the home); *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965) (establishing a fundamental right of marital privacy over questions of procreation). The combination of free exercise

and privacy rights pushes the interests in this case far beyond those in *Lawrence*. For purposes of substantive due process analysis, heightened scrutiny applies either when a court identifies a fundamental right or, alternatively, where the law affects a suspect classification. *See, e.g*., *Molinari v. Bloomberg*, 564 F.3d 587, 606 (2d Cir. 2009) (rational basis analysis only applied where "a statute neither interferes with a fundamental right nor singles out a suspect classification.") (citations and brackets omitted); *Matsuda v. City & Cty. of Honolulu*, 512 F.3d 1148, 1156 (9th Cir. 2008) (same); *Kamman Inc. v. City of Hewitt*, 31 F. App'x 159 (5th Cir. 2001) (same); *see also Spiteri v. Russo*, No. 12-CV-2780 MKB RLM, 2013 WL 4806960, at *53 n.36 (E.D.N.Y. Sept. 7, 2013) ("Under the suspect classification analysis, laws and government actions that affect suspect classes such as race and religion are subject to strict scrutiny") (citation removed). This Circuit has looked for either a fundamental right or a suspect classification in determining whether to apply heightened scrutiny. *See Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (applying rational basis test is law " does not affect a fundamental right and categorizes people on the basis of a non-suspect classification"). The Browns have articulated both fundamental rights like Free Exercise and Free Speech as well as suspect classifications based on religion. Further, 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).

As applied to the Browns, the law criminalizes the family's decision to organize child-rearing and romantic relationships among multiple partners in addition to Mr. Brown's single legal spouse. It further proscribes the mere act of cohabitation by these intimately-connected adults, even in the absence of a religious ceremony or other indicia of spousal ties, thereby directly interfering with the Browns' practice of living in the same or adjacent homes. (J.A. at 36-38). Thus, whether facially or as applied, the cohabitation provision impinges upon fundamental Due Process interests.

From *Lawrence* to *Obergefell*, the Court has been consistent in amplifying a core principle: the Due Process Clause circumscribes and in some cases virtually forbids state intervention in private relationships and conduct in the home. This protected relationship does not exist solely in cases of blood relation and legal marriage. *See, e.g.*, *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844-46 (1977) (protecting right of foster parents);[13] *Eisenstadt v. Baird*,

[13] Notably, the *Holm* analysis expressly disclaims any notion that the state must be initially involved for a marriage to exist, see *Holm*, 137 P.3d at 733-35, which removes from the countervailing concerns present in *Smith*, where the foster child-parent relationship was created by the state in the first instance.

405 U.S. 438, 453-54 (1972) (protecting rights of unmarried individuals); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984).[14]

If heightened scrutiny applies, the cohabitation law clearly fails when applied to either category of non-religious or religious cohabitation. The Browns were investigated and no crimes or harm was found in their plural family. Such harm cannot be assumed any more than it can be for monogamous relationships or casual relationships in society. Any harm like child abuse or fraud can occur as readily in non-plural relationships. More importantly, they can be (and are already are) addressed by narrowly tailored criminal laws. Judge Waddoups left in place the criminalization of bigamy to allow prosecution of anyone who secures or asserts multiple marriage licenses in Utah. The reason that the State did not present evidence of harm is that it cannot be presented in a way to justify the criminalization of polygamous relationships without also justifying the criminalization of monogamous or adulterous relationships. Once strict scrutiny is applied, the unconstitutionality of the law is evident.

B. Even Without Applying Strict or Heightened Scrutiny, the Cohabitation Provision Would Be Unconstitutional Under A Rational Basis Test.

[14] The Supreme Court's holding in *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974), is not contrary to this principle. *Boraas* concerned the state's authority to limit cohabitation of multiple unrelated people in the context of zoning.

The lower court ultimately did not require strict or heightened scrutiny to strike down the cohabitation provision. The rational basis test has been applied to strike down prior statutes with more developed records of alleged harm than the instant case. Indeed, if the *Lawrence* decision did not apply strict or heightened scrutiny, it clearly laid out a standard of review that cannot be met on the record created by the State in this case.

The instant case bears striking similarity to *United States Dep't of Agric. v. Moreno*. 413 U.S. 528, 534 (1973). In *Moreno*, the federal government claimed a rational basis of combatting fraud (as here) with a provision that made households ineligible for food stamps if they contained a member who was not related to other members of the household. The Court struck down the law under a rational basis analysis and specifically rejected the argument that certain types of households were more likely to commit fraud (as in this case). Much like criminalizing all cohabitation by citing a few extreme cases of polygamists, the Court noted that the government could not satisfy a rational basis test with such loose association or extrapolation.

> But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

Id. at 536. The Court also noted that the government had more direct legal means to combat or sanction fraud. *Id.*

In advancing similar arguments in the instant case, the State ignores the admonishment of the Supreme Court that the rational basis test is "not a toothless" scrutiny. *See Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (citing, as an example, *Jimenez v. Weinberger*, 417 U.S. 628 (1974), where it rejected a provision concerning illegitimate children as not rationally related to the purpose of preventing false claims); *see also Copelin-Brown v. New Mexico State Pers. Office*, 399 F.3d 1248, 1255 (10th Cir. 2005) (striking down a classification for disabled versus non-disabled persons as too attenuated to reducing administrative burdens). Indeed, the Supreme Court struck down the law in *Lawrence* because such claims are little more than illustrations of covert (and often overt) bias against alternative lifestyles and relationships. A more recent example of a government action failing a rational basis review occurred in *United States v. Windsor*, where the Supreme Court found the federal Defense of Marriage Act invalid because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." 133 S. Ct. 2675, 2696 (2013); *see also Riker v. Lemmon*, 2015 U.S. App. LEXIS 14322 *13-15 (7th Cir. Aug. 14, 2015) (noting that state shoulders a more demanding standard even in a case involving prison security).

This Court has shown the same level of scrutiny under the rational basis test in other areas. In *Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n* [OSSAA], this Court recognized several legitimate government purposes for distinguishing between public and nonpublic schools but rejected OSSAA's majority voting requirement and those legitimate purposes. *Id.* This Court deemed OSSAA's dislike of nonpublic schools to not be a legitimate state interest and ruled that the voting requirement could not survive rational basis scrutiny. *See id.* at 1035 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting Colorado's constitutional amendment precluding protections for homosexuals under rational basis analysis).

Over the last two decades, the Supreme Court has notably struck down state or municipal legislation using a "rational basis" standard that is widely perceived as more demanding when it comes to state justifications for the classification. *See Romer v. Evans*, 517 U.S. 620, 624; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); Erwin Chemerinsky, *Constitutional Law: Principles and Policies,* 536 (1997); *see also Powers v. Harris*, 379 F.3d 1208, 1223-25 (10th Cir. 2004) (considering this changing case law); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009) (same); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (surveying Supreme Court precedent on the adjustment of rational basis review). The more searching rational basis review of

Cleburne and *Romer* is justified in part by concerns about legislative animus toward a politically vulnerable group.

Similarly, *Lawrence* provides more exacting review for state intervention into conduct that is related but not identical to the acts of familial organization discussed in *Griswold* and *Moore*. *See also Massachusetts*, 682 F.3d at 15 ("For generations, moral disapproval has been taken as an adequate basis for legislation . . . . But, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis."). Accordingly, familial and marital rights, with respect to living arrangements and procreation, are subject to heightened protection as "fundamental interests," while sexual activity itself is subject to heightened rational basis review because of its close connection to intimate relationships that are part and parcel of the family unit. *Lawrence*, 539 U.S. at 567. Under *Lawrence*, "moral opposition" is an invalid interest even under rational basis review—as was the group-based animus under *Cleburne* and *Romer*.

Lawrence constitutes the Due Process Clause counterpart to the modified rational-basis analysis of *Romer* and *Cleburne*: the standard for a permissible state rationale for interference in intimate, consensual adult conduct in the home is more

demanding than typical rational basis review.[15] By its terms, the cohabitation provision criminalizes the choice to cohabitate with more than one intimate sexual partner who is deemed "married," even if solely in a religious sense.[16] Thus, even if the state does not directly interfere with a fundamental interest, its criminalization of cohabitation and sexual intimacy is clearly within the scope of *Lawrence*'s more exacting rational basis standard.

In *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), this Court ruled against state bans on same-sex marriage and distinguished *Seegmiller*. While the Court continued its rejection of the protection of "the right to engage in private sexual conduct," it noted that *Lawrence* stands for the protection of the right to choose one's lifestyle and intimate relations. It stressed that such liberty interests necessarily mean that old concepts of social order can, and must, be set aside in a pluralistic society:

> We must also note that *Lawrence* itself alluded to marriage, stating that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 539 U.S. at 574. The Court quoted Casey's holding

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[15] Construing *Lawrence* as providing for heightened rational basis review also reconciles the conflicting interpretations of the Circuits by explaining 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).

[16] The *Holm* Court expressly held that sexual intimacy, in addition to cohabitation, is one recurring element of the state's nebulous definition of "marriage." *Holm*, 137 P.3d at 737.

> that matters 'involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment' . . .
>
> The drafters of the Fifth and Fourteenth Amendments 'knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.' *Id.* at 579.

Id. at 1218. The Browns are not seeking protection of the right to engage in sexual conduct but to be allowed to structure their family relations in accordance with their own moral and personal mores. Under the standard advanced by the government, Utah could still criminalize adultery or cohabitation of unmarried individuals—two propositions widely discredited by courts and commentators.

This Court has maintained that "no one disputes a right to be free from government interference in matters of consensual sexual privacy." *Seegmiller*, 528 F.3d at 769. This statement is clearly consistent with the Supreme Court cases discussed above but means little if mere unpopularity or generalized claims can overcome that right to privacy. The State has simply declared certain private consensual relations to be marriage and then criminalized that conduct in the name of protecting an institution. It, however, remains the "consensual sexual privacy" of adults as well as the criminalization of religious associations and practices. The State confirmed that the law was targeting what is effectively adultery, though

prosecution was focused on religious, as opposed to simply adulterous, cohabitation. *Buhman*, 947 F. Supp. 2d at 1213-14. As the lower court noted,

> The only difference between the two examples is the religious element and the resulting belief of participants to be justified in holding themselves out to the public as "husband" and "wife" despite knowing that their "marriage" is not a legal union in the eyes of the State. Both scenarios—the adulterous cohabitation and the religious cohabitation—"involve minors" as the children born to women involved in such relationships, "involve public conduct," and involve "economic implications to [women] and children."

Id. at 1223-24. There is no rational basis for the line drawn under the law. As the lower court found, the vague references to harm from extreme polygamous compounds can be (and already are being) addressed with direct criminal laws governing child abuse, spousal abuse, and welfare fraud in all families—monogamous or polygamous. Such a law cannot be upheld in a facial or applied challenge without effectively negating any protections afforded under prior cases and gutting the rational basis test established by the Supreme Court.

C. The District Court Correctly Found That The Cohabitation Clause Was Void For Vagueness.

The government offers no direct analysis of the standards and case law underlying the determination of the District Court that the cohabitation provision is unconstitutional under the void for vagueness doctrine. Indeed, there are only a couple references to "vagueness problems" in the government's brief, which

should be deemed to have waived the issue for the purposes of appeal.[17] *See Riser v. QEP Energy*, 776 F.3d 1191, 1201 (10th Cir. 2015) ("In [appellant's] opening brief, she does not argue that she satisfied her prima facie case, but simply asserts a prima facie case exists . . . . thus [appellant] has waived this argument."); *Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) ("Issues not adequately briefed will not be considered on appeal."); *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1031 (10th Cir. 2007) ("We will not review an issue in the absence of reasoned arguments advanced by the appellant as to the grounds for its appeal."). The only references to the adjective "vague" can be found in the general section advancing a new interpretation of the law. That amounts to two passing references (or three references if the Court includes the reference at the end to "the Statute's possible ambitguities [sic]." App. Br. at 40. If the Court is willing to treat this as an appellate argument on a constitutional issue, it is woefully inadequate.

Recently, the Supreme Court reinforced the basis for the lower court decision with its ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In that case, the Court considered statutory language that allowed for increased sentencing

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[17] The section of government's brief that is purportedly committed to the void for vagueness ruling does not argue that specific constitutional issue but repeats earlier arguments against the substantive due process violation and the use of *Lawrence*. App. Br. at 55-58. Indeed, the only reference to vagueness at all is found in the title of the Section.

in cases involving a "violent felony" (defined as a case with "a serious potential risk of physical injury to another."). Even though the Court had twice upheld the residual clause against void for vagueness arguments, it abandoned those rulings and found the clause void for vagueness. *Id.* at 2560 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise."). Notably, the government attempted a familiar argument: arguing that the law is not vague merely because some underlying "crimes may clearly pose a serious potential risk of physical injury to another." *Id.*; *see also Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393 (1926) ("Penal statutes . . . should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."). Much like relying on a subset of extreme polygynist cases like Warren Jeffs, the government seeks to cure the vagueness of the statute by saying that prosecutors could use discretion in moving against the worst cases (while avoiding adultery and other cases). In *Johnson*, however, the Court wrote "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." 135 S. Ct. at 2558.

Likewise, the Court has warned about unconstitutional vagueness when laws appear designed to be a handy vehicle to prosecute people when no other charge is proven. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) ("A

vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."). That is precisely what the District Court found with the cohabitation law and the virtually "limitless prosecutorial discretion" in the State's use of the law. *Buhman*, 947 F. Supp. 2d at 1225-26 (quoting *Carhart*, 550 U.S. at 150). Just as described in *Papachristou*, the lower court found that "much of the Statute's usefulness, apparently, lies in the State's perception that it can potentially simply charge religious polygamists under the Statute when it has insufficient evidence of other crimes." *Id.* at 1216. The Court has also stressed (as it did again in *Johnson*) that "the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." *Johnson,* 135 S. Ct. at 2558 (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939). Federal courts have refused to either assume prosecutors or police will render vague language clear or leave the precise definition of a given crime to the context of the case. *See Leal v. Town of Cicero*, 2000 U.S. Dist. LEXIS 5860, *7-9 (N.D. Ill. Mar. 31, 2000) ("Without such guidelines, the public is at risk of having a police officer treat two individuals differently though they are engaged in the same conduct."). It is not enough, as the government suggested, that the absence of clear language is needed to help prosecute cases with little actual evidence: "just because the state

can't prove it doesn't mean it hasn't happened. That's what's happening in the [religious] polygamist communities." *Buhman*, 947 F. Supp. 2d at 1215.

The government insists that the District Court's effort to preserve most of the statute was itself an "absurd" result because it was based on the assumption that "the purpose of Utah's bigamy statute is simply to avoid marriage license fraud or prohibit libelous claims of multiple marriages." App. Br. at 35. Instead, the State maintains that the purpose is to "prevent any and all indication of multiple simultaneous marriages." *Id.* at 36. Putting aside the indeterminacy of criminalizing "any and all indication" of marriage, the State suggests (in conflict with its earlier position) that such cohabitation might not be always required: targeting "multiple marriages and multiple partners, *usually* cohabitating with one or more partner [sic] at a time." *Id.* at 38 (emphasis added).

The Appellant's new interpretation on appeal only magnifies the issue of vagueness. There is no indication of what would constitute "publicly holding oneself out as married to more that [sic] one person and cohabitating with them." *Id.* at 37. For example, the Browns have never claimed to have multiple marriage licenses. They call themselves spouses according to their faith. Other religious or social groups use terms like "brother," "sister," "mother," or "father" in similar fashion. Moreover, after asking the Court to read in the word "and" to combine the two clauses, the State suggests that cohabitation might not be required for

prosecution, noting that targets "*usually* cohabitat[e] with one or more partner [sic] at a time." *Id.* (emphasis added). There is no more explanation given about the meaning of such a newly fashioned statute than there was under the actual statute analyzed by the District Court. This Court is simply told that "[a] couple can 'purport' to 'marry' with the intent of creating a lawful marriage or a couple can 'purport' to 'marry' without the intent of creating a legally congnzible [sic] marriage." *Id.* at 50. There is no definition on what constitutes "[s]olemnization" of a marriage, but the State insists that the Browns are engaged in a criminal act under the "purports to marry" prong of the statute because Kody Brown "was legally married to Meri when he subsequently solemnized marital relationships with Janelle, Christine and Robyn." *Id.* at 52.

To put it simply, the continuing rhetorical contortions displayed by the State on appeal is ample evidence of an incurable vagueness problem. The Constitution requires "that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Carhart*, 550 U.S. at 148-49, (2007). Not only do people "of ordinary intelligence" have difficulty in understanding what is prohibited, Utah counsel evidenced the same difficulty at both the trial and appellate level. *Carhart*, 550 U.S. at 149 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). It does not cure

and only magnifies the problem when the State insists that it rarely targets people under the law. That position, supporting "arbitrary or discriminatory enforcement," only adds to the unconstitutional vagueness of the law. The notion that the government will simply pick targets among a huge number of cohabitating adults is the very antithesis of what the Supreme Court has stated is the obligation of the government to "articulate its aims with a reasonable degree of clarity [in order to] ensure[] that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduce[] the danger of caprice and discrimination in the administration of the laws, enable[] individuals to conform their conduct to the requirements of law, and permit[] meaningful judicial review." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). The result was aptly described by the lower court as "apparently limitless prosecutorial discretion in whether and whom to prosecute under the Statute [that] 'vests virtually complete discretion in the hands of [law enforcement and prosecutors] to determine whether' people cohabiting in the State of Utah for whatever reason, but particularly those involved in religiously motivated cohabitation, have violated the Statute's cohabitation prong." *Buhman*, 947 F. Supp. 2d at 1225-26 (*quoting Carhart*, 550 U.S. at 150).

IV. THE DISTRICT COURT CORRECTLY FOUND THAT UTAH'S CRIMINALIZATION OF COHABITATION VIOLATED THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Appellant challenges the free exercise analysis of the lower court based entirely on its application of the strict scrutiny standard. Specifically, the government argues that prior case law is controlling on the question of whether the cohabitation provision is operationally neutral. The government misconstrues the past precedent as well as the decision of the lower court. While the lower court found the law to be facially neutral, it found (in part based on the uncontested record) that the law did indeed target religious polygamists. Despite the government's acknowledgement of the lower court's "wonderfully thorough job of covering the history, purpose and case law surrounding the area," App. Br. at 35, it seems intent again on treating this Court as a trial court for the purposes of introducing new arguments and factual assertions. Both the case law and the record in this case are clear on applicability of a strict scrutiny standard. However, the cohabitation provision would fail as easily on this record under an intermediate or rational basis test.

A. The District Court Correctly Applied The Strict Scrutiny Test In Finding A Violation of the Free Exercise Clause.

Utah Code Ann. § 76-7-101 imposes a substantial burden on the free exercise of religion for the Brown family and other plural families. As noted,

much has changed since the *Reynolds* decision in 1878. *Cf. Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989) (holding that "history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."). As found by the District Court, the statute was not operationally neutral under the standard laid out in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

The Supreme Court has mandated different tests under the Free Exercise Clause depending on the context of the violation. If a law is "neutral and of general applicability" it need not satisfy a compelling governmental interest. *See Smith*, 494 U.S. at 890; *Hialeah*, 508 U.S. at 531. The Supreme Court has stressed that strict scrutiny applies if a law is not completely neutral or if it is applied against particularly religious practices or beliefs: "[n]eutrality and general applicability are related, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Hialeah*, 508 U.S. at 532-33; *see also Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 242 (3d Cir. 2008) ("A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that

undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated."); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (same). Thus, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Hialeah*, 508 U.S. at 534. The Court looks to how the law is actually used "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535.

Once again, it is important to stress that this case is not about bigamy, which was preserved by the lower court as a crime, but *cohabitation*. In that sense, many decisions like *Green* are only tangentially relevant to the constitutional analysis. As for bigamy, there may be less operationally or as applied bias since the state is prosecuting anyone with multiple marriage licenses or engaged in marital fraud. It can still do so after the ruling of the District Court—much like most other states. Thus, the Utah Supreme Court in *Green* relied on the *Geer* case, which was a conventional bigamy case of a man with thirteen marriages. *See State v. Geer*, 765 P.2d 1 (Utah Ct. App. 1988). Bigamy is a neutral and clearly defined crime. Cohabitation is not.

Hialeah is particularly illuminating on this point. In that case, a city ordinance of Hialeah was worded neutrally in regulating animal sacrifice and covered any individual or group that "kills, slaughters or sacrifices animals for any

type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." *Hialeah*, 508 U.S. at 527. Much like the criminalization of plural relationships, the ordinance was defended as neutral. The city prevailed on that basis at both the trial and appellate court, but the Supreme Court reversed, holding that the law was not neutral and that strict scrutiny was justified. The Court expressly rejected the claim of the city that the Court's "inquiry must end with the text of the laws at issue [because] [f]acial neutrality is not determinative." *Id.* at 534. The Court held that discriminatory laws are often written in neutral language when they are in reality "covert suppression of particular religious beliefs." *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)).

As the District Court carefully detailed, the Utah law was drafted with the clear intent of criminalizing the practice of polygamy or plural marriage among Utah religious organizations like the Fundamentalist *Church of Jesus Christ of Latter Day Saints* (FLDS) and the *Apostolic United Brethren* (AUB). In 1894, Congress passed the Utah Enabling Act. The Act authorized the territory of Utah to ratify a constitution and be admitted to the union provided that "polygamous or plural marriages" shall be "forever prohibited." By placing the prohibition on polygamy in the same section intended to protect religious liberty, the Enabling

Act undoubtedly targeted polygamy for its religious motivation.[18] The statute has only been used against such religious families despite the fact that cohabitation would extend to a myriad of plural relationships among non-religious individuals. Just as the prohibition on the slaughter or sacrifice of animals was a covert effort to target Santería, the cohabitation provision is an effort to combat religious polygamy in the state. As such, the strict scrutiny standard should apply.[19]

This Court previously based its decision on the compelling interest on the right of the majority to dictate its preferred "fundamental values" that are "inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built." *Potter*, 760 F.2d at 1070. These are the same "fundamental

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[18] A review of the "Mormon Cases" before the Supreme Court reflects the same nexus. *See Davis v. Beason*, 133 U.S. 333, 342 (1890) (insisting that early Mormonism was not a religion afforded protection under the First Amendment because it is a "cultus."); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890) (referring to the LDS Church as "a return to barbarism" and "contrary to the spirit of Christianity.").

[19] As noted earlier, the decision in *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985) does not alter this result as previously discussed. Even if one were to accept the case as controlling on a facial challenge, it would not be determinative in the accompanying "as applied" challenge in this case. Moreover, this is a challenge to the criminalization of private conduct and the selective targeting of this one family. This Court emphasized that "[s]electivity in the enforcement of laws is subject to constitutional constraints" and noted that such selective enforcement cannot be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Potter*, 760 F.2d at 1071.

values" that supported the criminalization of homosexual relations. It is precisely the argument made *in dissent* in *Lawrence* and rejected by the Supreme 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 Court answered that question in the negative. *Id.* While discussing due process, the Court stressed that there is a difference between official recognition and criminalization—the very distinction drawn in this case:

> [The case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. 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.

Lawrence, 539 U.S. at 578.

The cohabitation provision raises many of the issues addressed in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012). The Court stressed the need for the Religion Clauses to protect religious organizations from governmental regulations that infringe on their faith-based decisions and practices, particularly in "a religious organization's freedom to select its own ministers." *Id.* at 706. By analogy, this case raises the question of a

religious group's freedom to choose its own marriage structure—so long as its participants are consenting adults. While other citizens openly live in plural relationships—many with children by different partners—religious polygamists face the threat of prosecution for openly proclaiming their spiritual spouses.

The cohabitation provision has been applied to a tiny fraction of those adults engaging in such unions. Cohabitation is now the norm in our society with recent studies showing that the number of married households have fallen from 72 percent in 1960 to 50 percent in 2012. Andrew L. Yarrow, *Falling Marriage Rates Reveal Economic Fault Lines*, N.Y. Times, Feb. 6, 2015. The percent of those who have multiple sexual partners has also increased. *See generally The Loadstone Rock, supra*, at 1908-09. As the Chief Justice of the Utah Supreme Court has noted, "the cohabitation of unmarried couples, who live together 'as if' they are married in the sense that they share a household and a sexually intimate relationship, is commonplace in contemporary society." *Holm*, 137 P.3d at 771-72 (Durham, C.J., dissenting in part) (citing data from the Utah Governor's Comm'n on Marriage & Utah State Univ. Extension, *Marriage in Utah Study* 35-36 (2003) that up to 46 percent of people between the ages of eighteen and sixty-four were cohabitating outside of marriage). Despite the existence of laws criminalizing adultery (Utah Code Ann. § 76-7-103 (2013)) and fornication (Utah Code Ann. § 76-7-104 (2013)), those laws are not being enforced. It is religious cohabitation

that has been prosecuted. *Cf. Green*, 99 P.3d at 833 n.16. (acknowledging that "the word 'cohabit' could be problematic . . . [and] deserv[ing of] legislative consideration.").

The only distinguishing factor between millions of cohabitation cases that are not prosecuted and those that are targeted for prosecution in Utah is the solemnization or religious element associated with families like the Browns. The State admitted that it did not prosecute adulterous cohabitation alone and that the statute was conceived and has been applied as a criminalization of religious unions. Assistant Attorney General Jerrold S. Jensen, counsel for Appellant, conceded that so long as the individuals did not make a claim of spiritual marriage, they could cohabitate, have children, and live together. Judge Waddoups noted that "the problem is deciding what constitutes a marriage for purposes of this act." *Buhman*, 947 F. Supp. 2d at 1214.

> THE COURT: Okay. Let's suppose that he says the same thing, but he says it to his Jewish rabbi, does that now become a polygamist marriage? And the rabbi says I bless you and recognize you as husband and wife.
>
> MR. JENSEN: Well, if they are holding themselves out as husband and wife, I would recognize that as marriage.
>
> THE COURT: So is it the recognition by a religious organization that it believes that they are living together in a recognized relationship by the religion sufficient?
>
> MR. JENSEN: No, no, no. . . . I think it's the representation that they make to the world as to what is their relationship. If they make it as husband and wife, then that constitutes marriage under the statute.

> THE COURT: If they say we're not husband and wife, we just live together, then it's not under the statute.
>
> MR. JENSEN: Then it's not governed under the statute.

(*Id.* at 12:6-13:4.). It is the solemnization of such relationships in a religious ceremony or recognition that is a critical factor in the application of this law among hundreds of thousands of such relationship in the State. There is no solemnization of relationships cited by the State that is not religious in nature; such ceremonies have been entirely part of fundamentalist Mormon practices. Indeed, this point was also conceded by the State:

> MR. JENSEN: Well, there is no question that polygamy is associated with religion in this state. Not all of the cases that have been prosecuted in this state are against people that assert religion as a defense. There has been cases in which there was not religion.
>
> THE COURT: But aren't those cases all where there was legally recognized marriages claimed as to both spouses.
>
> MR. JENSEN: Yes, yes, yes.
>
> THE COURT: That's a different scenario than what we're talking about here. . . .

(*Id.* at 16:2-16.) So that there was no mistake about the position of the State and the operation of the statute, the Court returned later to confirm what was conceded by the State:

> MR. JENSEN: [B]ut the issue as to cohabitation in the statute, and I think the statute has to be looked at clearly, the cohabitation in the statute only applies when someone holds themselves out to be married. *That is a*

> *different situation than cohabitation that generally exists in the state*. . . . [I]t's not marriage but they know the other person is married. So they're cohabiting. That is different than just cohabitation. Two people can go out and cohabit, and let's admit, it goes on all the time. But in this situation under the statute they're not prosecuted unless the one cohabiting knows that person is married. It's the same as with marriage.
>
> THE COURT: So it applies to an adulterous relationship? By definition, adultery is a person who is married and has intimate relationships with another person to whom he is not married. That's what you've just described.
>
> MR. JENSEN: All right, Your Honor. But let's look at how this really works in practice. *In practice there is the marriage, it may not be recognized by the state, but it is a marriage, it's performed, there is a wedding ceremony performed, there are vows exchanged. The problem is proving it*. The federal government had that problem in the 1880s. That's why they added cohabitation to the Edmunds Statute. The same thing with the Utah statute. The problem was proving that they were married, so they have added cohabitate, but the person has to cohabitate knowing that other person is married. . . .
>
> THE COURT: So tell me what's different between adultery and what you've just described.
>
> MR. JENSEN: The one is that they claim to be married. But just because the state can't prove it doesn't mean it hasn't happened. That's what's happening in the [religious] polygamist communities.
>
> THE COURT: So it's the expression of the fact that the person is a wife that makes it illegal.
>
> MR. JENSEN: Yes.

(*Id.* at 51:17-53:22 (emphases added).) There was no such record in prior cases before this Court, and this case (unlike the prior cases) does not involve bigamy, child or spousal abuse, or welfare fraud. Given these admissions and the record of

cases in the State, it is obvious that the law is not neutral as applied or "operationally" under *Hialeah*. It is the religious motivation and solemnization that is used to target families like the Browns. *See Hialeah*, 508 U.S. at 533.

The record in this case also belies any notion that the law is generally applicable. Indeed, as stressed in *Hialeah*, "[n]eutrality and general applicability are related, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.' *Id.* at 532-33. Even "in pursuit of legitimate interests", the State "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. The lower court found a pattern of "selective prosecution" that targeted religious families while ignoring the vast majority of adulterous cohabitation in the State. Indeed, the State established that it is most likely to proceed against anyone who speaks publicly about such relationships, an arbitrary distinction that raises a host of free speech issues. *Buhman*, 947 F. Supp. 2d at 1216. The Court also found that "much of the Statute's usefulness, apparently, lies in the State's perception that it can potentially simply charge religious polygamists under the Statute when it has insufficient evidence of other crimes." *Id*. Finally, the Court noted that this case was illustrative of the "selective prosecution" policies under the law with the Appellant first adopting a "new policy" not to prosecute the Browns but then admitting that he was not bound to follow that policy. *Id.* at 1216-17. The cohabitation provision

cannot be sustained absent a showing that it is "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Hialeah*, 508 U.S. at 533; *cf. Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780-82 (2014) (rejecting contraceptive mandate as the least restrictive means for achieving compelling interest under Religious Freedom Restoration Act).

The use of the cohabitation provision is not necessary to protect the State's interest in regulating marriage. That interest is protected under the bigamy provision that was not challenged by the Browns and was not altered by the District Court. The government cannot use this general interest to criminalize cohabitation any more than it can do so to criminalize adultery or fornication as inimical to good family life. That ship has sailed with cases over a decade ago like *Lawrence.* Moreover, given the State's position that it does not view the ubiquitous presence of cohabitation and adultery as a cause of prosecution, it is hard to see the nexus between the cohabitation provision and the interest in protecting the institution of marriage in the State. Indeed, absent a public solemnization or recognition of a plural union, the State does not prosecute and only a small number of such cases are brought. The District Court found this interest not only unsupported on the record but felt "compelled to identify an absurdity in the State's position" in trying to combat the problem of the decline in

number of people marrying in our society by "penaliz[ing] people for making a firm marriage-like commitment to each other. *Buhman*, 947 F. Supp. 2d at 1218-19. As the Supreme Court held in *Yoder*, 406 U.S. at 215 (1972), "the essence of all that has been said and written on the subject [of the Free Exercise Clause] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

It is equally absurd to claim that the cohabitation provision (as opposed to the bigamy provision) is needed to support the State's interest to prevent marriage and benefits fraud. The Browns were very open about their single marriage license and spiritual relationships. Indeed, it is difficult to imagine a more transparent family. The Browns were investigated for years and were not found to have engaged in any fraud for benefits.[20] The justification of barring religious cohabitation because some abusers have come from inside such families is no better than barring groups based on race or gender on anecdotal belief that they are more likely to commit certain crimes.

Finally, there is no cognizable basis for maintaining that the cohabitation provision protects "vulnerable individuals from exploitation and abuse." *Green*,

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[20] Indeed, this argument resembles the claim rejected in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), where the government sought to criminalize lying about military honors or so-called "stolen valor." The Court found that the government had other means to address such crimes and the government failed to show the least restrictive means to protect these interests.

99 P.3d at 830. Discussing individual cases like that of Warren Jeffs does not reveal the percentage of such abuses among plural families or establish that such extreme cases are indicative of the wider array of such families for the purposes of harm. There is little value to such studies without knowing the prevalence of the abuses within a defined class. Indeed, this argument is often made without looking at the rate of abuses associated with monogamous marriages or non-married families. Obviously, there are a high number of cases of spousal and child abuse in monogamous unions.[21] A court cannot assume that the rate of abuse that occurs in plural unions is the inherent and unchanging profile for this group any more than it can for monogamous unions.

Accordingly, the District Court correctly found that "the cohabitation prong not only is not narrowly tailored to advance a compelling State interest but that it actually inhibits the advancement of this compelling State interest of 'protecting vulnerable individuals from exploitation and abuse.'" *Buhman*, 947 F. Supp. 2d at 1221 (quoting *Green*, 99 P.3d at 830).

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[21] Some groups report that one out of every four women are victims of domestic abuse. *See, e.g.*, *Domestic Violence: Statistics & Facts*, SAFEHORIZON, http://www.safehorizon.org/page/domestic-violence-statistics--facts-52.html (last visited May 2, 2015). Other groups put the number of children abused in homes in the United States at over 3 million annually. *See The Effects of Domestic Violence on Children*, DOMESTIC VIOLENCE ROUNDTABLE, http://www.domesticviolenceroundtable.org/effect-on-children.html (last visited May 2, 2015). The vast majority of such cases occur in conventional families.

B. Even Without Applying A Strict Scrutiny Test, The Cohabitation Provision Would Fail A Rational Basis Test.

If the Court were to find that the cohabitation provision is facially and operationally neutral and not subject to a strict scrutiny analysis, the government's arguments would still have to meet a rational basis. *See generally Taylor v. Roswell Indep. Sch. Dist*., 713 F.3d 25, 52 (10th Cir. 2013); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004). The Appellant offers just one page of support for a rational basis to support the law under a Free Exercise analysis. App. Br. at 44-45. The claims advanced on appeal are little more than generalities such as "barring bigamy serves Utah's best interests." *Id.* at 44. The entirety of the rational basis showing offered to the Court is:

> Utah has an interst [sic] in regulating marriage because it is an important social unit. . . Utah additionally has an interest in prohibiting polygamy in order to avoid marriage fraud as well as to prevent the exploitation of government benefits for people with a marital status. . . . The Statute also assits [sic] the State's interests in protecting women and children from crimes such as statutory rape, sexual assault, and failure to pay child support.

Id. at 44-45. The Court is expected to simply accept such claims as manifestly true. However, bigamy is still a crime in Utah and the lower court specifically tailored the opinion to allow for the prosecution of marriage fraud. The State offers nothing to show why people who merely cohabitate as plural families overwhelmingly commit fraud or exploit benefits (or how such families exploit benefits in higher numbers than monogamous families). Likewise, there are tens

of thousands of religious cohabitants in Utah and many more non-religious cohabitants. The State has offered nothing to show that people that cohabitate are causing substantially higher numbers of rapes and assaults as a class (or again how those cases measure up against such abuses in monogamous or non-cohabitating relationships). The State is arguing that, regardless of the fact that the Browns have never been accused of such abuses, their family should be defined as a criminal enterprise because other people in such relationships have committed crimes. A far greater number of cases of child and spousal abuse are tried every year in monogamous families without such a presumption. Likewise, a state could argue that homosexual relationships are known to have a higher incidence of AIDS or of sex-related crimes as the basis for re-criminalizing homosexual relationships. The Court struck down the law in *Lawrence* based on such unsupported presumptions and bias against alternative lifestyles and relationships. The same should be true in this case.

V. THE DISTRICT COURT CORRECTLY FOUND THAT THE STATUTE WAS UNCONSTITUTIONAL UNDER A HYBRID CLAIM ANALYSIS.

The lower court held separately that this case constitutes a "hybrid" constitutional claim that is subject to strict scrutiny. *Buhman*, 947 F. Supp. 2d at 1221-22. Once again, the Appellant has elected not to argue against this holding of

the District Court. The only reference to the hybrid claim comes in the summary of arguments when the government states "there is no so-called hybrid rights claim here because neither the *Lawrence* Due Process analysis nor the *Reynolds* barred Free Exercise claims can serve as the basis for a hybrid rights claim triggering strict scrutiny." App. Br. at 12. Stating little more than "the Court's wrong" is not an appellate argument under the federal rules. It is grossly unfair and a clear violation of federal rules to decline to argue an issue and then file arguments in a reply brief when the Appellee cannot respond. The Browns are left again in a position to try to guess what arguments may be made to refute them.[22] Accordingly, the government should not be allowed to argue this issue on appeal. Fed. R. App. P. 28(a)(8)(A) (brief "must contain: appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."); *United States v. Kunzman*, 54 F.3d 1522, 1534 (10th Cir. 1995) ("It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for the appeal.")

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[22] Indeed, the District Court chastised the Appellant for his failure to argue a variety of claims. *Buhman*, 947 F. Supp. 2d at 1181 n.8 (quoting Def.'s Reply Cross-Mot. Summ. J. 4) ("The court is not impressed with Defendant's characterization of Plaintiffs' serious and substantial legal arguments in support of each of their Constitutional claims (Due Process, Equal Protection, Free Speech, Free Association, Free Exercise, and Establishment of Religion) as merely a 'philosophical discussion about legal theories.'").

The Appellant does not specifically contest the District Court's determination that "each of Plaintiffs' companion constitutional claims—the Freedom of Association claim, the Substantive Due Process Claim, the Equal Protection Claim, the Free Speech Claim, or the Establishment Clause claim, each as argued in Plaintiffs' Memorandum in Support of their Motion for Summary Judgment (Dkt. No. 50), and each largely or entirely unopposed by Defendant (with the exception of the Substantive Due Process claim)—makes a 'colorable showing' of a constitutional violation, thus requiring heightened scrutiny of the Statute under *Smith*." *Id.* at 1222. When a free exercise claim is raised in conjunction with companion rights like free speech, the strict scrutiny standard is applied. *See Smith*, 494 U.S. at 882; *Grace United Methodist Church v. City of Cheyenne Bd. of Adjustment*, 451 F.3d 643, 655 (10th Cir. 2006); *Axson-Flynn v. Johnson,* 356 F.3d 1277, 1296-97 (10th Cir. 2004). The secondary or companion right need not be proven, but rather a plaintiff need only raise a "colorable claim that a companion right has been violated." *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); *see also Axson-Flynn,* 356 F.3d at 1297. A colorable claim is viewed as "a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian Coll.*, 360 F.3d at 1032; *see also Axson-Flynn,* 356 F.3d at 1297. The District Court found such a claim had been made. *Buhman*, 947 F. Supp. 2d at 1222. Plaintiffs documented, for

example, the denial of their associational and speech rights when the government targeted them after they publicly revealed their plural family. The Browns were targeted due to their public statements as part of their television program and Appellant publicly associated his investigation with the public statements (including declaring that the family was committing felonies every night on their program.). *Id.* at 1179. The government does not address those rights in its appeal and the cohabitation provision should fail under the unchallenged hybrid analysis of the District Court in its opinion below.

VI. THE DISTRICT COURT CORRECTLY FOUND THAT APPELLEES WERE ENTITLED TO FEES UNDER SECTIONS 1983 AND 1988.

As with other claims in this litigation, the Section 1983 claim was simplified by a failure of the government to raise any defense. Indeed, until he was found liable, the government said nothing at all about either Section 1983 or damages under the section. After ordering supplemental briefing on the Browns' claim under 42 U.S.C. § 1983 (J.A. at 888), Judge Waddoups found that the Defendant had waived his defenses:

> Defendant . . . has waived his various immunity defenses by not raising them in his Answer, as was his duty under Rule 8(c)(1) of the Federal Rules of Civil Procedure, or opposing or mentioning Plaintiffs' assertion of their Section 1983 claim in their Complaint, their Motion for Summary Judgment, and their Opposition to Defendant's Cross-Motion. The court must view this as a conscious decision on the part of Defendant, a decision that has consequences under the orderly administration of justice in the federal

> courts. . . . The Court must therefore agree with Plaintiffs that Defendant's approach of neither raising the defenses of qualified immunity or prosecutorial immunity as affirmative defenses, or even mentioning them in the briefing responding to Plaintiffs' Section 1983 claim constitutes a waiver of these defenses."

Brown v. Herbert, 43 F. Supp. 3d 1229, 1232 (D. Utah 2014). Indeed, the lower court agreed that the government was trying to claim the "judicial equivalent of a Mulligan for the hapless or absent litigant." *Id.* (quoting Pl.'s Resp. to Court Order 14). Undeterred by that decision, Appellant is seeking to secure the same type of Mulligan on appeal.

The lower court found that the Browns sufficiently stated a claim for money damages under § 1983 in addition to the injunctive and constitutional relief that they sought. (J.A. at 726). Further, the lower court granted summary judgment for the Browns on the *entirety* of their § 1983 claim. Appellant does not challenge the injunctive and declaratory relief granted by the District Court on the § 1983 claim. App. at 54 n.4. Instead, he attempts belatedly to challenge the finding that the Complaint stated a claim for § 1983 money damages. *Id.* at 53.[23] After prevailing on the claims in this litigation, the Browns sought to show good faith in facilitating

[23] Additionally, Appellant does not argue that the Browns claim money damages to have properly secured declaratory relief or attorneys' fees for the violations found by the Court. Indeed, the Browns may prevail on their § 1983 claim without pursuing retrospective pecuniary relief. *See Ward v. Utah*, 321 F.3d 1263, 1269 (10th Cir. 2003) (finding that a declaratory judgment and injunctive relief was sufficient to redress injuries without retroactive damages).

a resolution in the case by waiving certain damages. Though they properly pleaded money damages in connection with their § 1983 claim, the Browns elected not to seek damages at the District Court below. Instead, the Browns simply reserved the right to seek attorneys' fees as a prevailing party pursuant to Section 1988. (J.A. at 654). The decision was based on a desire to bring years of litigation to an end.[24]

In a demonstration that "no good deed goes unpunished," Appellant seizes on this concession and attempts to enlist this Court in penalizing the Browns for their decision to streamline the litigation process. He argues that the claim for money damages was rendered moot by their decision to not have a trial on this issue. App. Br. at 54. However, the Browns' election not to actively pursue monetary relief after they had pleaded the § 1983 claim did not alter that they were nevertheless entitled to specific damages that the District Court may have deemed proper under § 1983. *See* Fed. R. Civ. P. 54(c) ("a final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings.*") (emphasis added); *cf. Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978) (noting that omissions in a plaintiff's prayer for relief "[are] not a barrier to redress of a meritorious claim.").

[24] Ultimately, parties reached a compromise on fees pending the outcome of this appeal to avoid unnecessary litigation.

A. Appellant Waived Any Defenses to Damages

Appellant makes the astonishing assertion that he was not required to assert any affirmative defenses in response to claims under § 1983 because the defenses were not "germane to the claims Plaintiffs pleaded . . . ." App. Br. at 63. Appellant insists that he concluded, quite on his own, and in contradiction the lower court's ultimate finding, that the Browns were only seeking injunctive relief, and not money damages. *Id*. However, this flimsy (and ultimately incorrect) conclusion does not give the government a license to ignore proper practices and not even *mention* any affirmative defenses. Choices have consequences in litigation. A failure to assert a defense can only be classified as waiver if federal rules of practice are to have any meaning.

In the vast majority of cases, defendants follow the "best procedure of pleading immunity in their answer or amended answer." *Ahmad v. Furlong*, 435 F.3d 1196, 1202 (10th Cir. 2006). In this case, however, Appellant *never* articulated a defense to the § 1983 claim, neither in his answer nor in any subsequent briefing.[25] It is well settled that the failure to plead an affirmative

[25] The Complaint explicitly raised claims under § 1983 in multiple places. *See* Compl., ¶¶ 29, 231 (J.A. at 16-55). In response, the Defendant's answer merely "denies that the U.S. Constitution affords [the plaintiffs] the relief they seek,", Ans. ¶ 21 (J.A. at 266-286), in direct response to Compl. ¶29, which explicitly states the Plaintiffs "[are] bring[ing] this action pursuant to 42 U.S.C. § 1983", Compl. ¶ 29 (J.A. at 22). Additionally, in the section entitled "Seventh Claim For Relief: 42 U.S.C. § 1983", the Plaintiffs again explicitly refer to the Defendants' deprivation

defense constitutes a waiver of that defense—a rule vigorously enforced across the circuits. *See Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002); *Pei-Herng Hor v. Ching-Wu Chu*, 699 F.3d 1331, 1337–38 (Fed. Cir. 2012); *Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269–70 (6th Cir. 2010); *Narducci v. Moore*, 572 F.3d 313, 323 (7th Cir. 2009); *Blissett v. Coughlin*, 66 F.3d 531, 538 (2d Cir. 1995); *Angarita v. St. Louis Cty.*, 981 F.2d 1537, 1548 (8th Cir. 1992); *Davis v. Huskipower Outdoor Equip. Corp.*, 936 F.2d 193, 198 (5th Cir. 1991); *Maul v. Constan*, 928 F.2d 784, 785–87 (7th Cir. 1991). Indeed, the purpose of the federal rule is precisely to avoid a last-minute change after years of litigation. *See Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1443–44 (10th Cir. 1992) ("The Tenth Circuit has held that "[t]he purpose behind rule 8(c) [is] that of putting plaintiff on notice well in advance of trial that defendant intends to present a defense in the nature of an avoidance . . . .").

This Court's comments from *Evans v. Fogerty* ring particularly true here: "Although the defense of qualified immunity provides public officials important protection from baseless and harassing lawsuits, it is not a parachute to be deployed only when the plane has run out of fuel. Defendants must diligently raise

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of the Plaintiffs' rights in violation of 42 U.S.C. § 1983. Compl. ¶231 (J.A. at 38). The answer, however, only "denies the allegations contained in paragraph 231." Ans. ¶ 94 (J.A. at 278). Moreover, not one of the thirty-five separate defenses offered in the answer makes any mention of qualified immunity, § 1983, or any other affirmative defense.

the defense during pretrial proceedings and ensure it is included in the pretrial order." *Evans v. Fogarty*, 241 F. App'x 542, 550 n.9 (10th Cir. 2007).

B. The District Court Did Not Err in Finding That the Complaint Properly Pleaded a Claim for Money Damages.

Putting aside these waiver issues, the fact remains that the Browns *did* plead a claim for money damages. While ultimately asking for *less* in damages than the amount to which they are legally entitled, the Browns did not render the issue moot for the lower court since the breadth of relief is still available to the trial court. This Court has held that in determining whether a certain type of relief may be awarded, the critical question is whether the complaint "gave any indication that [the plaintiffs] might be entitled" to that relief. *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999) (citing *Pension Benefit Guar. Corp. v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994)); *see also Conley v. Gibson*, 355 U.S. 41, 47 (1957). Thus, where a plaintiff's complaint alleges specific injuries and includes a general prayer for relief, it is presumed that any appropriate form of relief is sought, in addition to those expressly requested. *See Frazier v. Simmons*, 254 F.3d 1247, 1255 (10th Cir. 2001) (request for monetary damages and "such other relief as the court deems just and equitable" was adequate indication that he also sought injunctive relief in relation to an Eleventh Amendment immunity defense).

Relying on this Court's decision in *Frazier*, the court below noted that the Browns had "unambiguously asserted a number of specific injuries in their Complaint that entitle them to monetary damages." *Buhman*, 43 F. Supp. 3d at 1231. Quoting the Complaint, the court also noted that the Complaint sought to "recover all of their attorneys' fees, costs, and expenses incurred in this action pursuant to 42 U.S.C. § 1988, *and any other relief that this Court may order.*" *Id.* (emphasis in the court's order). Finally, the lower court recognized that the Appellees specifically included a request that the court "award such other relief as it may deem just and proper." *Id*.

In response to the lower court's order, Appellant points to numerous instances where, in addition to seeking monetary damages, Appellees sought declaratory and injunctive relief. App. Br. at 56-58. Of course, this argument is unavailing. It is axiomatic that a party's requests for equitable relief are not a bar to requests for damages.

The Appellant also argues that this Court's decision in *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001) is inapplicable and should not have been relied upon by the lower court. *Frazier* is both applicable and instructive. In *Frazier*, the defendant argued that the plaintiff had failed to adequately request injunctive relief. *Id.* at 1253-54. Looking to its decision in *Calderon*, this Court in *Frazier* noted that "the threshold question is whether plaintiff's complaint gave *any*

indication that she might be entitled to injunction relief." *Frazier*, 254 F.3d at 1254 (emphasis in original). This Court then held that the plaintiff "provided sufficient indication" that he sought equitable relief, including because of the "[t]he nature of the harms [plaintiff] alleged he suffered makes his claims amenable to injunctive relief," and because he included a general request for equitable relief." *Id.* at 1255.

The government attempts to limit the holding of *Frazier* by the mere fact that the general prayer for relief included the word "equitable." App. Br. at 60. This choked reading of *Frazier* is unsupported by the case. In fact, the test articulated by *Frazier* and *Calderon* concerns whether, as a whole, a plaintiff's pleadings give "any indication" of the relief requested, and whether the "nature of the harms alleged" are amenable to the relief requested.

Here, as the lower court noted, the Complaint "unambiguously asserted a number of specific injuries in their complaint that entitled them to monetary damages, and more than once implored the court to grant *any* just relief. (J.A. at 727). For example, the Complaint stated that the threat of prosecution compelled the family to move from Utah to Nevada and led to Meri Brown's termination from her long-held job. (J.A. at 45-46). Further Kody Brown declared under penalty of perjury that it cost "thousands of dollars" to move the family to

Nevada.[26] *Id.* at 105-06. Those allegations, in tandem with the request that the Court "[a]ward such other relief as it may deem just and proper," provide ample indication that the Browns were entitled to both retrospective and prospective relief as the lower court may have found appropriate. Further, the nature of the harms alleged, including financial damages resulting from Appellant's conduct, are amenable to a finding that money damages were sufficiently pleaded. *See Frazier*, 254 F.3d at 1255. As instructed by this Court's precedents, the lower court considered the entirety of the Complaint, not just buzz words, as the government advocates. Accordingly, the lower court's decision is perfectly in line with controlling precedents, and should be affirmed.

The government also contends that the lower court's interpretation of *Frazier* is inconsistent with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Twombly* and *Iqbal* stand for the proposition that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible on its face*." *Iqbal*, 556 U.S. at 678 (emphasis added).

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[26] That conduct is not part of a prosecutorial function afforded absolute immunity, and it is not part of a valid investigative or administrative function given qualified immunity. *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009); *Mink v. Suthers*, 482 F.3d 1244, 1261-62 (10th Cir. 2007). Indeed, prosecutors have been disciplined for public comments before indictments. *See* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics*, 2000, 22 Geo. J. Legal Ethics 448-49 (2009); ABA Model Rule 3.8; Utah Rules of Prof'l Conduct R. 3.8(f).

The crux of the government's argument is the contention that the lower court looked only to the phrase "such other relief" in the Complaint to find that Appellees' properly pleaded money damages. App. Br. at 62. The government contends further that the Complaint did not include enough information to "surpass speculation" as required by *Twombly* and *Iqbal*. *Id.* However, it is clear from the record that the Complaint articulates, and that the lower court explicitly considered, "a number of specific injuries" to find that "Defendant was adequately on notice that Plaintiffs were seeking money damages in addition to the injunctive and constitutional relief sought." *Buhman*, 43 F. Supp. 3d 1229, 1232 (D. Utah 2014). The lower court's consideration of the *entirety* of the Complaint is consistent with *Frazier*, *Twombly*, and *Iqbal*.

In sum, the government has provided no reason for why the lower court's application of the logic in *Frazier* is inapplicable to this case. The Browns gave ample indication of the nature of the harms alleged, and requested any such relief that the court may have deemed proper. Appellant was on notice that the Appellees were seeking money damages, and the lower court correctly held that the Complaint properly pleaded money damages.

For the foregoing reasons, this Court should affirm the lower court's grant of summary judgment on Appellees § 1983 claim.

VII. THE AMICUS FILINGS IN FAVOR OF THE STATE ADVANCE UNSUPPORTED LEGAL AND FACTUAL CLAIMS.

The two amicus briefs filed in support of the State only serve to highlight the conspicuous omission in this case: any record of harm that would justify the criminalization of cohabitation in Utah. Despite the uncontested record below, the amici seek to get the court to take judicial notice of alleged harms that are not only unsupported in the record but also entirely unrelated to the Browns.

The Sound Choices Coalition (SCC) offers little beyond conclusory statements about harm regarding "bigamous cohabitation." SCC Br. at 1. As a threshold matter, the brief ignores the fact that the statute does not deal with "bigamous cohabitation" but all cohabitation. Bigamy remains a crime in Utah due to the careful severance by the lower court of the cohabitation provision to preserve the criminalization of bigamy. In the absence of a record in this case, the SCC seeks to rely on the factual record of a foreign court in another case from 2011. There is no support for a court to import such findings from another case, let alone a foreign jurisdiction.[27] The SCC simply ignores that the law applies to all

[27] Ironically, lead counsel was a legal expert in the Canadian case and has compared the treatment of harm between United States and Canadian jurisdictions. *See generally Loadstone Rock*, *supra* (citing countervailing studies on the harm associated with plural families). If the Court is going to accept the conclusions of other courts, including foreign courts, it should permit the Appellees the same license to import countervailing findings. Otherwise this case should be decided on the record agreed upon by the parties before the finder of fact.

cohabitation including plural families like the Browns with no evidence of child abuse. It is akin to showing that monogamous families have spousal or child abuse and then asserting monogamy can be outlawed. The SCC states "the bigamous cohabitation prong of the statute, . . . may not be perfect, but it does encompass with some precision the practice of polygamy." *Id.* at 8. The SCC appears to mean that the broad cohabitation language would cover any and all plural relationships including polygamy. As to the rest of the thousands of cohabitating adults, the SCC simply offers a rhetorical shrug: "To the extent that bigamous cohabitation may incidentally encompass adulterous cohabitation, the fact is insignificant in the constitutional analysis because adulterers are entitled, at most, to rational basis due process." *Id.* The import of that statement appears to be that the State can today criminalize adultery and the rest is left to prosecutorial discretion. That view is wholly at odds with existing precedent, including but not limited to *Lawrence.*

Amicus Eagle Forum suffers from the same anachronistic constitutional analysis. The amicus argues that "domestic-relations cases fall outside the categories of cases at law and equity over which both Article III and statutory subject-matter jurisdiction extend the federal judicial power." Eagle Forum Br. at 5. Of course, such a view that a "right to marriage was not a case at law or equity," *id.* at 6, is a curious position in the wake of the *Obergefell* decision or the decision

of this Court in *Kitchen v. Herbert*, 755 F.3d 1193, 1198 (10th Cir.) *cert. denied,* 135 S. Ct. 265 (2014). Putting aside that fundamental threshold error, this case is not about the recognition of marriage but the criminalization of cohabitation for consenting adults as a whole. Whatever interest the vast majority of the Eagle Forum's brief on state rights and marriage may hold for the Court, it is strikingly unconnected to the merits of this case even for an amicus filing.

The Eagle Forum also raises jurisdictional issues that are not raised by the State. Indeed, the Eagle Forum not only raises this unchallenged issue but also raises a position that even the State did not give credence to below. The Eagle Forum is arguing that marriage cases are not "cases in law or equity." *Id.* at 12. The Eagle Forum advances an argument never accepted by the federal courts and dismisses the ruling in *Obergefell* for accepting jurisdiction as obvious rather than addressing the Eagle Forum's dubious jurisdictional point. *Id.* at 12 n.5. It is facially frivolous and unsupported to bar federal rulings related to state marriage on the basis that "Article III lists all relevant forms of English jurisdiction except ecclesiastical courts, which suggests that the Framers intended to reserve that non-federal form of jurisdiction solely to the states." *Id.* 13-14.[28] Finally, the Eagle

[28] Likewise, Eagle Forum argues that this case does not meet its novel equity conditions since, unlike *Loving v. Virginia*, there was no actual prosecution. Once again, the equity arguments (like the alternative argument that these cases must come from state appeals) have never been adopted by the federal courts. Putting that aside, the lower court found that the government not only investigated the

Forum uses much of its brief to argue that the law can be upheld on the basis of a rational basis because polygamy is still not deeply rooted in our society. Once again, this case is not about the recognition of polygamous marriage. It is not about polygamy but privacy—and privacy rights have changed in the last two hundreds years notwithstanding arguments in the Eagle Forum brief.

VIII. CONCLUSION

In light of the foregoing, Appellees respectfully submit that the lower court decision should be affirmed in its entirety.

Respectfully submitted,

/s/

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Browns but also declared publicly that they were felons. It also found that the government retained the power to prosecute the Browns in the future. *See Buhman*, 947 F. Supp. 2d at 1180, 1216-17.

STATEMENT REGARDING ORAL ARGUMENT

Appellees agree that, given the importance of the legal and policy issues at stake, oral argument is warranted and requested.

Respectfully submitted,

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Dated: August 25, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[x] this brief contains 18,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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*On June 5, 2015, the Court granted a motion to allow 5,000 additional words for the Appellees brief.

Date: August 25, 2015

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;
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Date: August 25, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2015, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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