No. 14-4117

In the United States Court of Appeals for the Tenth Circuit

KODY BROWN, MERI BROWN, JANELLE BROWN,
CHRISTINE BROWN, ROBYN SULLIVAN,
Plaintiffs-Appellees,

v.

JEFFREY BUHMAN, IN HIS OFFICIAL CAPACITY,
Defendant-Appellant,

and

GARY R HERBERT IN HIS OFFICIAL CAPACITY;
MARK SHURTLEFF IN HIS OFFICIAL CAPACITY,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH, CIVIL ACTION
NO. 2:11-CV-0652, HON. CLARK WADDOUPS

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: June 29, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit corporation, files this brief with the parties' consent.[1] Since its founding in 1981, EFELDF has consistently defended traditional American values, including traditional marriage. Further, EFELDF has a longstanding interest in applying the Constitution and its federalist structure as written, including confining federal courts to the spheres that the Founders intended. For the foregoing reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Five Utah residents engaged in a polygamous relationship (collectively, "Plaintiffs") sued the County Attorney for Utah County – where Plaintiffs live – and Utah's Governor and Attorney General (collectively, "Utah") both to enjoin enforcement of Utah's bigamy law and to declare their right to engage in their relationship under the U.S. Constitution. After dismissing the Governor and Attorney General, the district court entered judgment for Plaintiffs.

Constitutional Background

The Due Process Clause makes monogamous (*i.e.*, "two person") marriage a fundamental right. *Obergefell v. Hodges*, 576 U.S. __, Slip Op. at 3 (2015);

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Kitchen v. Herbert, 755 F.3d 1193, 1199 (10th Cir. 2014). State laws that deny fundamental rights trigger strict scrutiny. *Kitchen*, 755 F.3d at 1218. By contrast, courts analyze state-law restrictions that do not implicate fundamental rights or protected classes under the same rational-basis test. *Curtis v. Oklahoma City Pub. Schs. Bd. of Educ.*, 147 F.3d 1200, 1215 (10th Cir. 1998).

The First Amendment protects religious freedom, U.S. CONST. amend. I, but – as with the Equal Protection and Due Process Clauses – the level of scrutiny that courts afford to religious-freedom cases varies with the type of government infringement involved. First, "a law targeting religious beliefs as such is never permissible," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993), but non-neutral laws with "the *object* … to infringe upon or restrict practices because of their religious motivation" can be "justified by a compelling interest and … narrowly tailored to advance that interest." *Id.* By contrast, the First Amendment does not always extend to "generally applicable and otherwise valid provision[s]" merely because they have an "incidental effect" on religious practice. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990).

Statutory Background

Under Section 3 of the Utah Enabling Act, "polygamous or plural marriages are forever prohibited." Utah Enabling Act of 1894, ch. 138 §3, 28 Stat. 107, 108. Consequently, both Utah's constitution, UTAH CONST., art. III ("polygamous or

plural marriages are forever prohibited") and its statutes prohibit polygamy:

> (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.

Factual Background

Amicus EFELDF adopts the facts stated in Utah's brief. In summary, Plaintiffs are Utah residents – one man and four women – in a plural marriage, with the man officially married to one woman and the other three women joined to the man in ceremonies religiously and socially similar to weddings (*e.g.*, joining lives, white dresses, celebrations). After the notoriety of Plaintiffs' relationship on a "reality" television program, Utah opened an *investigation* of Plaintiffs under Utah's bigamy statute. Utah never filed criminal charges against Plaintiffs and, prior to the district court ruling, determined that it would not.

SUMMARY OF ARGUMENT

Suits to declare marriage rights – including rights to the unlicensed "quasi-marriages" here – fall under the domestic-relations exception to federal jurisdiction (Section I.A); moreover, the Supreme Court's controlling decision in *Reynolds v.*

U.S., 98 U.S. 145, 168 (1878), renders Plaintiffs' contrary claims too insubstantial to constitute a federal controversy (Section I.B). In any event, federal courts lack authority to narrow state laws contrary to supreme court decisions of that state (Section I.B).

On the equal-protection and due-process merits, Plaintiffs are not similarly situated with monogamous couples (Section II.A) and there is no fundamental right to polygamous relationships (Section II.B). The homosexual-rights cases on which Plaintiffs rely protect only private intimate conduct and monogamous marriages; while those cases may authorize three-or-more-party intimate conduct in private, they authorize only two-party, monogamous family structures in public (Section II.C). Under the circumstances, the rational-basis test applies, and the harms that polygamy visits on spouses and children suffice to uphold Utah law (Section II.D). Finally, Utah's prohibition of polygamy is a neutral protection that incidentally affects Plaintiffs' religion – along with other religions and even secular beliefs – which the First Amendment does not protect (Section III).

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION

The district court lacked – and thus this Court lacks – jurisdiction to decide the merits of Plaintiffs' claims. These jurisdictional limits are "founded in concern about the proper – and properly limited – role of the courts in a democratic

society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (interior quotations omitted). Accordingly, appellate courts must determine not only their own appellate jurisdiction, but also the lower court's jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998). This section outlines several respects in which the district court exceeded the proper role of a federal district court.

A. Given the Lack of Impending Enforcement, Plaintiffs' Case Seeks a Mere Declaration of Marriage Rights, which Triggers the Domestic-Relations Exception to Federal Jurisdiction

The domestic-relations exception to federal jurisdiction recognizes that domestic-relations cases fall outside the categories of cases at law and equity over which both Article III and statutory subject-matter jurisdiction extend the federal judicial power. Not only when the founders drafted Article III and the original states ratified it, but also when Congress drafted the precursors to the federal courts' statutory federal-question and civil-rights jurisdiction, a case asserting the right to marriage was not a case at law or equity. Accordingly, this marriage-rights case falls outside the federal judicial power.

In Utah, the common law prevails except as abrogated by its constitution or legislature, and – like most (if not all) states – Utah adopts the common law of England. *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶49, 221 P.3d 256, 270 (Utah 2009); UTAH CODE ANN. §68-3-1. Utah therefore naturally looks to

English authorities on common-law issues, *Branch v. Western Petroleum*, 657 P.2d 267, 273 (Utah 1982), which is fatal – both on jurisdiction and the merits – to Plaintiffs' claims.

In English common law, marriage was defined as "the voluntary union for life of one man and one woman, to the exclusion of all others." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 343, 798 N.E.2d 941 (Mass. 2003) (*quoting Hyde v. Hyde*, [1861-1873] All E.R. 175 (1866)). At the time of this Nation's founding, England's ecclesiastical courts had sole jurisdiction over marriage:

> The *holiness* of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the [ecclesiastical or] spiritual courts.

1 WILLIAM BLACKSTONE, COMMENTARIES *433 (emphasis in original). Thus, the jurisdictional analysis here must consider not only founding-era's English definitions of domestic relations but also the division of English judicial authority in such cases.[2]

Blackstone recognized three types of unwritten or common law: general

[2] Indeed, until 1604, polygamy itself was "'considered as of ecclesiastical cognizance exclusively.'" *People v. Martin*, 188 Cal. 281, 286-87, 205 P. 121, 123-24 (Cal. 1922) (*quoting* 7 Corpus Juris, at 1158). In 1604, England made polygamy a crime under the common-law courts' jurisdiction. *Id.* (*citing* 1 Jac. 1, Chap. XI, 7 Stats. at Large 88).

customs, particular customs that affect particular districts, and particular customs adopted and used by particular courts (*e.g.*, civil and canon laws). *Id.* *67, *79. The courts responsible for the third common-law group included the ecclesiastical courts, as well as the university, military, and admiralty courts. *Id.* *83. An appeal from these courts lay in the Crown, not to the appellate courts at Westminster. *Id.* *84. At the time, cases at law were heard before the Court of King's Bench or the Court of Common Pleas, and cases in equity were heard before the Court of Exchequer or the Court of Chancery. 3 BLACKSTONE *37-*46. In 1787, only ecclesiastical courts could hear marriage-related cases like this one, *State v. Roswell*, 6 Conn. 446, 448-50 (Conn. 1827) (collecting cases); *Reynolds*, 98 U.S. at 165 ("upon the separation of the ecclesiastical courts from the civil[,] the ecclesiastical [was] supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage"); *accord Barber v. Barber*, 62 U.S. (21 How.) 582, 591 (1859);[3] *In re Burrus*, 136 U.S. 586, 593 (1890); *cf. Maynard v. Hill*, 125 U.S. 190, 206 (1888).

Our Constitution establishes a federal structure of dual state-federal

[3] Significantly, the *Barber* majority did not disagree on this point with the *Barber* dissent, which was even more clear: "it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised." *Id.* at 604 (Daniel, J., dissenting).

sovereignty, *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990), which the states entered with their retained "sovereignty intact." *Fed'l Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002); U.S. CONST. amend. X. The question presented here is whether the people or the states surrendered their power over domestic relations to the federal government:

> When the Revolution took place, the people of each state became themselves sovereign; and in that character held [all of the powers previously held by the Crown] subject only to the rights since surrendered by the constitution to the general government.

Martin v. Lessee of Waddell, 41 U.S. 367, 406 (1842). More specifically, the question presented here is whether the states – as heirs to the Crown's full sovereign, judicial powers – surrendered the sliver of judicial power over domestic relations, which ecclesiastical courts exercised in England.

Unlike our federalist structure that divides power between the federal and state sovereigns, England's sovereignty – both the inter-branch powers and the local-national powers – were combined in the Crown and only in the Crown. *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 366 (2006); *Boumediene v. Bush*, 553 U.S. 723, 748 (2008). Whereas all claims under English law must lie within *some* English court, *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), it is not true here that all claims must lie within some *federal* court. While many claims fall within the concurrent jurisdiction of federal and state courts, *Haywood v. Drown*,

556 U.S. 729, 735 (2009), some claims fall exclusively with one sovereign's courts.

Consistent with our federal structure, in which the states remain sovereign in spheres not delegated to the federal government, the Supreme Court long ago recognized a domestic-relations exception to federal jurisdiction:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

Burrus, 136 U.S. at 593. Indeed, the Supreme Court had previously "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, … either as an original proceeding in chancery or as an incident to divorce *a vinculo*." *Barber*, 62 U.S. (21 How.) at 597. That exception has both a *statutory* and a *constitutional* component, and it concerns both where litigation starts and where it ends.[4]

The statutory and constitutional questions pose the same etymological issue, but the statutory one focuses not on the federal judicial power's outer limits but on the limits that Congress intended when Congress created the lower federal courts. Of course, the two are not the same thing. The "Article III … power to hear cases

[4] In *dicta*, the Supreme Court implied narrower bounds for the domestic-relations exception for types of federal cases not relevant here. *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) (diversity jurisdiction) (discussed *infra*); *cf. Marshall v. Marshall*, 547 U.S. 293, 306-09 (2006) (probate and bankruptcy).

'arising under' federal statutes… is not self-executing," and Congress need not provide the lower federal courts with the full scope of judicial power that Article III makes available to the Supreme Court. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986). The *statutory* issue is whether Congress included this type of domestic-relations issue when it created the federal courts and established their jurisdiction over federal-question and civil-rights cases in law and equity. The *constitutional* question is whether Article III's grant of jurisdiction over cases in law and equity encompasses issues of domestic relations. As explained below, this case presents only the statutory question of where litigation starts – *e.g.*, state or federal court – without addressing whether the Supreme Court has constitutional power to hear such cases under Article III when a case arises from state courts.

Before the Fourteenth Amendment's ratification, the Supreme Court and the states recognized the distinct jurisdictions of a "court of admiralty, chancery, ecclesiastical court, or court of common law." *Williamson v. Berry*, 49 U.S. (8 How.) 495, 540-41 (1850); *Gaines v. Chew*, 43 U.S. (2 How.) 619, 645 (1844) ("equity will not set aside a will for fraud [because] where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court; and at law, on a devise of real property"); *Crump v. Morgan*, 38 N.C. 91, 98-99 (N.C. 1843) (recognizing "the canon and civil laws" of English "Ecclesiastical Courts … and as parts of the common law, which by custom are adopted and used in peculiar

jurisdictions"); *see also Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (allowing state-court divorce suit against foreign consul, notwithstanding exclusive federal jurisdiction over such suits generally, based on the domestic-relations exception under *Burrus* and *Barber*). Although this Court need not reach the issue, *amicus* EFELDF respectfully submits that Article III itself does not extend the federal judicial power to marriage-rights cases.

1. This Court Need Not Resolve Whether Marriage-Rights Cases Fall within Article III

Constitutionally, there is a question as to the scope of the judicial power conveyed to federal courts (including the Supreme Court) by Article III:

> The judicial power shall extend to all cases, *in law and equity*, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction[.]

U.S. CONST. art. III, §2 (emphasis added). The uncertainty lies in the term of art "cases in law and equity," which did not include pure marriage-rights issues when the states ratified the Constitution.

In writing about "delineating the boundary between the federal and State jurisdictions," Madison demonstrated that the Framers were well aware of the various jurisdictions in English law:

> The precise extent of the common law, and the statute law, the maritime law, the ecclesiastical law, the law of

> corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed.

THE FEDERALIST PAPERS, No. 37, at 224-25 (C. Rossiter ed. 1961). Indeed, more contemporaneously with the applicable legal doctrines, courts had no difficulty in recognizing that domestic-relations cases are not cases in law or equity. *Williamson*, 49 U.S. (8 How.) at 540-541; *Gaines*, 43 U.S. (2 How.) at 645; *Burrus*, 136 U.S. at 593; *Barber*, 62 U.S. (21 How.) at 584. Significantly, *Ankenbrandt*, *Marshall*, and *Obergefell* do not hold to the contrary.[5]

Like *Barber*, *Ankenbrandt* concerned a tort suit, which would constitute a suit at law or equity, 504 U.S. at 704; as such, the Court's declining to research English legal history to understand the terms of Article III was appropriate because the case did not turn on the distinctions between law courts, chancery courts, and

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[5] *Obergefell* did not even address jurisdiction, so any jurisdiction-by-negative-implication arguments would constitute "drive-by jurisdictional rulings [that] have no precedential effect." *Steel Co.*, 523 U.S. at 91. The jurisdictional statutes in *Ankenbrandt* and *Marshall* differ from those at issue here in an important respect. The original diversity statute applied to "all suits of a civil nature at common law or in equity," 1 Stat. 73, 78 (1789), whereas the original bankruptcy language applied to "all matters and proceedings in bankruptcy." 36 Stat. 1087, 1093 (1911). A proceeding in ecclesiastical court involved civil or canonical matters and the common law, 1 BLACKSTONE *67, *79, but was not a suit *at law*.

ecclesiastical courts. Any statements on the contours of the domestic-relations exception in *Ankenbrandt* are *dict*a for the same reason that they were *dicta* in *Barber:* a tort suit, as a suit at law or equity, did not present the question of jurisdiction over suits *not* in equity and *not* at law.

Similarly, *Marshall* was resolved on a perceived judicial limitation under a statutory interpretation not based on the distinction between law-equity courts versus ecclesiastical courts appearing on the face of a statute, 547 U.S. at 308-09; *see also* note 5, *supra; Markham v. Allen*, 326 U.S. 490, 494 (1946) (outlining federal-court jurisdiction with respect to probate matters). The probate exception at issue in *Marshall* is solely a judicial construct, unlike the law-equity court versus ecclesiastical court distinction based on founding-era jurisprudence and appearing on the face of Article III and the original statutory grants of subject-matter jurisdiction relevant here.

Of course, if Article III's reference to cases at law and equity meant *all* cases, the Framers would have written Article III to say all cases. Put differently, the canon "*expressio unius est exclusio alterius* … has force … when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Here, Article III lists all relevant forms of English jurisdiction except ecclesiastical courts, which suggests

that the Framers intended to reserve that non-federal form of jurisdiction solely to the states.

Although *amicus* EFELDF notes the question whether the Constitution extends to pure marriage-rights cases that are not suits at law or equity, this Court need not answer that question in deciding *this case* because the statutory issue resolves the jurisdictional question presented.

2. This Case Exceeds the Lower Federal Courts' Statutory Subject-Matter Jurisdiction

At least initially, all relevant acts of Congress to provide jurisdiction to the lower federal courts were limited to actions in law or equity. Although Congress modernized these statutes in 1948 to refer to "all civil actions arising under [federal law]," 28 U.S.C. §1331, and "any civil action authorized by law," 28 U.S.C. §1343(a)(3), the Supreme Court already has held that Congress did not intend the 1948 modernization of that text to confer additional powers not already conferred. Accordingly, the lower federal courts' powers face the same limits now that existed when Congress created those powers.

In both statutes, however, Congress extended jurisdiction only to suits "at law or in equity." *See* 36 Stat. at 1092 ("all suits at law or in equity authorized by law … to redress [civil rights] deprivation[s]"); *id.* at 1094 ("[a]ny suit of a civil nature, at law or in equity, arising under" federal law). The statutes' modernization in 1948 did not expand the scope of the jurisdiction conferred: "no changes of law

or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); *accord Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (repeals by implication disfavored); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 128 (1985).

Even if Article III includes pure marriage-rights cases, what Congress meant by "cases in law and equity" excluded marriage-related cases:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant.

Ankenbrandt, 504 U.S. at 700. *Ankenbrandt* suggests a narrowing of the domestic-relations exception to cases "involving the issuance of a divorce, alimony, or child custody decree," but not to torts such as fraud. *Id.* at 704. As far as it goes, that distinction supports including marriage rights in the domestic-relations exception (an issue that *Ankenbrandt* had no reason to consider, much less decide), *cf. U.S. v. Lopez*, 514 U.S. 549, 564 (1995) (grouping "marriage, divorce, and child custody" as conceptually related), in contrast to recognized federal jurisdiction over torts at law and in equity.

Under the foregoing analysis, it appears that limitations on the lower federal courts' jurisdiction require polygamous plaintiffs to begin their challenges to state

marriage laws in state courts, which have general jurisdiction over these issues. Importantly, denying a federal forum for this suit would not deny all relief, insofar as plaintiffs could bring these federal claims in state court under the doctrine of concurrent jurisdiction. *Haywood,* 556 U.S. at 735. Contrary to the widely-held assumption that federal-question jurisdiction exists for any federal claim, it simply does not. As Justice Holmes recognized in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), sometimes "a page of history is worth a volume of logic." Until 1875, the lower federal courts did not have federal-question jurisdiction.[6] *Merrell Dow Pharm.,* 478 U.S. at 807. As that historical example shows, unexamined assumptions cannot and do not accurately define the bounds of the lower federal courts' jurisdiction.

Instead, "because the Framers believed the state courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channeled to the federal courts." *South Carolina v. Regan*, 465 U.S. 367, 396 (1984). Whatever Congress did not expressly empower the lower federal courts to hear falls outside their jurisdiction:

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[6] Indeed, until 1980, federal-question jurisdiction itself had an amount-in-controversy requirement that likely would have precluded suits over marriage rights under §1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (*citing* Pub. L. No. 94-574, 90 Stat. 2721 (1976)) (eliminating amount-in-controversy minima for suits against federal agencies and officers); Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980) (same for other suits).

> [T]he uniform and established doctrine is, that Congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.

Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 620 (1875). As creatures of statute, the lower courts have only the jurisdiction that Congress gave them, which need not extend to the full limits – whatever they may be – of the judicial power under Article III.

3. The Lower Federal Courts' Authority over Marriage Rights May Be Narrower than Article III's Authority

Assuming *arguendo* that Article III includes federal authority over marriage rights does not answer the statutory question here. Indeed, the question of whether the Supreme Court would have jurisdiction under Article III to hear an appeal from a state court must await a petition for a writ of *certiorari* from a state court judgment. Even if the domestic-relations exception applies here, Article III may allow the Supreme Court to hear an appeal from a state court because Article III's scope is broader than §1331's scope. *Compare, e.g.*, *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) *with Am. Well Works v. Layne*, 241 US 257, 259-60 (1916); *cf. Merrell Dow Pharm.*, 478 U.S. at 807. Alternatively, other marriage-related cases may fall within the law-equity categories, even if a pure marriage-rights case does not. For example, *Loving v. Virginia*, 388 U.S. 1 (1967), arose

from a criminal action appealed from a state supreme court, *Loving v. Commonwealth*, 206 Va. 924, 925, 147 S.E.2d 78 (Va. 1966), and *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), reached the Supreme Court from a federal district-court tax-refund action brought under 28 U.S.C. §1346(a)(1). In both cases, the suit was in equity (*Loving*) or law (*Windsor*), and the petitioner Loving and plaintiff Windsor did not seek the right to marry, having married under another jurisdiction's laws that implicated rights *vis-à-vis* the respondent Virginia and defendant United States.[7]

B. Rewriting State Law Exceeds the Federal Judiciary's Powers

Assuming *arguendo* that the lower federal courts even have jurisdiction over this litigation, this Court then must resolve the absurdity of a federal district court's ignoring controlling authority from the U.S. Supreme Court to issue a narrowing interpretation of state law that adopts the views of a state supreme-court *dissent* over the holding of the state supreme court on the very question presented.

First, given that *Reynolds* remains on point for polygamy, the lower federal courts have an obligation to follow that authority and leave it to the Supreme Court to reverse *Reynolds:*

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[7] Although similar to *Loving* initially, this case did not involve an actual prosecution and, in any event, fell off the equity scale when Utah disavowed any intent to prosecute Plaintiffs. Without imminent harm or irreparable injury, this is not a case in equity; it merely seeks a declaration of rights.

> "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). While it might be enough to resolve this case on the merits, *Reynolds* actually goes even further, denying the district courts' jurisdiction over these decided questions: "federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit," where a claim is "plainly unsubstantial … [when] its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans v. Lavine*, 415 U.S. 528, 537 (1974) (interior quotations omitted); *Goosby v. Osser*, 409 U.S. 512, 518 (1973). Moreover, while the Supreme Court decided *Reynolds* more than a century ago, this Court recognized much more recently that *Reynolds* remains controlling. *Potter v. Murray City*, 760 F.2d 1065, 1071 (10th Cir. 1985). Under the circumstances, the district court's failure to follows these binding precedents is difficult to understand.

Second, assuming *arguendo* that it had jurisdiction, the district court did not have the option of rewriting Utah law contrary to Utah Supreme Court's controlling decision in *State v. Holm*, 2006 UT 31, 137 P.3d 726 (Utah 2006):

"Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988) (interior quotations omitted, alterations in original); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws"). Under the circumstances, a federal court with jurisdiction could uphold or enjoin Utah law, but it could not rewrite Utah law.

II. THERE IS NO FOURTEENTH-AMENDMENT RIGHT TO POLYGAMOUS MARRIAGE

The Fourteenth Amendment's Equal Protection and Due Process Clauses have been held to protect the right to marry in a variety of situations. In this Section, *amicus* EFELDF evaluates Plaintiffs' claims under those clauses. Because they lack a fundamental right to polygamous marriage and are not members of a protected class, Plaintiffs' action must proceed under the rational basis test; under that test, however, Utah's police-power concerns for public safety easily justify the bigamy law.

A. Plaintiffs Are Not Similarly Situated with Married Monogamous Couples, and Utah Has No Discriminatory Purpose

The Equal Protection Clause "'embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.'" *Coalition for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008) (*quoting Vacco v.*

Quill, 521 U.S. 793, 799 (1997)). To raise an equal-protection claim vis-à-vis the government's treatment of a similarly situated class, the two classes must be "'in all relevant respects alike.'" *Id.* (*quoting Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Further, "ordinary equal protection standards" require a plaintiff to "show both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.*, 470 U.S. 598, 608 (1985). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part *'because of,'* not merely *'in spite of'* its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Plaintiffs cannot either establish that they are similarly situated with monogamous couples or show an impermissibly discriminatory purpose in Utah's bigamy law.

A classification is clearly "reasonable, not arbitrary" if it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (internal quotations omitted). Provided that Utah rationally may prefer monogamy, *see* Section II.D, *infra*, Plaintiffs are not similarly situated with monogamous couples.

Second, any "foreseeable" or even "volitional" impact on the non-favored

class does not qualify as a "[d]iscriminatory purpose" if the state lawfully may benefit the favored class. *Feeney*, 442 U.S. at 278-79. Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (interior quotations omitted). While "[a] tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), Plaintiffs' religion lacks a similar monopoly on polygamy. *State v. Fischer*, 219 Ariz. 408, 413, 199 P.3d 663, 668 (Ariz. Ct. App. 2008) ("Polygamy has been actually a common theme found in Christianity, Judaism, Islam, and other religions") (interior quotations and alterations omitted). Again, if it rationally may prefer monogamy, *see* Section II.D, *infra*, Utah does not have an impermissible "discriminatory purpose."

B. There Is No Fundamental Right to Polygamous Marriage

The Supreme Court has recognized the limits posed on using the Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Given "[t]he tendency of a principle to expand itself to the limit of its logic," *id.* at 733 n.23 (interior quotations omitted), the *Glucksberg* majority recognized that courts must tread cautiously when

expounding substantive due-process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. "[E]xtending constitutional protection to an asserted right or liberty interest" thus requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Id.* at 720. *Glucksberg* precludes Plaintiffs' supporting polygamous marriage with citations to precedents on the fundamental right to monogamous marriage. *See* Section II.C, *infra*.

As indicated, "fundamental" rights must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Even those who fervently believe that polygamy meets the second prong must admit that it cannot meet the first. Leaving aside what the states that ratified the Fourteenth Amendment believed *in the 1860s*, polygamy (which this Court easily rejected in 1985) is not "deeply rooted" *today*.

C. The *Obergefell-Lawrence* Line of Cases Does Not Apply to Bigamy

Although *Obergefell* rejected *Glucksberg* "both with respect to the right to marry and the rights of gays and lesbians," Slip Op. at 17-18 (*citing Loving*, 388 U.S., at 12; *Lawrence v. Texas*, 539 U.S., 558, 566-67 (2003)), neither *Obergefell–Loving* marriage rights nor *Lawrence* intimacy rights help Plaintiffs. For marriage, the majority's reasoning extends only to two-person marriages. *Id.* at 3. For

intimacy, the issue is "the most private human conduct, sexual behavior, and in the most private of places, the home," *Lawrence*, 539 U.S. at 567, "beyond the marital relationship." *Id.* at 565. *Lawrence* did "not involve minors" or "persons who might be injured," and it did "not involve whether the government must give formal recognition to any relationship that [the intimate] persons seek to enter." *Id.* at 578. *Lawrence* thus extends to *private* intimate conduct, without public recognition, and presumably extends to conduct that involves more than two people. As indicated, however, *Obergefell* extends only to monogamy.

Because federal courts lack authority to strike the bigamy law's cohabitation prong,[8] that prong continues to apply to marriage-like relationships under the contemporary meaning of "cohabitation" (namely, "to live together *as husband and wife*"). BLACK'S LAW DICTIONARY, at 236 (5th ed. 1979) (emphasis added). Utah courts – and, by extension, federal courts sitting in Utah – must follow Utah law and thus English common law as their "rule of decision," "so far as it was not repugnant to, or in conflict with" constitutional protections. UTAH CODE ANN. §68-

[8] For its part, *amicus* Eagle Forum respectfully submits that Utah's arguments about the and-or distinctions in the statute are plausible and backed by the Utah state courts, Utah Br. at 35-40, which should suffice for this Court. Alternatively, this Court could read the two prongs as follows: (a) the purports-to-marry prong applies to actual marriages of whatever sort, and (b) the cohabitation prong applies to marriage-like relationships under the contemporary meaning of "cohabitation." BLACK'S LAW DICTIONARY, at 236 (5th ed. 1979) (quoted *infra*).

3-1; 42 U.S.C. §1988(a).[9] In founding-era England, having multiple marriage-like relationships (*i.e.*, not marriage-license fraud, but cohabitation) was actionable, albeit only in ecclesiastical courts. *Roswell*, 6 Conn. at 448-50 (collecting cases); *Holm*, 2006 UT 31 ¶22, 137 P.3d at 735 ("the bigamy statute does not require a party to enter into a second marriage (however defined) to run afoul of the statute; cohabitation alone would constitute bigamy pursuant to the statute's terms"); *Murphy v. Ramsey*, 114 U.S. 15, 42-43 (1885). Thus, because nothing in the *Obergefell-Lawrence* line of cases overturns *Potter* and *Reynolds*, the panel here has no basis to reject that common-law rule.

D. Prohibiting Polygamy Satisfies the Rational-Basis Test

With neither a fundamental right nor a protected class, Plaintiffs' Fourteenth Amendment challenge to Utah's bigamy law must proceed under the rational-basis test.[10] To prevail, Plaintiffs must offer far more evidence than they have before they can dislodge Utah's preference for monogamy as the family building block in

[9] Under 42 U.S.C. §1988(a), federal courts follow state law on civil-rights claims "so far as the [state law] is not inconsistent with the Constitution and laws of the United States." *See Karnes v. SCI Colo. Funeral Servs.*, 162 F.3d 1077, 1080 (10th Cir. 1998); *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

[10] Although elevated scrutiny does not apply, *amicus* Eagle Forum respectfully submits that Utah's bigamy law readily meets it. Altering something "fundamental to our very existence and survival," *Loving*, 388 U.S. at 12, implicates the most compelling governmental interests. Utah thus has every right to resist radical change to the social fabric. *U.S. v. Griffin*, 7 F.3d 1512, 1517 (10th Cir. 1993) ("[i]mportant government interests include … minimizing the risk of harm to … the public").

Utah.[11] Specifically, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988). Further, it would suffice if plausible policies *may have guided* the decisionmaker and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11-12 (citations omitted, emphasis added). Under the rational-basis test, laws need only "further[] a legitimate state interest," which requires only "a plausible policy reason for the classification." *Id.* Moreover, courts presume the rationality of economic and social legislation, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas*, 487 U.S. at 462-63 (interior quotations omitted). Utah's bigamy law easily meets that test.

With respect to monogamy, it is enough, for example, that Utah "rationally may have … considered [it] to be true" that monogamy has benefits – and is more

[11] Summary judgment for defendants is appropriate "whenever plaintiffs fail adequately to support one of the elements of their claim upon which they ha[ve] the burden of proof." *Milne v. USA Cycling Inc.*, 575 F.3d 1120, 1125-26 (10th Cir. 2009) (internal quotations omitted). Because Plaintiffs failed to support their claim, summary judgment for Utah is required.

safe – for both children and spouses. *Nordlinger*, 505 U.S. at 11-12. Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (interior quotations omitted); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-17 (1976) (rational-basis test does not require narrow tailoring). As the entity vested with authority over family relationships, Utah can make choices to ensure the best aggregate outcomes, without violating the Equal Protection Clause. Thus, polygamy's correlation with sexual and physical abuse (Utah Br. at 14) is enough to doom Plaintiffs' claims, even if they, individually, are the best spouses and parents ever.

Further, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Accordingly, Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v.*

Clover Leaf Creamery Co., 449 U.S. 456, 463-64 (1981) (emphasis in original). While EFELDF respectfully submits that Plaintiffs *never* will be able to negative the value of monogamy as a social building block, Plaintiffs cannot prevail when the data *required by their theory of the case* either do not exist or, worse, argue against Plaintiffs' position.

III. THERE IS NO FIRST-AMENDMENT RIGHT TO POLYGAMOUS MARRIAGE

The analysis under the Fourteenth Amendment largely answers Plaintiffs' claims under the First Amendment as well: clearly, Utah has ample reason to prohibit polygamy, and the United States similarly had ample reason to condition Utah's entry into the Union on that prohibition. The religious-freedom question is whether those prohibitions violate the First Amendment. The rational bases that satisfy the Equal-Protection and Due Process Clauses (namely, avoidance of sexual abuse and the like) clearly also satisfy the First Amendment.

In *Hialeah*, for example, the Supreme Court considered "multiple concerns unrelated to religious animosity" such as "the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal" as possible non-discriminatory bases for the restrictions on animal sacrifice there. *Hialeah*, 508 U.S. at 535. Given the many other ways in which animals could lawfully be killed, however, it was clear that "the ordinances when considered together disclose an object remote from these legitimate concerns." *Id.* Because polygamy

exists within numerous religions, this case lacks the "religious gerrymander[ing]" present in the animal-sacrifice ordinance. *Id.* at 534 (interior quotations omitted). Of course, if the group there had practiced *human* sacrifices, the result would have been different regardless of any gerrymandering. Here, the harms that Utah and the United States seek to avert are harms to humans in polygamous relationships, and there is no suggestion of a double standard pitting the mistreatment of some humans (or religions) against that of others. While it might feel to Plaintiffs – or seem to the district judge – that Utah or the United States intends to persecute Plaintiffs' religion, Utah is merely prohibiting a harmful practice, without regard to religion. *See State v. Geer*, 765 P.2d 1, 3 (Utah Ct. App. 1988) (prosecuting non-religiously motivated bigamy); *Holm*, 2006 UT at ¶50, 137 P.3d at 741 (prosecuting religiously motivated bigamy); *Fischer*, 219 Ariz. at 413, 199 P.3d at 668 (numerous religions allow bigamy). Under the Supreme Court's religious-freedom jurisprudence, that suffices.

CONCLUSION

This Court should reverse the district court either for lack of jurisdiction or on the merits.

Dated: June 29, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

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1. The foregoing brief complies with the privacy requirements of Tenth Cir. Rule 25.5 because the brief does not contain any private information that that rule would require to be redacted.

2. The paper copies of the foregoing brief required to be submitted to the clerk's office are exact copies of the brief as filed via ECF.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2015, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit using the CM/ECF system, thereby serving the following parties' counsel:

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