No. 14-4117

In the United States Court of Appeals for the Tenth Circuit

JEFFREY BUHMAN, in his official capacity,

Appellant/Defendant.

v.

KODY BROWN, MERI BROWN, JANELLE BROWN, CHRISTINE BROWN, ROBYN SULLIVAN,

Appellees/Plaintiffs.

On appeal from the U.S. District Court for the District of Utah,
Honorable Clark Waddoups presiding, Case No. 2:11-CV-00652-CW

Brief of Appellant Mr. Jeffrey Buhman

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ORAL ARGUMENT REQUESTED

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PRIOR OR RELATED APPEALS

The State of Utah is not aware of any appeals prior or related to this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the State of Utah affirms that it is not a corporation, but a sovereign State government.

INTRODUCTION

The dispute in the district court began with an admitted and high-profile polygamist group, commonly known as the Brown family, bringing an action against Mr. Buhman, County Attorney for Utah County, the Utah Attorney General and the Governor of Utah, each in their official capcities, to enjoin enforcement of and have declared unconstitutional the Utah Bigamy Statute, which is the mechanism through which polygamy prosecutions in Utah proceed. *Brown v. Herbert*, 850 F. Supp.2d 1240, 1243 (D. Utah 2012). The polygamist group includes Kody Brown, an avowed polygamist, his four wives and seventeen children. *Id*. at 1244; *see also The Sister Wives* (The Learning Channel, 2014). Kody Brown married in a state-recognized state-sanctioned marriage with his wife Meri, and later "spritully married" Janelle, Robyn and Christine (collectively the "Plaintiffs" or "Browns"). Complaint ¶ 32; R. Vol I at 23. As members of the Apostolic United Brethren Church, the Plaintiffs consider polygamy a fundamental religious practice. *Brown,* 850 F. Supp.2d at 1178, 1178 n.5. Plaintiffs argued below that the Utah Bigamy Statute, Utah Code Ann. § 76-7-101 (the "Statute"), is unconstitutional both facially and as-applied to them. *Id*. at 1189.

In deciding the issues, the district court broke its analysis of the Statute into two parts as it read the Statute as comprised of two parts, what it termed the "cohabitation" prong and the "purports to marry" prong. *Id*. at 1192. In

conducting its Free Exercise Clause analysis, the district court applied strict scrutiny, and found the "cohabitation" prong unconstitutional, and struck it from the Statute. *Id*. at 1232. The district court also reasoned, under a Due Process Clause analysis, that the "cohabitation" prong was also governed by the principles of *Lawrence v. Texas*, 539 U.S. 558 (2003), and concluded that the provision did not survive rational basis review. *Brown*, 947 F. Supp.2d at 1225. It also determined that the cohabitation prong is unconstitutionally void for vagueness. *See id*. at 1226.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(3). That court's decision was entered on August, 27, 2014. App. Vol. II 560. Mr. Buhman filed a notice of appeal. App. III. 731. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause renders Utah's Bigamy Statute, which prohibits those already married from cohabitating with another partner and purporting to be married to another, fails rational basis review and is void for vagueness.

2. Whether the First Amendment's Free Exercise Clause render's Utah's Bigamy Statute unconstitutional.

3. Whether the District Court Incorrectly Determined that Strict Scrutiny Governed Appellee's Free Exercise Claim.

4. Whether the District Court Erred by Finding Plaintiffs' Complaint Sufficiently Stated a Claim for Section 1983 Money Damages.

STATEMENT OF THE CASE

This suit began when, a polygamist group of some repute through a television reality show, "*The Sister Wives*," filed suit on July 13, 2011 against the Utah County Attorney, Mr. Buhman, as well as Utah's Governor and Attorney General, seeking a declaration that Utah Code Ann. § 76-7-101 (the "Statute") is unconstitutional, both as-applied to the group and facially, and enjoining the Statute's enforcement. *Brown v. Buhman*, 947 F. Supp.2d. 1170, 1176, 1178 (D. Utah 2013). Under the Statute, a person who has a husband or wife is guilty of bigamy, a third degree felony, when such a person cohabits with or purports to be married to another person. Utah Code Ann. § 76-7-101. A person also commits bigamy in Utah if that person cohabits with or purports to marry another person who is known to be already married. *Id*.

Plaintiffs, a polygamist group known popularly as the Browns, are members of the Appostolic United Brethren Chruch, a religious organization that practices polygamy as core tenant of its religion. *Brown*, 947 F. Supp.2d at n.5. According to Plaintiffs, and not disputed by Utah, Kody Brown is legally married to Meri

Brown, and "spiritually married" to Janelle Brown, Robyn Sullivan and Christine Brown. Compl. ¶ 32; App. Vol. I. 23.[1] After the Plaintiffs admitted to being in a polygamist relationship on *The Sister Wives*, the Lehi City Police Department filed a report with Mr. Buhman, alleging the offense of bigamy. Mem in Supp. Mootness ¶ 4; App. II. at 312. Mr. Buhman then watched commercials for the *The Sister Wives* television show and publically stated that he had placed the Browns under investigation. Compl. ¶ 32; App. Vol. I. 23.

Plaintiffs sued to challenge the Statute, which bans and criminalizes polygamy, as unconstitutional and sought a preliminary injunction to prevent its enforcement. *Brown*, 850 F. Supp.2d at 1246. Plaintiffs argued that the Statute violates the Free Exercise Clause of the United States Constitution, both facially and as-applied to them. *Brown*, 947 F. Supp.2d 1176, 1191. On this claim, they contended that there is no compelling state interest to support the Statute. Compl. ¶ 198; App. Vol. I at 49. Plaintiffs also alleged that the Statue violates the Due Process Clause, both facially and as-applied. *Brown*, 947 F. Supp.2d 1176, 1191. In support of that claim, they contended that the Statute criminalizes the private behavior of adults exercising their freedom, identifies consenting adults as criminals based on their private choices of sexuality, and allows for selective prosecution of cohabitation. Compl. ¶¶ 181, 183, 185; App. Vol. I 47-49.

[1] Record cites to the Parties' Joint Appendix, filed herewith, and identified by volume and page number.

The district court dismissed the claims against Utah's Governor and Attorney General, but allowed the suit to go forward against Mr. Buhman. *Brown v. Herbert*, 850 F.Supp.2d 1240 (D. Utah 2012). Mr. Buhman maintained that the Statute is constitutional based on three basic arguments: 1) that clear and binding precedent from this Court and the Supreme Court holds that Utah can criminalize polygamy, and this precedent is the basis for Utah's Statute; 2) that the United States Constitution does not protect the practice of polygamy as a fundamental right, and 3) that the State of Utah has a rational basis, and compelling interest, in averting the social harms associated with polygamy and polygamist practices. *See generally*, Def's Reply to Pls' Mem. in Opp. To Def's Mot. for Summ. J.; App. Vol. II, at 542-55. He supported his point regarding compelling interests by recounting stories accounts of former members of the the Apostolic United Brethren Church, of which the Plaintiffs are members. *See id*. (citing Andrea Moore-Emmett, *God's Brothel* 9 (2004)). Those accounts demonstrate that polygamist communities are rampant with sexual abuse of children and women. *See id*.

In analyzing the Free Exercise claim, the district court found parts of the Statute unconstitutional, both facially and as-applied to Plaintiffs, and "struck" the phrase "or cohabits with another person" as a violation of First Amendment Free Exercise protections. *Brown*, 947 F.Supp.2d at 1176. The district court purported

to follow the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), as subsequently construed by the Supreme Court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Brown*, 947 F. Supp.2d at 1203, 1208. The district court properly understood that *Smith*'s rule is that citizens' free exercise rights do not allow them non-compliance with facially neutral and generally applicable laws. *See id*. at 1203. Further, the district court correctly interpreted *Hialeah* to hold that if a law is found to not be generally applicable or neutral, and it singles out and burdens religious practice, then the provision is reviewed under strict scrutiny. *See id*. at 1208. Under strict scrutiny, *Hialeah's* rule is that a law must be narrowly tailored to advance a compelling governmental interest; if it does not, it violates the Free Exercise Clause. *See id*. (*citing Hialeah*, 508 U.S. at 531-32).

Mr. Buhman argued below that the Utah Legislature has determined, based on documented abuse in polygamist communities and groups, that polygamy is generally harmful to citizens, and, following clear Supreme Court precedent, the state may exercise its traditional Police Powers to prohibit and regulate it. *See id*. at 1224. The district court disagreed, and reasoned that adultery, including adulterous cohabitation, is not prosecuted though prohibited by statute, and yet what it termed "religious cohabitation" is prosecuted at the discretion of the state. *Id*. at 1217. Perhaps curiously, the district court found no rational basis to

distinguish between polygamy and adultery, because the cohabitation of unmarried couples, who live as if they are married, is commonplace in society. *See id*. at 1210 (the district court viewing unmarried couples who lived together as a married couple if the couple shared a household and had a sexually intimate relationship). Continuing a comparison to adultery statutes, the district court noted that adultery is generally not prosecuted and that adultery statutes are essentially moribund. *Id*. (citing *State v. Holm*, 137 P.3d 726, 772 (Utah 2006) (Durham, J. dissenting)). Continuing along this line of reasoning by analogy, the district court ulitimately concluded that the Statute's "cohabitation" prong was not narrowly tailored to advance the state's interest in protecting the institution of marriage. *Id*. at 1218.

When the district court analyzed Plaintiffs' Due Process claim, it was bound by this Court's decision in *Seegmiller v. Laverkin City*, 528 F.3d 762 (10th Cir. 2008). *Id*. at 1201. In *Seegmiller*, this Court denied a substantive Due Process claim based on a sexual privacy claim and concluded that the Constitution does not provide a general protection with respect to a person's participation in private consensual sex. *Id*. (citing *Seegmiller*, 528 F.3d at 772). In its substantive Due Process analysis, the district court concluded that religious cohabitation is not entitled to heightened scrutiny and further concluded that it could not ignore the Supreme Court's guidance that there is no general constitutionally protected sweeping right to sexual privacy. *Id*. at 1201-02 (citing *Seegmiller*, 528 F.3d at

771).

In spite of finding that it was bound by *Seegmiller* with respect to the fundamental rights under a substantive Due Processs analysis, the district court concluded that *Lawrence v. Texas*, 539 U.S. 558 (2003), provided the analytical model for its rational basis review of the Statute. *Brown*, 947 F. Supp.2d at 1223. The district court then conducted a Due Process analysis under a reading of *Lawrence*, and separating the two prongs of the Statute determined that the "cohabitation" prong does not pass rational basis review. *Id*. at 1225. Mr. Buhman argued that the Statute does not forbid private sexual conduct, but that it protects children born to a woman who participates in polygamous relationships, which are in violation of the Statute's "cohabitation" prong. *Id*. at 1223. He argued further that Utah legislative policy and history expressed and explained that polygamist practices often brings with it societal damage, such as abuse of children and women, And Utah rightfully uses its Police Powers to curtail such hazards to pubic welfare and the health of individual Utah citizens. *Id*. at 1224. The district court did not credit this rationale for the Statute and reasoned that the "cohabitation" prong could not pass rational basis review because it found that the State has a general strategy of not prosecuting religiously based polygamy. *See id*. Although at the same time, the district court acknowledged that the State has prosecuted religiously cohabitating individuals in the past, the district court

nevertheless found significant that some of those prosecutions also involved prosecutions for other related crimes in addition to the commission of polygamous cohabitation. *See id*.

Continuing its statutory analysis in bifurcated fashion, namely, addressing the "cohabitation" prong and the "purports to marry" prong, the district court conducted its Due Process analysis on the "purports to marry" portion of the Statute. *See id*. at 1226. Because it was troubled by the Utah Supreme Court's interpretation of the "purports to marry" language in *State v. Holm*, 137 P.3d 726 (Utah 2006), the distict court found that the language needed additional analysis as it conducted its constitutional review. *See Brown*, 947 F. Supp.2d at 1226. Specifically, the district court noted "one need not purport that a second marriage is entititled to legal recognition to run afoul of the purports to marry prong of the bigamy statute. Nowhere in the subsection is the term 'marry' tied to exclusively to State-sanctioned and recognized 'legal' marriage." *Id*. (quoting *Holm*, 137 P.3d at 736). The distict court specifically noted that the Utah Supreme Court in *Holm* held that "the term 'marry," as used in the bigamy statute includes both legally recognized marriages and those that are not State-sanctioned. . . ." *Id*. (quoting *Holm*, 137 P.3d at 735). The district court recognized, given the fact that it had earlier in its decision held the "cohabitation" prong unconstitutional, it would determine that the entirety of the Statute was unconstitutional if it found the

"purport to marry" prong unconstitutional. *See id*. (acknowledging that if the "purport to marry" prong is struck, then the statute becomes syntactically meaningless).

The district court also recognized that it could not rewrite the Statute to conform to the Constitution, and therefore, it correctly determined (though incorrectly applied) the rule that it must resort to every reasonable contruction to save the Statute from being rendered unconstitutional by judicial interpretation. *Id*. The district court reasoned that the Statute could be saved by adopting the interpretation of "purports to marry" and "marry" from the dissenting opinion in *Holm*. *Id*. at 1224 (citing *Holm*, 137 P.3 at 763-64) (Durham, J., dissenting)). Interpreting the "purports to marry" prong "as referring to an individual's entry into a legal union recognized by the the state as marriage," thd district court reasoned, "allows that the phrase does not encompass an individual's entry into a religious union where there has be no attempt to elicit the State's recognition of marital status or to procure the attendant benefits of this statu under the law, and where neither party to the union believed it to have legal import." *Id*. (quoting *Holm*, 137 P.3d at 763-64 (Durham, J., dissenting). The district court's adoption of the *Holm* dissent's interpretation of "purports to marry" and "marry" satisfied the district court that it had found a narrowing construction saving the Statute from unconstitutional infirmities. *Id*. The district court explained that the "purports to

marry" prong recognizes only State-sanctioned marriage and not religious unification, such as a religious conciliation. *See id*. at 1231. The district court further narrowed the term "marriage" to mean a union having legal status. *See id*. at 1232. The district court reasoned that its construction allows the Statute to prohibit bigamy and polygamy in situations where a person seeks multiple valid marriage licenses. *See id*. at 1234. It therefore found that under its construction of the Statute, the Plaintiffs were entitled to summary judgement as their polygamous behavior did not violate the district court's application of the Statute. *See id*.

SUMMARY OF ARGUMENT

The argument is fairly straightforward: 1) the district court erred in failing to recognize that it was bound by *United States v. Reynolds* and this Court's decision in *Potter v. Murray City*; 2) the district court's statutory analysis is infirm because it violates the canon of avoidance of absurd results (since we end of with a bigamy statute that only criminalizes marriage certificate fraud), and the better gloss under rules of statutory construction is to read the "or" between the two clauses as an "and"--as that's what bigamy/polygamy statutes are plainly designed to cover: plural sexual cohabitation where the cohabitators hold themselves out as being married; 3) *Seegmiller* tells us to read *Lawrence* narrowly and there is a rational basis for such a statute; 4) *Reynolds* and *Potter* control the Free Exercise question; 5) there is no hybrid rights heightened scrutiny because neither the

Lawrence sexual autonomy nor the *Reynolds* barred Free Exercise claim can serve as the basis for a hybrid rights claim triggering strict scrutiny.

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), which must be granted only when 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

A. INTRODUCTION

When the Unites States Supreme Court stated that the Union has always considered polygamy an offense against society, it was reiterating Congress's intent that bigamy is a crime in all Territories. *Reynolds v. United States*, 98 U.S. 145, 168 (1878). In *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985), this Court determined that the *Reynold*'s decision prohibiting polygamy remains fully applicable today. *Potter*, 760 F.2d at 1071; *See also, e.g.*, Colo. Rev. Stat. § 18-6-201; N.M. Stat. Ann. § 6-4-401; Okla. Stat. tit. §§ 881-884; Utah Code Ann. § 76-7-101; Wyo. Stat. Ann. § 6-4-401 (providing current tally if statutes that prohibit polygamy). Since then, Utah appellate courts have extended the prosecutions of bigamy to both religious and non-religious contexts. *Compare State v. Geer*, 765

P.2d 1, 3 (Utah Ct. App. 1988) (illustrating a prosecution for bigamy practiced for non-religious purposes) *with State v. Holm*, 137 P.3d 726, 732 (Utah 2006) (upholding the State's prosecution of a bigamist who claimed that his practices were religious in nature). And the Utah Supreme Court has explained that criminalizing the practice of plural marriage reduced the likelihood of crimes related to its practice, such as incest, sexual assault, statutory rape and failure to pay child support. *State v. Green*, 99 P.3d 820, 830 (Utah 2004). Government investigations and modern testimonials indicate that both physical and sexual abuse commonly occur within polygamist communities due, in part, to their structure that relies on, and in fact requires, secrecy. Richard A. Vasquez, "The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting *Reynolds* in Light of Modern Constitutional Jurisprudence", 5 *N.Y.U. J. Legis. & Pub. Pol'y* 225, 233 (2002). The Utah Supeme Court has recently found the anti-bigamy statute passes constitutional muster in *Green* and *Holm*. *See Holm*, 137 P.3d at 752, 832 (determining that Utah's bigamy statute does not run afoul of constitutional protections of either the Utah or United States Constitutions); *Green*, 99 P.3d at 834 (holding that Utah's bigamy statute is consistent with the United States Consitution and the rights provided under the First Amendment).

The Statute provides criminal liability as follows:

> **76-7-101. Bigamy -- Defense**.
> (1) 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.
> (2) Bigamy is a felony of the third degree.
> (3) It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to remarry.

Utah Code Ann. § 76-7-101. Plaintiffs challenge the constitutionality of subsection 1, and the fact that subsection 2 criminalizes the conduct described in the Statute.

The district court below differed with the the clear precedent from both this Court and the United States Supreme Court, and also declined to follow the Utah Supreme Court. *Brown v. Buhman*, 947 F. Supp.2d 1189, 1192 (D. Utah 2013). Contrary to the weight of precedent, the district court held that the Statute is unconstitutional under the Free Exercise Clause of the First Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id*. at 1190, 1221. Much of the district court's decision was influenced by and devoted to a history of polygamous practices in Utah, which, while the subject of controversial debate, is covered comprehensively and generally fairly. *Id*. at 1180-93.

The district court held that the Utah anti-bigimy statute was unconstitutional under the Free Exercise and Due Process Clauses of the United States Constitution. *See generally Brown*, 947 F. Supp2d at 1176. After coming to this conclusion, the

district court enganged in a narrowing construction of the meaning of the words "purports to marry" in the Statute. The district court found the Statute was neither operationally neutral nor generally applicable, and thus subject to strict scrutiny constitutional review. *Brown*, 974 F. Supp.2d at 1203, 1210. The district court ultimately reasoned that in order to perform its duty to salvage as much of the statute as possible, it had to narrow through construction and interpretation the Statute's ambit. *Id*. at 1234.

The district court incorrectly interpreted United States Supreme Court precedent in its application of the Free Exercise Clause, ingnoring the fact that both Supreme Court and Tenth Circuit precedent forclosed the district court's conclusion and analysis. Second, the district court incorrectly narrowed the statute to apply only to legally sanctioned marriages. The analysis was seriously flawed because it ignored governing canons of statutory construction. Finally, the district court also erroneously found that the Statute's "cohabitation" prong failed rational basis review under a substantive Due Process analysis. Primarily, the district court erred in ignoring the binding precedent that specifically holds that the several states may criminalize bigamy and polygamy in the interests of health, safety, welfare, and even morals, under their police power. *See Reynolds v. United States*, 98 U.S. 145, 168 (1878); *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

The district court also erred in bifurcating its analysis and evaluating the Statute's constutionality by analyzing the "cohabitation" prong separately from the "puports to marry" prong. Doing so led the district court to impermissibly violate the doctrine of avoidance of absurd results and constitutional problems, and also skewed to the point of infirmity its interpretation of the Due Process and Free Exercise claims. By reading the two parts of the bigamy statute as separate provisions rather than two elements of one crime, the Court invited rather than avoided an interpretation that implicated constitutional issues and also interpreted the bigamy statute to cover nothing but essentially marriage, or marriage certificate, fraud. If this Court does not reverse the district court on its statutory analysis, one can only be guilty of bigamy in Utah if one purports to have more than one marriage license with multiple partners. This result is absurd, as it imposes criminal liability for bigamy for those who essentially commit "marriage license" fraud.

A simple review of what was and is intended to be captured for criminal liability as bigamy or polygamy demonstrates the that the district court's statutory analysis is erroneous. To help this Court's analysis, a brief review of the most relevant cases is provided.

B. PRIMARY CASES TREATING THE CONSTITUTIONALITY OF THE BIGAMY AND POLYGAMY BANS.

1. *Potter v. Murray City*: Lack of Prosecution does not establish an Abandonment of State Laws and an Irrational Revival of Moribund Laws.

In *Potter v. City of Murray*, 760 F.2d 1065 (10th Cir. 1985), this Court deemed *Reynold v. United States*, 98 U.S. 145 (1878), to be controlling authority and still recognized by the Supreme Court. *Potter*, 760 F.2d at 168-69. In *Reynolds*, the Supreme Court clearly found that a Utah statute criminalizing polygamy was constitutional. 98 U.S. at 168. The *Reynolds* Court stated this principle strongly, but also grounded its analysis in the fact that the United States inherited its prohibition from British common law: "polygamy has always been odious among the northern and western nations of Europe … by statute, if committed in England or Wales, was mandated punishable in the civil courts, and the penalty was death." *Id*. at 164-65. While not taking the hard language of *Reynolds* to heart, federal courts, including this Court, have continually affirmed that *Reynolds* is still binding law on the question of Free Exercise rights and that those rights are not affected by bigamy or polygamy bans. *See*, *e.g.*, *Potter*, 760 F.2d at 1068; *Paris Adult Theater I v. Slaton*, 413 U.S. 49 68 n.15 (1973) ("Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim that such statutes violate the First Amendment or any other constitutional provision."); *Lukumi Babalu Aye, Inc. v.*

City of Hialeah, 508 U.S. 520, 535 (1993) (citing *Reynolds* as support for the proposition that adverse impact on religion from operation of legislative enactment does not translate into impermissible religious targeting where "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination"); *Bronson v. Swensen*, 500 F.3d 1099, 1103 (10th Cir. 2007); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir.2006) (citing *Reynolds* with approval); *Adgeh v. Oklahoma*, 434 F.App'x 746, 747. 2011 WL 3930289, *1 (10th Cir. 2011); *White v. Utah*, 41 F. App'x . 325, 326, 2002 WL 1038767, *2 (10th Cir. 2002).

In *Potter*, Murrray City, Utah terminated an employee, Royston Potter, a city police officer, because he was practicing plural marriage. 760 F.2d at 168. The cause for Potter's termination was failure to obey, defend, and support Article III of the Utah Constitution, which expressly prohibits plural marriage. Utah Const., Art. III (providing "[p]erfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of eligious worship; but polygamous or plural marriages are forever prohibited."). Mr. Potter sued claiming Utah's constitutional provision, which prohibited plural marriage, was constitutionally infirm and he sought to enjoin laws enforcing the provision. *Potter*, 760 F.2d at 1067. The district court concluded that the practice of polygamy is not a right protected under the Free

Exercise Clause and further reasoned that Utah has a compelling interest in disallowing polygamy. *See Potter*, 585 F. Supp.2d 1126, 1143 (D. Utah 1984).

On appeal to this Court, Potter argued that Utah's law prohibiting polygamy had fallen into desuetude and that invoking such a law after disuse is a violation of the Due Process Clause. *Potter*, 760 F.2d at 1067, 1070. This Court disagreed and reasoned that an insignificant quantity of posecutions does not insinuate a dissertion of Utah's laws and an illogical restoration in Potter's situation. *See id*. at 1071. This Court observted that polygamy has been prohibited since society's inception and its prohibition remains in full force. *See id*. This Court affirmed the district court's determination that the State of Utah has a compelling interest in prohibiting polygamy and defending the monogamous marriage relationship. *See id*. at 1070. This Court further declared that monogamy is an intimate part of society and the foundation of our culture. *Id*. (citing *Zabloki v. Redhail*, 434 U.S. 374, 384 (1978)).[2]

2. *State v. Green*: The Utah Supreme Court Finds Utah's Bigamy Statute Neutral, Both Facially and As-Applied, as Well as Generally Applicable under the Analysis set Forth in *Hialeah*

In *State v. Green*, the Utah Supreme Court found Utah's anti-bigamy statute, Utah Code Ann. § 76-7-101, neutral both facially and in operation. 99 P.3d 820,

[2] The Supeme Court in *Maynard v. Hill* stated that marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress." 125 U.S. 190, 211 (1888).

828 (Utah 2004). The court also determined that the Statute is related to the State's interest in preventing fraud and protecting weak individuals from abuse and exploitation. *Id*. at 830. Such exploitations in the practice of polygamy often target women and children who are susceptible to sexual assault, incest, and statutory rape. *Id*. at 830; *see also e.g.*, *State v. Kingston*, 46 P.3d 761, 762 (Utah Ct. App. 2002) (providing an example of a polygamist convicted of incest after he raped his sixteen year-old niece).

In that *Green*, Thomas Green, an avowed polygamist with nine wives and twenty-five children, appeard on multiple television programs with his wives. *Id*. at 822-23 (explaining that Green was married to Beth Cook, Lynda Penman, Shirley Beagley, LeeAnn Beagley, Hannah Bjorkman, Cari Bjorkman, Julie Dawn McKinley, and Linda Kunz). In 2000, Utah charged Green with four counts of bigamy. *Id*. at 823. Utah alleged that Green violated the Statute when he cohabitated with LeeAnn Beagley, Shirley Beagley, LeeAnn Beagley, Hannah Bjorkman, Cari Bjorkman while he was also legally married to Linda Kunz. *Id*. Green and his wives resided in a collection of mobile homes, which the group called "Green Haven"; Mr. Green resided in his own mobile home and his wives took turns spending nights with him on a rotating schedule. *Id*. at 822-23.

At the beginning of pretrial hearings, the State filed a motion requesting the court to acknowledge the existence of a lawful marriage between Linda Kunz and

Mr. Green. *Id*. The motion was based on Utah's unsolemnized marriage statute, Utah Code Ann. § 30-1-4.5 (the "Unsolemnized Statute"), which allows a court to find a legal marriage in the absence of solemnization. *Green* at 99 P.3d at 823 (citing *Whyte v. Blair*, 885 P.2d 791, 793 (Utah 1994). An unsolemnized marriage becomes valid and legal in Utah if an administrative order or a court establishes that a marriage has emerged between a woman and a man who are capable of giving consent, are of legal age, and are legally able to enter into a solemnized marriage under Utah law, have cohabitated, have mutualy undertaken marriage duties, obligations and rights, and created a reputation with the public as husband and wife. Utah Code Ann. § 30-1-4.5. In *Whyte*, the Utah Supreme Court clarified that a marriage is valid from the date that the couple completes the elements of the Unsolemnized Statute, not from the date a court grants an order validating the marriage. 885 P.2d at 833. The trial court found a valid marriage existed in the absence of solemnization and Mr. Green was convicted of four counts of bigamy. *Id*. at 823.

Mr. Green appealed to the Utah Court of Appeals, which in turn, certified the appeal to the Utah Supreme Court. *Id*. Mr. Green argued, under the First Amendment, that the Statute was unconstitutional because it violated his right to exercise his religion. *Id*. at 825. More specifically, Mr. Green claimed that the Statute could not withstand constitutional challenge under the standard announced

by the Supreme Court in *Hialeah*, because the Statute prohibited religiously motivated bigamy. *Id*. at 824-25 (citing *Hialeah*, 508 U.S. at 531, 533-40). Mr. Green also claimed that the State incorrectly applied the Unsolemnized Statute when it argued a lawful marriage existed between Mr. Green and Linda Kunz. *Id*. at 824.

The Utah Supreme Court disagreed with Mr. Green's contentions, and reasoned that the United States Supreme Court in *Reynolds* held that the government cannot impede on a person's religious beliefs or opinions; however, it may intervene *with a person's religious practices*. *Id*. at 825 (citing *Reynolds*, 98 U.S. at 165). The *Green* court further recognized that the *Reynolds* decision, although more than a century old, has never been overruled. *Id*. (noting the United States Supreme Court "has cited *Reynolds* with approval in subsequent cases, evidencing its continued validity"). Accordingly, the court further reasoned that, under *Hialeah*, the controlling standard was whether the Statute was facially neutral and generally applicable *Id*. at 126.[3] If the Statute was facially neutral and generally applicable then rational basis scrutiny applied. *Id*. at 829 (reasoning that when a law is both neutral and generally applicable, then it is only necessary that the law is "rationally related to a legitimate government end.")

[3] The Court in *Hialeah* determined the neutrality of a law by assessing the law's operational and facial neutrality. 508 U.S. at 533, 534. The Court assessed the facial neutrality of the law by examining the law's text and assessed the law's operational neutrality by examining the law's application. *Id*.

With respect to the neutrality argument, Mr. Green claimed that the Statute's use of the word "cohabit" targeted religiously motivated bigamous practices. *Id*. at 827. He further argued that the targeting is apparent because previous law, made in reaction to polygamy, used "cohabitation" as a factor when prosecuting polygamy, and thus the Statute that specifies that "cohabit" is an element of bigamy is aimed at religiously motivated practices. *Id*. The *Green* court disagreed and held that the Staute explained prohibitions in specific terms, without mention of religious practices. *Id*. The court also noted that the word "cohabit" does not derive from religious meanings or associations. *Id*. Therefore the court found that the Statute was facially neutral. *Id*. at 827.

Next the court analyzed the Statute's effect. *Id*. (citing *Haileah*, 508 U.S. at 535). The court concluded that the Statute does not operate to single out or rebuke religiously motivated polygamy, because it is not limited in application to polygamists. *Id*. For example, in *State v. Geer*, the Utah Court of Appeals found that the Statute applied to a man who committed bigamy for non-religious reasons. *Id*. at 827 (citing *State v. Geer*, 765 P.2d 1, 3 (Utah Ct. App. 1988) (procecution of a non-religious bigamist)). With the *Geer* example in mind, the *Green* court held tha the Statute was operationally neutral. *Id*. at 828.

Finally, the court analyzed the general applicability requirement and applied a test based on primary emphasis it gleaned from *Hialeah*. *Id*. (citing *Hialeah*, 508

U.S. at 531). The *Hialeah* Court emphasized that a law that imposes burdens, in a selective manner, cannot be generally applicable, but because the State of Utah applies the Statute to all citizens, the Statute was deemed constitutional. *See id*. (explaining that Utah applies the statute to everyone, not just polygamists).

The *Green* court found the Statute was neuetral and generally applicable; and therefore, strict scrutiny did not apply. *Id*. (citing *Hialeah*, 508 U.S. at 531). With this in mind, the *Green* court reiterated that it had determined that the Statute does not target only bigamy that is religious in nature, because anyone, regardless of justification or intent, is subject to prosecution. *See id*.

It further noted that the Utah legislature decided that forbidding bigamy rationally served legitimate governmental ends, specifically: 1) state regulation of marriage that focused on monogamy, which the court found was supported by evidence that demonstrated child and women welfare was served as "[c]rimes not unusually attendant to the practice of polygamy, including incest, sexual assault, statutory rape, and failure to pay child support.; 2) making evidence of such abuse easier to obtain; and 3) preventing the perpetration of marriage fraud. *See id*. at 830 (social science citations omitted). Finally, the *Green* court concluded that the Statute is rationally related to these numerous governmental ends, including regulating marriage and protecting vulnerable individuals, because it did not impermissibly infringe on Free Exercise constitutional protections. *Id*. at 829-30

(citing *McGowan v. Maryland*, 366 U.S. 420 442 (1961); *Hialeah*, 508 U.S. at 531; *Smith*, 494 U.S. at 884-86; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)).

3. *State v. Holm*: The Utah Supreme Court Correctly Interpres the "Purports to Marry" Prong when the Court Deemed Utah's Anti-Bigamy Statute Consitutional

In *State v. Holm*, 137 P.3d 726, 742 (Utah 2006), the Utah Supreme Court rejected the notion that the Free Exercise Clause protects polygamy. *Id*. at 742. The *Holm* court was not persuaded that the Constitution, under a substantive Due Process analysis, forced Utah to tolerate and recognize polygamy. *Id*. at 732-33. The court also concluded that the term "marry" in the Statute is not limted to lawfully recognized marriages; therefore, based on circumstantial evidence, one need not seek State recognition of a second legal marriage in order to run afoul of the Statute. *Id*. at 736 ("[t]he term 'marry' is not confined to legally recognized marriages' . . . "[and o]ne need not purport that a second marriage is entitled to legal recognition to run afoul of the 'purports to marry' prong of the bigamy statute").

In that case Plaintiff Rodney Holm was lawfully married to Suzi Stubbs, after which, Holm married Wendy Holm and Ruth Stubbs in two separate religious ceremonies. *Id*. at 730 (Ruth Stubbs, the sister of Susan Stubbs, was only sixteen at the time of her marriage to Holm).

At t the time of his prosecution, Holm was a member of a religious group called the Fundamental Church of Jesus Christ of Latter-Day-Saints. ("FLDS"). *Id*. Holm was charged under the Statute, which led to a bigamy conviction, a third degree felony. *Id*. (Holm was also charged with "three counts of unlawful sexual conduct with a sixteen-or-seventeen-year-old"). At trial, Ruth Stubbs testified that she believed she was married to Holm even though she was aware that the marriage was not lawful. *See id*. (she testified "that she had worn a white dress, which she considered a wedding dress; that she and Holm exchanged vows; that Warren Jeffs, then a religious leader of the FLDS church, conducted the ceremony"). The State also introduced evidence that Holm and Ruth Stubbs considered themselves husband and wife and frequently had sexual intercourse. *Id*. (Ruth Stubbs testified that "she had moved in with Holm; that she and Holm had 'regularly' engaged in sexual intercourse . . . [and] 'regarded each other as husband and wife.'").

Holm petitioned the court for dismissal and argued that the "purports to marry" prong of the Statute only applied to legally recognized marriages. *Id*. The trial court rejected Holm's argument and sent the jury out for deliberation. *See id*. at 732. The jury concluded Holm had violated both the "purports to marry" prong and "cohabitation" prong, because Holm already had a wife when he married Ruth. *See id*. at 731-32. (stating that Holm was guilty of bigamy when he "purported to

marry" and "cohabitated" with Ruth Stubbs).

In his defense, Holm argued that the word "marry," in the Statute, is only applicable to a lawful marriage and added that neither Ruth nor Holm anticipated that the religious ceremony would allow State-sanctioned legal benefits. *See id*. Holm argued when the the trial court convicted him of bigamy, the conviction was unconstitutional. In evaluating his claim, the Utah Supreme Court looked to the legislative intent of the Statute to interpret the "purports to marry" prong. *Id*. at 733. The court first sought intent in the plain language of the Statute. *Id*. at 733 (citing *Foutz v. City of S. Jordan*, 100 P.3d 1171, 1174 (Utah 2004)). The court assumed that "the legislature used each word advisedly" and gave "effect to each term according to its ordinary and accepted meaning." *See id*. (quoting *C.T. ex rel. Taylor v. Johnson*, 977 P.2d 479, 481 (Utah 1999). The State contended, as is consistent here, that the term "marry" is not restricted to legally recognized marriages. *See id*. Holm maintained that "marry" should refer to only legally recognized marriages. *See id*.

The court agreed with the prosecution and held that the term "marry," as proscribed in the Statute, includes both legal marriages and those not authorized by the State. *See id*. The court reasoned that the interpretation of the term "marry" is supported by the language of the statute, the structure of the Utah Code, the plain meaning of the term, and the legislative history and purpose of the Statute. *See id*.

at 733 (stating that the court only turns to legislative history when a statute is ambigious). It is not necessary for a second marriage, of any kind, to exist in order to violate the Statute; thus, cohabitation alone could establish bigamy under the statute. *See id*. at 734-35. In addition, the court deduced that the Utah Legislature anticipated the possibility of an unlawful marriage or unlawful marital relationship when it drafted the statute. *See id*. at 735. Further, the court found that the Utah Legislature acknowledged the State has power to recognize an unlawful marital relationship as a legal marriage, regardless of the parties' inent of the relationship. *Id*. at 735 (citing *State v. Green*, 99 P.3d 820, 823 (Utah 2004)). The court explained that the *Green* court had correctly "allowed an unsolemnized marriage to serve as a predicate marriage for the purposes of a bigamy prosecution." *Id*. at 736 (citing *Green*, 99 P.3d at 823). The *Holm* court concurred that the State has an interest in criminalizing unlicensed marriages so it may fairly distribute welfare, curb abuse, and enhance spousal support. *See id*. at 744.

When the court interpreted the term "marry" as applied to Holm, based on Ruth Stubbs testimony of her wedding ceremony, it was clear to the court that Holm intended to marry Ruth Stubbs. *See id*. at 736. The marriage ceremony between Holm and Ruth Stubbs mirrored a marriage ceremony that the State would recognize as a legal marriage. *See id*. at 737. The court determined that the one factor by itself was not enough to prove a marriage existed between Holm and

Ruth Stubbs, it was apparent that the two formed a marriage, in accordance to the Statute. *See id*. With such conduct in mind, the *Holm* court held Holm's conduct was within the Statute's "purports to marry" prong. *See id*.

The *Holm* Court noted that in *Reynolds* the Court held that prosecution of religiously motivated polygamy is not a violation of the Free Exercise Clause. *See id*. at 741 (citing *Reynolds*, 98 U.S. at 166). Mr. Holm attacked the *Reynolds* opinion, much as Plaintiffs do here, by decrying that *Reynolds* is a hollow relic and that modern jurisprudence allows religiously motivated polygamy. *See id*. The *Holm* court disagreed and reasoned that *Reynolds* is still controlling authority because the United States Supreme Court has cited *Reynolds* in several recent Free Exercise Clause cases. *See id*. at 742 (citing *Smith*, 494 U.S. 872; *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Hialeah*, 508 U.S. at 533).

In response Holm argued, not unlike here, that due to the Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), polygamous behavior is a fundamental right protected by the Due Process Clause of the United States Constitution. *See id*. at 742 (citing *Lawrence*, 538 U.S. at 593). Addressing this argument, the *Holm* court concluded the State could criminalize bigamy and polygamy for several reasons. *See id*. at 742-43. The court disagreed with Mr. Holm and determined that *Lawrence* does not preclude the legislature from barring polygamous practices.

See id. at 744. The *Holm* court distinguished *Lawrence* by identifying the public conduct left unaddressed in *Lawrence*'s privacy protections, where as the Holm case involved the public institution of marriage. *See id*. at 743. The *Holm* court further reasoned that the formation of marital relationships was of great importance to the state, regardless of what the relationship participants, or its observers, cared to name the union. *See id*. The court explained that marital relationships serve as the corner stone of society and that the people of Utah have declared polygamous relationships harmful. *See id*. at 744.

The *Holm* court concluded with reference to this Court's decision in *Potter*, when it determined that Utah had a compelling interest in imposing its prohibition on plural marriage in order to shelter the monogamous marriage relationship. *See id*. at 744 (citing *Potter*, 760 F.2d at 1065). The court conluded that the United States Constitution does not protect Holm's polygamous behavior, and it therefore upheld his conviction under the "purports to marry" prong of the Statute. *See id*. at 752.

C. THE DISTRICT COURT ERRED BY NOT RECOGNIZING CONTIUING VITALITY OF AND BINDING PRECEDENT FROM DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT

Before beginning to analyze the legal issues raised individually, the district court asserted:

The court need not be entirely bound by the extremely narrow free

> exercise construct evident in *Reynolds*; that case is, perhaps ironically considering the content of the current case, not controlling for today's ruling that he cohabitation prong is unconstitutional. In fact, the court believes that *Reynolds* is not, or should no longer be considered, good law, but also acknowledges its ambiguous status given its continued citation by both the Supreme Court and the Tenth Circuit as general historical support for the broad principle that a statute may incidentally burden a particular religious practice so long as it is a generally applicable, neutral law not arising from religious animus or targeted at a specific religious group or practice.

Brown, 947 F.Supp.2d at 1189-90.

In *Potter v. City of Murray*, 760 F.2d 1065 (10th Cir. 1985), this Court deemed *Reynold v. United States*, 98 U.S. 145 (1878) to be controlling authority and still recognized by the Supreme Court. *Potter*, 760 F.2d at 168-69. In *Reynolds*, the Supreme Court clearly reasoned that a Utah statute criminalizing polygamy was constitutional. 98 U.S. at 168. The *Reynolds* Court stated this principle strongly, but also grounded its analysis in the fact that the United States inherited its prohibition from British common law: "polygamy has always been odious among the norther and western nations of Europe … by statute, if committed in England or Wales, was mand punishable in the civil courts, and the penalty was death." *Id*. at 164-65. While not taking the hard language of *Reynolds* to heart, federal courts, including this Court, have continually affirmed that *Reynolds* is still binding law on the question of Free Exercise rights and that those rights are not affected by bigamy or polygamy bans. *See, e.g.*, *Potter*, 760 F.2d at 1068; *Paris Adult Theater I v. Slaton*, 413 U.S. 49 68 n.15 (1973) ("Statutes

making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim that such statutes violate the First Amendment or any other constitutional provision."); *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citing *Reynolds* as support for the proposition that adverse impact on religion from operation of legislative enactment does not translate into impermissible religious targeting where "*a social harm may have been a legitimate concern of government for reasons quite apart from discrimination*")(emphasis added); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir.2006) (citing *Reynolds* with approval); *Adgeh v. Oklahoma*, 434 Fed. Appx. 746, 747. 2011 WL 3930289, *1 (10th Cir. 2011); *White v. Utah*, 41 Fed.Appx. 325, 326, 2002 WL 1038767, *2 (10th Cir. 2002); *Bronson v. Swensen*, 500 F.3d 1099, 1103 (10th Cir. 2007).

This Court has been unwaivering in stating that a decision of one of its panels may not be overruled by another panel, and that only an en banc panel of this Court can change or readdress this Court's prior holdings. *See Barnes v. United States*, 776 F.3d 1134 (10th Cir. 2015) (citing *In re Smith*, 10 F.3d 723, 724 (10th Cir.1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."). Moreover, this Court has been clear that it is not only bound by holdings of the Supreme Court, but also that it is bound by Supreme Court dicta. *See United*

States v. Orona, 724 F.3d 1297, 1311 (10th Cir.2013) (reiterating that "we are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings[.]"). Such must also be the rule for district courts in this circuit for the rule of law to have reliability and stability. For the simple reason that the entire challenge brought in this case is governed by the ongoing binding effect of *Reynolds*, this Court should reverse and remand the decision of the district court with instructions to enter judgment for Mr. Buhman.

D. THE DISTRICT COURT ERRED IN ITS INITIAL INTERPRETATION OF THE BIGAMY STATUTE'S STRUCTURE AND LANGUAGE.

The district court does a wonderfully thorough job of covering the history, purpose and caselaw surrounding the area, but other than its primary mistake of not recognizing that it is bound by precedent, it makes a second error in its statutory interpretation and narrowing exercise that takes the statute out of the very heartland of conduct the statute is plainly supposed to cover.

After eschewing the continued vitality of the binding precedent addressed in the previous section, the district court ultimately found that the only manner in which any of the statute could be saved from constitutional infirmity was to completely strike the "cohabitation" prong of the statute and narrow the "purports to marry" prong of the statute to cover only instances where people enter or purport to enter into "a legal union recognized by the state as marriage. The phrase

does not encompass an individual's entry into a religious union where there has been no attempt to elicit the state's recognition of marital status or to procure the attendant benefits of this status under the law, and where neither party to the union believed it to have legal import." *Brown*, 947 F.Supp.2d at 1231 (agreeing with *Holm*, 137 P.3d at 761 (Durham, J dissenting). Thus, after the district court's narrowing construction, it turns out that one is guilty of bigamy under the Statute if one fraudulently marries more than one person or fraudulently holds oneself out as married to more than one person. In short, read this way, the purpose of Utah's bigamy statute is simply to avoid marriage license fraud or prohibit libelous claims of multiple marriages.

This interpretation is simply absurd, and violates the canon of avoidance of absurd results, something that the *Holm* court recognized, 137 P.3 at 735-36, n.6, and something the district court wanted to avoid. *Brown*, 947 F.Supp.2d at 1230-32. As Blackstone explained: "[W]here words bear . . . a very absurd signification, if literally understood, we must a little deviate from the received sense of them." William Blackstone, *Commentaries on the Law of England* § 2, at 60 (4th ed. 1770); *accord* Joseph Storey, *Commentaries on the Constitution of the United States* § 427, at 303 (2d ed. 1858).

> Even though, as Judge Learned Hand said, 'the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing,' nevertheless 'it is one of the surest indexes of a mature and developed jurisprudence not

> to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 455 (1989)(quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d. Cir.), *aff'd* 326 U.S. 404 (1945)). This principle was reaffirmed by the Supreme Court just last term in *Yates v. United States*, 135 S.Ct. 1074, 1086-88 (2015) where the Supreme Court noted that the plain language of the Sarbanes-Oxley Act determined that a fish, specifically a red grouper, was not a "tangible object" under the meaning of that statute. *Id.* No laughing matter there, as here, because the question in both cases is how to properly give notice of criminal liability and avoid a due process vagueness problem.

As covered above, the Utah Supreme Court has unambigiously held that the purpose of the statute is to prevent any and all indication of multiple simultaneous marriages. *Green*, 99 P.3d at 832. This principle object of the Statute is undenied by no court opinion cited by either party. The issue here is whether the proper statutory construction both to avoid absurd results and to avoid an interpretation that fosters constitutional doubt can be realized. It can, under simple adherence to other rules of statutory construction.

Every opinion covered in this area reflects the idea that the words "bigamy" and "polygamy" are unified, at least in part, on the idea that the conduct

circumscribed is both public and private, publicly holding oneself out as married to more that one person and cohabitating with them. While the district court recognized the correct rule: "[i]t is well-settled that a federal court must uphold a statute if it is 'readily susceptible' to a narrowing construction that would make it constitutional[,]" it provides a larger operation in its narrowing technique than necessary because it did not consider whether the two prongs of the statute could be read in the conjunctive rather than the disjunctive. *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 US. 383, 397 (1988)).

"We start with the proposition that the word 'or' is often used as a careless substitute for the word 'and'' that is, it is often used in phrases where 'and' would express the though with greater clarity. That trouble with the word has been with us for a long time . . . ." *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956); *United States v. Fisk*, 70 U.S. 445, 447 (1865) ("In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'"); *see also* Antonin Scalia and Brian A. Garner, *Reading Law* § 12 "Conjuctive/Disjunctive Canon at 119 (West, 2012) (discussing problem as "DeMorgan's Theorem").

It is undisputed that the action intended to be captured by anti-bigamy and anti-polygamy statutes is multiple marriages and multiple partners, usually cohabitating with one or more partner at a time. *See, e.g.*, *Holm*, 137 P.2d at n.5, n.6; *Brown*, 947 F.Supp.2d at 1225-26. The district court was troubled and predicated much of its analysis in striking down the "cohabition" prong of the statute by reading it as a stand alone provision. *See, e.g.*, *Brown*, 947 F.Supp.2d at 1224-25.

Read in this way, the provision would provide:

> **76-7-101. Bigamy -- Defense**.
> (1) 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 **[and]** cohabits with another person.

Utah Code Ann. § 76-7-101(1) (emphasis to alteration added). The statute interpreted in this way both keeps its historical focus and cures the vagueness problems that troubled the district court, thus avoiding at least one of (possibly many) constitutional concerns, also in accord with the standard canons of statutory construction.

"Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with [the Legislature's] intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Pub. Citizen v. United States Dep't of Justice*, 491 U.S.

4440 455 (1989) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)). "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case[,]" *Ashwander v. TVA*, 297 U.S. 288, 347 (1936), "if a case can be decided on either of two grounds, one involving a constitutional question, the other a statutory construction or general law, the Court will decide only the latter." *Id.* (Brandeis, J., concurring). For these reasons, Mr. Buhman suggests that this Court adopt the proffered narrowing construction should it finds one necessary since, as discussed below, it avoids the constitutional infirmities that the district court founds in the Statute's possible ambitguities.

E. THE DISTRICT COURT INCORRECTLY DETERMINED THAT STRICT SCUTINY GOVERNED ITS FREE EXERCISE ANALYSIS OF THE STATUTE'S "COHABITATION" PRONG.

For the reasons set forth above, the district court engaged in an incorrect narrowing construction of the statute. The court should have simply interpreted the statute as a whole, with two predicate conditions for criminal liability, which is in accord both with the plain understanding of the activites the statute should cover and avoids the absurd results of finding that the bigamy statute merely prohibits marriage license fraud.

But even if this Court were to disagree with the analysis above, it should still find that the district court's Free Exercise analysis was flawed. The district court

struck down the "cohabition" and narrowed the meaning of the "purport to marry" prong because it found that the prongs were neither facially and generally applicable nor operationally neutral and therefore subject to strict scrutiny. *Brown*, 947 F. Supp. at 1190. Significantly, the district court erroneously applied *Hialeah*'s the strict scrutiny standard in its Free Exercise analysis. *Brown*, 947 F. Supp.2d at 1203 (citing *Hialeah*, 508 U.S. at 546). Under a *Hialeah* analysis, the district court found "that the cohabitation prong fails the operational neutrality test and, accordingly, also fails the general applicability requirement." *Brown*, 947 F. Supp.2d at 1210.

As noted above, the Utah Supreme Court in *State v. Green* applied the *Hialeah* analysis and held the "cohabitation" prong of the statute was neutral and of general applicability. 99 P.3d 820. The Utah Supreme Court reasoned that to determine the facial neutrality of the law it is necessary to evaluate the law's text and that to determine the operational neutrality of the law it is necessary to assess the law in its actual operation. *Id*. (citing *Hialeah*, 508 U.S. at 533, 535).

The *Green* court correctly determined that the plain words of the Statute, including "cohabitation," are neutral, secular, and do not apply only to religious marital practices. *Compare id*. (demonstrating that Utah's bigamy statute does not solely punish religiously driven polygamy), *with State v. Geer*, 765 P.2d 1, 1-2 (Utah Ct. App. 1988) (exhibiting a prosection of Utah anti-bigamy statute that

involved a man who committed bigamy for non-religious reasons). Specifically, the *Green* court noted that the word "cohabit" does not have religious connotations or origins; instead, it is a term of secular meaning. 99 P.3d at 827 (citing *The American Heritage Dictionary of the English Language* (Houghton Mifflin Harcourt, 4th ed. 2000). The *Green* court was also accurate in reiterating that the United States Supreme Court has never expressly overruled the *Reynolds* decision. *Compare Green*, 99 P.3d at 825 (stating that the United States Supreme Court has never explicitly orruled the reasoning in Reynolds); *with Brown*, 947 947 F. Supp.2d at 1189 (stating the district court did not consider *Reynolds* good law); *see also Hialeah*, 508 U.S. at 535 (citing *McGowan v. Maryland*, 366 U.S. 420, 464 (1961) (explaining that "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination")); *Smith*, 494 U.S. at 878,-79 (discussing that the United States Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"); *Potter*, 760 F.2d at 1066-70 (citing *Reynolds* and recognizing the "continued vitality of *Reynolds*" and that "polygamy has been prohibited in our society since its inception"). The *Green* court further reasoned that the Statute was not intended to target only religiously driven bigamy, even though the Statute has an adverse impact on religiously motivated bigamy. *See* 99 P.3d at 828.

Recall that at issue in *Reynolds* itself, Mr. Reynolds, a polygamist, challenged the prohibition of bigamy and argued that marrying more than one woman was his religious duty. 98 U.S. at 148, 161 (indicating that Reynolds was a polygamist because he was married to Marry Ann Tuddenhan and Amelia Jane Schofield). The *Reynolds* Court reasoned that law could not intrude on mere religious opinions and beliefs; however, laws could regulate religious behavior, as the Court in *McGowan* would later reason, because the law could have a different legitimate concern of government quite apart from religious discrimination). *See id*. at 166. Here, the Statute does not solely target religiously driven bigamy (as is evidenced by *Geer* and observations of earlier court decisions addressed above); accordingly, any individual who violates the statute is subject to the operationally and facially neutral regulation. *See Green*, 99 P.3d at 828 (citing *Geer*, 765 P.2d at 3).

This Court of course came to a similar conclusion in *Potter*, including the determination that the Statute did not violate the Free Exercise Clause. 760 F.2d at 1070. The *Potter* Court echoed the importance of *Reynolds* when stating that society has prohibited polygamy since its foundation and the prohibition on polygamy continues today. *See id*. The *Potter* Court, therefore, determined it could not disregard the holding in *Reynolds*, and further reasoned that a lack of non-religiously driven prosecutions does not demonstrate that a State law only

prosecutes religiously driven polygamy. *See id*. at 1069, 1071 (citing *United States v. Blitstien*, 626 F.2d 774, 782 (10th Cit. 1980) (stating that a "mere failure to prosecute other offenders is no basis for finding a denial of equal protection."). Ultimately, this Court acknowledged that anti-bigamy statutes slightly restrain individual freedoms, but there is no rational argument that an anti-bigamy statute violated the Constitution. *See Potter*, 760 F.2d at 1069 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 n.15 (1973) (deducing that "statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision.").

In accord with the rule of *Hialeah*, the *Green* and *Holm* courts noted that if a statute is facially neutral and operationally neutral in application, then the State need only show that the Statute is rationally related to a legitimate governmental interst. *See Green*, 99 P.3d at 829; *Holm*, 137 P.3d at 742. The State of Utah has through its Legislature determined that barring bigamy serves Utah's best interests. *See Green*, P.3d at 829; *Potter*, 760 F.2d at 1070. "Utah has a policy and public interest implicit in the prohibition of polygamy under criminal sanction, has established a vast and convoluted network of other laws clearly establishing its compelling interest to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage." *Potter*, 760 F.2d at 1070.

Utah has an interst in regulating marriage because it is an important social unit, and this interest remains as this Court has recently recognized regardless of how other state provisions regulating marriage are evaluated for their constitutional soundness or infirmity. *See Kitchen v. Herbert*, 755 F.3d 1193, 1219-20 (10th Cir. 2014); *accord id*. at 1231 (Kelly, J. dissenting). 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. *Green*, 99 P.3d at 830. The Statute also assits the State's interests in protecting women and children from crimes such as statutory rape, sexual assault, and failure to pay child support. *See id*. Such interests are rationally related to bigamy and polygamy prohibitions, which is likely why courts but for the district court below have summarily found such the case, and found such regulations perfectly constitutional. *See id*.; *see also Holm*, 137 P.3d at 752.

In this case, for all of the foregoing reasons, the applicable standard of review is rational basis scrutiny, as several Utah Supreme Court cases have determined that the Statute is both facially and operationally neutral, as well as generally applicable to all Utah citizens. *See*, *e.g.*, *Hialeah*, 508 U.S. at 531; *Green*, 99 P.3d at 829 ; *Holm*, 137 P.3d at 745

For the foregoing reasons, the district court erred in its Free Exercise analysis in finding that strict scrutiny applied, and this Court should reverse the

decision on that basis, finding that sufficient rational bases exist to support the constitutionality of the Statute under a Free Exercise analysis.

F. THE DISTRICT COURT ERRONEOUSLY APPLIED *LAWRENCE* IN ITS DUE PROCESS ANALYSIS OF THE STATUTE'S "COHABITATION" PRONG AND THE TERM IS NOT UNCONSTITUTIONALLY VAGUE

1. Rational Basis Review and *Lawrence*

The district court also erred by incorrectly conducting the Due Process rational basis test it found applicable under *Lawrence v. Texas*, 539 U.S. 558 (2003). *Brown*, 947 F. Supp.2d at 1222-26. In an apparent departure from its stated premise that "[i]t is axiomatic that state courts are the final arbiters of state law[,]" *id*. at 1192 (quoting *United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004)(citations omitted), the district court rather suprising gave up its stated premise and differed from the Utah Supreme Court's analysis in *Holm*, where that court concluded that *Lawrence* does not inhibit Utah's Legislature from forbidding the practice of polygamy. 137 P.3d at 744. In *Lawrence*, the Court struck down a statute criminalizing homosexual sodomy and concluded that the Due Process Clause of the Fourteenth Amendment protects private, consensual sexual behavior. 539 U.S. at 560, 585. The *Holm* court reasoned that the *Lawrence* decision is narrow in scope and limited in application because its holding was distinguished more that forty times since it was decided. *Holm*, 137 P.3d at 742 n.10 (citing *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005). The *Muth* court observed that

Lawrence "did not announce . . . a fundamental right, protected by the constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest." 412 F.3d at 817. Similarly, the *Holm* court distinguished between the private acts in *Lawrence*, which were not protected by the law, to the public acts of marriage, which are. 137 P.3d at 743. The *Holm* court identified that marriage is a public institution protection by the law and "presents the exact conduct indentified in *Lawrence* as outside the scope of its holding." *Id*. The *Lawrence* Court stated that the private acts in question did not involve people who might be coerced or injured; people who may not readily refuse to consent; or people involved involved in public conduct.

This Court made a similar point. In *Seegmiller*, this Court denied a substantive Due Process claim and concluded that the Constitution does not provide a general protection with respect to a person's participation in private consensual sex. *Id*. (citing *Seegmiller*, 528 F.3d at 772). And when the district court analyzed Plaintiffs' Due Process claim, it was bound by *Seegmiller* In its substantive Due Process analysis, the district court concluded that religious cohabitation is not entitled to heightened scrutiny and further that it could not ignore the Supreme Court's guidance that there is no general constitutionally protected sweeping right to sexual privacy. *Id*. at 1201-02 (citing *Seegmiller*, 528 F.3d at 771). But after giving that lip service to precedent, the district court

recognizes *Seegmiller* but also tries to distinguish it, and ultimately finds that there is no rational basis for the Statute's criminal penalty for what it calls "religious cohabitation." *See id*.

Following basic statutory construction demonstrates that the district court's analysis under *Lawrence* is incorrect, as bigamy or polygamy are not simply limited to cohabitation, but also includes the public act of purporting to be married, a public act by definition not covered by *Lawrence*'s privacy holdings. This alternate interpretation is in line with that of the *Holm* court, which reasoned that the behavior at issue, bigamy, is not limited to personal preference involving sexual activity, but instead, bigamy raises questions concerning the regulation of marital relationships. 137 P.3d at 743. The *Holm* Court also acknowledged that the State of Utah had recognized the importance of monogamous unions and the way such unions affect the public in its entirety. *See id*. The difference between the public nature of polygamous marriage and the private sexual actions of consenting adults is plain. *See id*. at 744. The formation of marital relationships is of great importance to the State of Utah, regardless of what the marriage participants, or its observers, care to name the polygamous relationsip. *See id*. at 743.

Ultimately, the *Holm* court determined that the citizens of Utah have declared that polygamous relationships are harmful. *See id*. at 744. The *Holm*

court also acknowledged that the State had a legitimate interest in criminalizing bigamy. *See id*. at 752. The district court inappropriately applied *Lawrence* in its rational basis review of the "cohabitation" prong of the Statute in its Due Process analysis, both because the two "prongs" of the statute should be read together, thus entailing, as discussed here, that the acts of bigamy and polygamy have a public portion of holding oneself out, or "purporting to be married," which is a public act. And while the State may not have an interest in the private sexual conduct within the home, it does have an interst in regulating public marital conduct, which is not governed by *Lawrence* at all. *See Holm*, 137 P.3d at 743 (stating that the conduct in *Holm* is outside the scope of the holding in *Lawrence*). For these reasons as well, this Court should reverse the Due Process analysis.

G. THE DISTRICT COURT ERRONEOUSLY NARROWED THE "PURPORTS TO MARRY" PRONG OF THE STATUTE AND MISAPPLIED THE STATUTE IN ITS ENTIRETY.

After it "struck" the "cohabitation" prong of the Statute, *Brown*, 947 F. Supp.2d at 1227, the district court narrowed, or attempted to save the Statute, specifically the "purports to marry prong." *Id*. at 1234. The district court determined that the "purports to marry" prong applied only when a person requested that the State of Utah acknowledge a relationship as a legally recognized marriage. *Brown*, 947 F. Supp.2d at 1231. And it ignored Utah precedent that the term "marry" is not confined to legally recognized marriages, but also included

marriages that are not sanctioned by the state. *Holm*, 137 P.3d at 733. Indeed, the Utah Code, the legislative history of the Statute, the plain meaning of the Statute, the purpose of the Statute, and the Statute itself support this definition of "marry." *See id.*

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 marriage. *See* id. at 736. In *State v. Kingston*, 46 P.3d 761 (Utah Ct. App. 2002), a sixteen-year-old-girl was forced to marry her thirty-two-year-old uncle, David Kingston, as his fifteenth plural wife, in a secret ceremony. *See* Def's Reply Mem. in Opp. to Defs' Mot. for Sum. J. at 10-1l; App. Vol. II. at 551-52. The sixteen-year-old attempted to escape Mr. Kingston but, as a result, her father beat her unconscious in a barn. *See id.* Mr. Kingston was convicted of one count of unlawful sexual conduct and three counts of incest. *See Kingston*, 46 P.3d at 761-62, 767.

With such ceremonies and others in mind, the *Holm* court correctly stated that, based on the Utah Code, it is apparent that the state legislature had no intention limiting the term "marriage" to legally recognized marriages. 137 P.3d at 735. Under a legal system where the legislature permitted unsolemnized marriages and deferred to the judiciary to find the existence of a legal marriage, it is evident that the legislature recognized that the request or execution of a marriage license is

not dispositive. *See id*. (citing *Whyte v. Blair*, 885 P.2d at 793). The court in *Whyte* stated that the judicial decree only recognizes that a man and woman have entered into a marital relationship based on the consent and conduct, although it was not legally recognized or formally solemnized. 885 P.2d at 793 (citing Utah Code Ann. § 30-1-4.5). Such a system means, that under the Utah Code, regardless of whether the parties to a marital relationship want recognition by the State of Utah, the State of Utah has the authority to legally acknowledge the purported marriage. *See Holm*, 137 P.3d at 735.

The Utah Supreme Court recognized that the Statute's purpose is to prevent any and all indication of multiple simultaneous marriages. *Green*, 99 P.3d at 832 (opining that the purpose of the Statute is to prevent all indications of a repeated marriage). In *Green*, the court allowed an unsolemnized marriage to serve as a predicate marriage for purposed of a bigamy prosecution. *Id*. at 834. Using the *Green* court's reasoning, the *Holm* court concluded that if an unlicensed and unsolemnized union may serve as an established marriage under the "purports to marry" prong of the Statute, the court could deduce that an unlicensed solemnized marriage, such as a spiritual marriage, can violate the "purports to marry" prong. 137 P.3d at 736. The *Holm* court's conclusion applies to marriages that could never be legal, such as a marriage between a minor and adult. *Id*. at 736 (citing Utah Code Ann. § 30-1-15. The Solemnization of prohibited marriage—Penalty

statute indicates tha an illegal marriage is one that involves a minor, thus also demonstrating that the construction of "purports to marry" by the district court are at odds with the meaning of "marry" throughout the Utah Code. *See id.*; Utah Code Ann. § 30-1-15.

The district court misguidedly narrowed the construction of "purports to marry" prong to encompass only legally binding marriages. *Compare Brown*, 947 F. Supp.2d at 1230 (stating the "purport to marry" prong of the statute should be interpreted "as referring to an individual's claim of entry into a legal union recognized by the state as marriage") *with Holm*, 137 P.3d at 728 (determining "one need not purport that a second marriage is entitled to legal recognition to run afoul of the "purports to marry" prong of the bigamy statute."). In this way, a so-called spiritual marriage can violate the "purports to marry" prong of the Statute. *See Holm*, 137 P.3d at 736. When considering the conduct described above, and its thoughtful treatment by Utah jurists, the district court ought to have applied the "purports to marry" prong of the Statute to Kody Brown, because he was legally married to Meri when he subsequently solemnized marital relationships with Janelle, Christine and Robyn. *Compare Holm*, 137 P.3d at 736 (demonstrating that "one need not purport that a second marriage is entitled to legal recognition to run afould of the 'purports to marry' prong of the bigamy statute."), *and Green*, 99 P.3d at 832 (articulating the Statute prevents all indicia of repeated marriage) *with*

Brown, 947 F. Supp.2d at 1231 (outlining that the 'purports to marry' prong refers "to an individual's claim of entry into a legal union recognized by the state as marriage."). For this reason it was error for the district court to enter summary judgment for Kody Brown, and this Court should reverse that decision on de novo review and remand with the appropriate instructions.

H. THE DISTRICT COURT ERRED BY FINDING PLAINTIFFS' COMPLAINT SUFFICIENTLY STATED A CLAIM FOR SECTION 1983 MONEY DAMAGES.

Title 42 Section 1983 of the United States Code provides a civil remedy against a person, who acting under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Litigation under the statute has been described by commentators as "complex." *See* K. Blum and K. Urbonya, *Section 1983 Litigation*, Federal Judicial Center (1998); *accord* M. Schwartz, Touro Law Center, *Section 1983 Litigation* at 3, Federal Judicial Center (2014).

The district court concluded Plaintiffs' complaint stated a claim for Section 1983 money damages and therefore put Defendant on notice of the need to affirmatively assert his qualified or absolute immunity from suit. That conclusion misconstrues the language of Plaintiffs' complaint, misapprehends the intricacies of Section 1983 litigation, and adjudicates a moot issue.

Section 1983 is not a source of substantive rights. A person cannot be alleged to have violated Section 1983 - alone - but Section 1983 provides a "method for vindicating federal rights" conferred elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *accord Gaines v. Stensberg*, 292 F.3d 1222, 1225 (10th Cir. 2002). Merely reciting Section 1983, while necessary to invoke the district court's jurisdiction to consider a constitutional claim, was insufficient to give Defendant notice that Plaintiffs sought money damages. But the "first step" with respect to any Section 1983 is to identify the specific infringement being alleged. *Albright v. Oliver*, 510 U.S. 266, 273 (1994).[4]

[4] The transcript from the January 2014 hearing at which this issue was first discussed is telling, and reveals that Plaintiffs, and to a lessor degree the district court, misconstrued Defendant's contention. Below, Defendant agreed Plaintiffs appropriately pleaded a cause of the action under Section 1983 to support an award of equitable relief. App. Vol. III. at 883-85. Defendant also agreed that should Plaintiffs prevail on that claim, 42 U.S.C. § 1988 would support an award of their costs of suit – which would include attorney fees, costs and other expenses. App. Vol. III. at 884; Tr., p. 7:9-10. On this point, even the district court agreed:

> . . . well you're correct, they in part[,] they seek a declaration under 1983, they seek enjoinment, and they seek reasonable attorney's fees under Section 1988 and such other reasonable – so there is no specific prayer for damages.

App. Vol. III. at 884; Tr., p. 7:3-7.

All the more Defendant contended below, as here, is that by failing to name him in an individual capacity, or to demand money damages under Section 1983, Plaintiffs' complaint failed to trigger Defendant's absolute or qualified immunity from such suit.

1. The district court's order addresses only a moot claim.

Responding to the district court's call for additional briefing, although believing themselves entitled to money damages, Plaintiffs' plainly stated they were not seeking money damages. Reserving the right to seek attorney fees, Plaintiffs affirmatively waived the right to "ask for repayment of their moving costs, loss of contracts, or other expenses." App. Vol. III 654. Having done so, Plaintiffs' made further inquiry into whether they adequately pleaded a case for money damages moot. The district court's order substantively addressing that claim should be vacated.

An issue becomes moot when during the course of litigation facts or circumstances change such that a justiciable controversy no longer exists. *See Jordan v. Sosa*, 654 F.3d 1012, 1023 (10th Cir. 2011). The mootness doctrine recognizes that although a controversy may exist when litigation commences, once it ceases to exist, so too does the court's ability to address it. *Id.* Lacking an actual controversy about the propriety of money damages, the district court lacked the ability to proceed. *See Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011) (role of district court is to review justiciable disputes when doing so will have practical consequences to the parties). Choosing to do so warrants an order vacating that part of the district court's August 2014 final judgment and order here. But even should this Court find the district court's order

warrants substantive treatment, not merely vacatur, it should nonetheless reverse.

2. Plaintiffs' complaint did not plead a claim for money damages.

Section 1983 provides a federal remedy in two, distinct ways: through "official capacity" suits that seek an equitable order and grant of declaratory and/or prospective injunctive relief, or through "personal capacity" suits that seek an award of money damages against an individually named government. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Plaintiffs' complaint states the former, but nowhere the latter.

Captioned "Complaint for Declaratory, Injunctive and Other Relief," Plaintiffs' complaint named Defendant Buhman in his "official capacity as County Attorney for Utah County."[5] App. Vol. I. 16. Plaintiffs neither sued nor named Buhman in his "individual capacity. Plaintiffs' additional averments fare not better. But none states a claim for monetary relief, instead, each expresses relief in only equitable terms.

In the section entitled "Nature of the Action," Plaintiffs' specifically sought "a declaration that Utah Code Ann. § 76-7-101 is unconstitutional," and requested a "preliminary and permanent injunction preventing" Buhman from enforcing those provisions against them. App. Vol. I. 19-20; Compl, ¶ 16. Plaintiffs

[5] Plaintiffs' complaint similarly named the dismissed defendants, Governor Gary R. Herbert and then-Attorney General, Mark L. Shurtleff, in their "official capacities."

repeated this refrain at paragraph 29, when they sought "[t]o enforce the rights afforded by the United States Constitution," by bringing an action "pursuant to 42 U.S.C. § 1983 for declaratory and injunctive relief against enforcement of Utah's laws banning and criminalizing polygamy." App. Vol. 1 21; Compl, ¶ 19. Numerous other paragraphs specifically requested equitable, declaratory, or injunctive relief; making no mention of money damages. App. Vol. 1 21; Compl, ¶ 17.

Even Plaintiffs' enumerated Section 1983 claim is devoid of a claim for Section 1983 money damages:

SEVENTH CLAIM FOR RELIEF: 42 U.S.C. § 1983

> 230. The Plaintiffs incorporate here by reference paragraphs 1 through 229, *supra*, as if fully set forth herein.[6]
> 231. Insofar as they are enforcing the terms of Utah

[6] Plaintiffs' complaint contains 231 numbered paragraphs. Paragraphs 1 through 13 state Plaintiffs' "Introduction." Paragraphs 14 and 15 recite "Jurisdiction and Venue." Plaintiffs' statement of the "Nature of the Action," is contained in paragraph numbers 16 through 31. A recitation of the parties and their relation to the case are found at paragraphs 32 to 36 (Plaintiffs) and 37 to 40 (Defendants). Plaintiffs recite the dispositive constitutional provisions at paragraphs 41 and 42 and set forth their specific factual averments in 134 separate paragraphs (numbered 43 to 134). And, Plaintiffs seven claims for relief are contained in paragraphs 178 to 185 (due process); 186-194 (equal protection); 195-201 (free exercise); 202 to 210 (free speech); 211 to 221 (freedom of association); 222 to 229 (establishment of religion); and 230 to 231 (section 1983).

Of those paragraphs, the district court pointed to only 5 that the court believed were sufficient to assert an injury that could entitle Plaintiffs to award of money damages. *See* Memo Dec. and Judgment at pp. 1-2 (citing Compl. §§ 172-177). In none are damages specifically sought or alleged.

> Code Ann. § 76-7-101, the Defendants, acting under color of state law, are depriving and will continue to deprive the Plaintiffs of numerous rights secured by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

App. Vol. I. 38; Compl. ¶¶ 230-31).

No paragraph in Plaintiffs' complaint made a claim for money damages. None. Not even Plaintiffs' prayer for relief. But stated in its entirety, that Prayer sought to have the district court:

> 1. Enter an order declaring that Utah Code Ann. § 76-7-101 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Free Exercise, Establishment, Free Speech, and Freedom of Association Clauses of the First Amendment, and 42 U.S.C. § 1983.
>
> 2. Order a preliminary and permanent injunction enjoining enforcement or application of Utah Code Ann. § 76-7-12-1 against the Brown family on the basis of their consensual plural family association.
>
> 3. Award the Plaintiffs reasonable attorneys' [sic] fees and costs incurred in maintaining this action pursuant to 42 U.S.C. § 1988.
>
> [and]
>
> 4. Award such other relief as it may deem just and proper.

App. Vol. I. 39; Compl. Prayer. Looking to the fourth prayer for relief and the catch-all phrase, "such other relief," Plaintiffs urged and the district court agreed the complaint sufficiently put Defendant on notice that money damages were

sought. *See also* App. Vol. I. 22; Compl. ¶ 29. But that phrase, read alone or in concert with the remainder of Plaintiffs' complaint was insufficient to put Mr. Buhaman on notice that money damages – and thus a need to plead qualified or absolute prosecutorial immunity – were at issue.

Mr. Buhman's reading of Plaintiffs' complaint is reasonable and supported by the actual language used. The district court's converse conclusion is not. But even when read in light of the catch-all phrase, Plaintiffs' complaint failed to state a claim for money damages.

3. Even when read in light of the catch all phrase, Plaintiffs' complaint failed to give Defendant notice of a need to affirmatively assert his absolute and/or qualified immunity.

Pointing to *Frazier v. Simmons*, the district court determined that Plaintiffs' use of "boilerplate" language was sufficient to notify Defendant that, in addition to equitable relief, Plaintiffs' sought to recover money damages. 254 F.3d 1247 (10th Cir. 2001). The complaint at issue in *Frazier* is distinguishable from the complaint at issue here. What is more, this Court's decision in *Frazier* is out of step with the subsequent United States Supreme Court authority.

a. *Frazier* is distinguishable.

In *Frazier*, unlike here, the plaintiff stated a claim for money damages, and also for "such other relief as the court deems just and *equitable*." *Id.* at 1254-55. Later, when this Court was asked to determine whether the plaintiff's use of the

phrase "equitable relief" was sufficient to put the defendant on notice that the plaintiff sought injunctive relief, this Court found that it did. *Id.* Cautioning that such a "boilerplate recitation . . . included in a prayer for relief is far from exemplary," the Court determined use of the term "equitable" in the plaintiff's complaint and in the pretrial order was sufficient to put the defendant on notice the plaintiff sought an equitable remedy. *Id.*

Distinguished by an unpublished decision of this Court, *Frazier* is similarly distinguishable here. But in *Romero v. City and County of Denver Dep't of Social Servs.*, 57 Fed. Appx. 835, 2003 WL 220494 (C.A. 10 (Colo.), this Court found that a complaint that nowhere mentioned the word "equitable" and that sued a state agency, not an official capacity actor, failed to support a claim for injunctive relief. *Id.*, at *2-3 . *Accord Rosen v. Cascade Int'l, Inc.,* 21 F.3d 1520, 1526 n. 12 (11th Cir. 1994) (rejecting appellees' suggestion that its complaint "successfully invoked the district court's equitable jurisdiction through [its] request for any additional relief as may appear 'just and proper'" in its final prayer for relief), *cited with approval by Frazier,* 254 F.3d at 1254.

Here, as in *Rosen* and *Romero*, Plaintiffs' complaint requested neither money damages nor monetary relief. The complaint never mentioned money or damages at all. But the complaint named Mr. Buhman in his official capacity, and requested equitable (i.e., declaratory and injunctive) relief alone. Under this

circumstance and in keeping with a narrow interpretation, use of the catch-all provision "such other relief" was insufficient to notify Mr. Buhman that that "other" relief included money. The district court's conclusion is error and should be vacated.

b. The district court's interpretation of *Frazier* is out of step with subsequent Supreme Court decisions in *Twombly* and *Iqbal*.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court refined and restated the manner in which a federal civil complaint must be pleaded. Soon after deciding *Twombly*, the Court resolved in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that like all federal civil rights complaints, actions plead under Section 1983 must contain factual allegations - not mere conclusions - that constitute a "plausible" claim for relief. Neither case can be read as creating a new - or heightened - pleading standard for Section 1983 claims, but each underscores what is required to state a claim under Federal civil rule 8(a).

To put a defendant on notice such that it may affirmatively respond, a federal civil rights complaint must contain:

> (1) a short and plain statement of the grounds on which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a *demand for judgment for the relief the pleader seeks*.

Fed. R. Civ. P. 8(a). Meeting these criteria, a plaintiff must please "more than labels and conclusions, and formulaic recitation of the elements of a cause of

action will not do." *Twombly*, 550 U.S. at 555. But to satisfy, *Iqbal*, *Twombly* and rule 8, a demand for relief must surpass speculation. *Id.*; *accord Iqbal*, 556 U.S. at 678-79 (threadbare recitals containing mere conclusory statements "do not suffice.")

Under those principles, looking only, as the district court did, to the catch-all phrase "such other relief" was not enough. But by failing to include a clear claim for monetary relief, Plaintiffs failed to comply with *Iqbal* and *Twombly* and also to give Defendant notice of claim for which his immunity should be raised. But the district court's order belies the Supreme Court's reasoning and also the intricacies of section 1983 litigation.

4. Qualified and absolute immunity protect a defendant from individual liability in personal capacity suits only.

A government official sued only in his or her official capacity is not a "person" for purposes of an award of Section 1983 money damages. *See Will v. Michigan*, 491 U.S. 58, 71 (1989); *Harris v. Champion*, 51 F.3d 901, 905-06 (10th Cir. 1995). But a claim against a municipal employee sued only in his official capacity is treated as a claim against the municipal entity itself. *Kentucky v. Graham*, 473 U.S. at 166; *see Branson Sch. Dist. v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998). Thus, to the extent Plaintiffs sued Mr. Buhman in his official capacity, Plaintiffs attempted to impose liability upon Mr. Buhman's employer – Utah County – not Mr. Buhman.

By contrast, a claim against a government employee in his or her personal capacity, is treated as a claim against the employee. *Id.* Pertinent here, the defenses of absolute prosecutorial and qualified immunity apply only to bar claims for monetary relief against government employees in their personal capacities. *Hafer v. Melo*, 502 U.S. 21, 223-23 (1991). Neither defense is germane to the claims Plaintiffs pleaded here – official capacity claims seeking declaratory and injunctive relief. *See Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1233 n.3 (10th Cir. 2004). For this, perhaps more than any other reason, a section 1983 complaint must clearly specify the capacity in which a defendant it sued.

The result remains unchanged even under *Monell v. Department of Social Services*, a case in which the Supreme Court recognized that - unlike state agencies or state officials – municipalities and municipal employees sued in an official capacity are suable "persons" for section 1983 money damages. *Id.*, 436 U.S. 658, 690 (1978). Because even with respect to *Monell*, a claim made against a municipal employee in his or her official capacity, is still treated as a claim against the municipality and for which affirmative, immunity defenses do not apply.

Below, Plaintiffs' complaint alleged Mr. Buhman acted in his official capacity as Utah County Attorney. The complaint did not allege that Mr. Buhman's independent actions violated Plaintiff's individual rights, nor name Mr. Buhman, individually. But in context, Plaintiffs complaint alleged only that Mr.

Buhman's adherence of to a policy, pattern, or practice of enforcing state law, caused their harm. The complaint also alleged, sought, and specifically prayed for only prospective, equitable relief barring Mr. Buhman's continued investigation or criminal law enforcement. Plaintiffs' complaint could have, but failed to raise any claims against Mr. Buhman in his personal capacity, and for which Mr. Buhman's common law immunity could or should have been alleged. In this light, Mr. Buhman's failure to raise those defenses was reasonable, and not tantamount to waiver.[7] The district court's converse conclusion is error. It should be ignored.

CONCLUSION

Accordingly, this Court should reverse the district court's grant of summary judgment to the Plaintiffs, and vacate the permanent injunction, and remand with any instructions the Court finds appropriate.

STATEMENT REGARDING ORAL ARGUMENT

Given the importance of the legal and policy issues at stake, oral argument is respectfully requested.

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[7] Although qualified immunity is an affirmative defense that a defendant has a burden to plead, and the failure to raise the defense may operate as a waiver, most courts are generally loath to find the defense waived. 1A Martin a. Schwartz, Section 1983 Litigation: Claims and Defenses § 9A.14[C][b] (4th ed. 2005). Not so here.

Date: May 29, 2015.

Respectfully submitted,

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/s/Parker Douglas

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Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th of May, 2015, a true, correct and complete copy of the foregoing Brief of Appellants and Addendum consisting of the Joint Appendix was filed with the Court and served on the following via the Court's ECF system:

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that all required privacy redactions have been made and this document was scanned for viruses with the most recent version of Microsoft Security Essentials v. 2.1.111.6.0, and, according to the program, is free of viruses.

The undersigned also certifies that on May 29, 2015, a true, correct and complete copy of this document was filed with the Court and served on the following via the Court's ECF system:

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