No. 14-4117

In the United States Court of Appeals
for the Tenth Circuit

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

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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

INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato's interest here lies in its unwavering commitment to the age-old principle that the freedom of speech is indispensable to a free and independent democratic society, as enshrined in the Constitution through the First Amendment.[1]

SUMMARY OF ARGUMENT

In Utah, one can promise love to someone in addition to one's spouse. One can share one's home and create a family with someone in addition to one's spouse. But one cannot, under penalty of criminal law, call this

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

other person one's wife or husband, or otherwise express that one is religiously or spiritually married to more than one person.

This happens because Utah defines criminal bigamy, Utah Code Ann. § 76-7-101 (West 2014), to include saying "I do" in a wedding ceremony, or saying "that's my wife" about someone one lives with, even when everyone knows that the marriage is not legally recognized. *See infra* Part I.A. The Utah Supreme Court has expressly stated that the statutory prohibition on "purport[ing] to marry" more than one person applies even when one is not "claiming any legal recognition of the marital relationship." *State v. Holm*, 137 P.3d 726, 736 (Utah 2006). Indeed, *Holm* found that the prohibition was violated simply by "religious solemnization," *id.* at 732—which involves nothing but speech and expressive conduct.

Utah's bigamy statute thus criminally punishes speech: the difference between permissible conduct (*e.g.*, promising to love someone other than one's spouse) and forbidden conduct (*e.g.*, using a ceremony to promise to love someone other than one's spouse) consists simply of what a participant in the conduct says. Moreover, this speech does not fall within any First Amendment exception, such as for fraud or con-

spiracy. Indeed, the statute criminalizes speech that creates and maintains intimate associations between consenting adults, and communicates freely chosen religious and moral values. The bigamy statute thus restricts protected and valuable speech because of its content, and is therefore presumptively unconstitutional.

Nor can the government rebut this presumption by showing that the law is narrowly tailored to a compelling government interest. Utah's bigamy statute is overinclusive as to any interest in preventing fraud, domestic abuse, or child sexual abuse.

And while speech that characterizes polygamous relationships as "marriages" might encourage the spread of such relationships, such a supposedly bad tendency cannot suffice to justify a content-based speech restriction on such speech. Utah may decline to legally recognize certain relationships as marriages, but it may not criminalize wedding vows—or speech labeling a polygamous relationship as a marriage—simply because it finds such relationships distasteful.

The District Court held Utah's bigamy statute unconstitutional primarily on Free Exercise Clause grounds. *Amicus* argues that the statute violates the Free Speech Clause independently of that analysis, as

appellees also contended below, *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1176, 1181 n.8, 1222 (D. Utah 2013), and contend on appeal, Appellee Br. 28, 54, 61. "[A]n appellee is generally permitted to defend the judgment won below on any ground supported by the record without filing a cross appeal." *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1037 n. 7 (10th Cir. 2011).

ARGUMENT

I. Utah's Bigamy Statute Criminalizes Speech

A. The Statute Restricts Conduct Only When It Is Accompanied by Speech That Conveys a Certain Message

Utah bigamy law does not ban married people from having sex with people other than their spouses.[2] It does not ban married people from

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[2] Utah adultery law does make such sex outside marriage a misdemeanor, Utah Code Ann. § 76-7-103 (West 2014)—not a felony like bigamy—but this statute has fallen into desuetude. In the words of then-Chief Justice Christine Durham in *State v. Holm*, 137 P.3d 726, 772 (Utah 2006) (Durham, C.J., dissenting),

> When asked at oral argument whether anyone had recently been prosecuted under the criminal adultery statute, the State expressed uncertainty, but suggested that there may have been some "attempts" to prosecute adultery. I have found two federal district cases in which the adultery statute was claimed to be relevant. *See Oliverson v. West Valley City*, 875 F. Supp. 1465, 1469 (D. Utah 1995) (considering the claim of a West Valley City police officer who alleged his supervisor disciplined him based in part on his having engaged in conduct that would violate section 76-7-103); *Roe v. Rampton*, 394 F. Supp. 677, 689 (D. Utah 1975) (Rit-

living with extramarital romantic partners. It does not ban married people from having and raising children with such partners.

Instead, Utah's bigamy law bans going through a marriage ceremony when one is already married, since that is what is meant by "purports to marry another person," Utah Code Ann. §§ 76-7-101(1), (2) (West 2014). The Utah Supreme Court has expressly concluded that "purports to marry" includes "religious solemnization" performed "without claiming any legal recognition of the marital relationship." *State v. Holm*, 137 P.3d 726, 736 (Utah 2006).

Yet just as wearing black armbands to protest the Vietnam War, *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 505-506 (1969), burning an American flag, *Texas v. Johnson*, 491 U.S. 397, 404-405 (1989), and holding a St. Patrick's Day parade, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-570 (1995), are speech under the First Amendment because of the mes-

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ter, D.J., dissenting) (suggesting that if the plaintiff wife were forced to comply with the requirement that she disclose an abortion to her husband, he would be able to bring charges against her under section 76-7-103). However, I have been unable to discover any prosecution under this provision. The most recent adultery prosecution to have reached this court appears to have occurred in 1928, under a previous criminal provision.

sage they convey, so too is a marriage ceremony. Such a ceremony is "inherently expressive," *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 66 (2006), because the parties have an "intent to convey a particularized message" by the ceremony—the message that they want to treat each other as spouses in their own eyes and in the eyes of God—and "the likelihood [is] great that the message would be understood by those who viewed it," *Johnson*, 491 U.S. at 404.

The message-conveying nature of the ceremony is present even though the expression is nonpolitical. Indeed, nonpolitical speech can constitute symbolic expression just as much as political expression can. *See Cressman v. Thompson*, 719 F.3d 1139, 1152, 1156 (10th Cir. 2013); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004) ("First Amendment protection does not hinge on the ideological nature of the speech involved."). Thus, the statute restricts speech—whether spoken or as expressed through ceremony[3]—because of its content. *See*

[3] For example, the court in *Holm* described a ceremony which "appeared, in every material respect, indistinguishable from a [legal] marriage ceremony"—complete with a white dress the bride considered a wedding dress, a religious officiant, and "vows typical of a traditional wedding ceremony." *Holm*, 137 P.3d at 736-37. That ceremony involved both spoken speech (*e.g.*, the speech of the officiant and the responses

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 657 (10th Cir. 2006) ("Content-based restrictions on speech [are] those which suppress, disadvantage, or impose differential burdens upon speech because of its content . . . .") (internal citations and quotation marks omitted).

The ban on "cohabitation" when one is already married likely also applies only to people who have gone through a wedding ceremony with the non-spouse—not just to people who live together in a romantic relationship with a non-spouse. As the court below noted, "Counsel for Defendant represented at oral argument . . . that the Statute is not intended to capture mere adultery or adulterous cohabitation, but that it is illegal under the Statute to *participate in a wedding ceremony* between a legally married individual and a person with whom he or she is cohabiting and/or to call that person a wife." *Brown*, 947 F. Supp. 2d at 1180 (emphasis added). It is "the expression of the fact that the person is a wife that makes it illegal." Tr. of Motions for Summary Judgment, Jan. 17, 2013, at 53, ER App. 875 (statement by trial court, describing the defendants' position on how mere adultery, which is not punished

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from the affirmative by the bride and groom) and expressive conduct (*e.g.*, the wearing of the symbolic white dress).

by the statute, differs from punishable cohabitation; the defendants' counsel agreed with this statement).

Indeed, unmarried couples' simply living together "is commonplace in contemporary society," including in Utah. *Holm*, 137 P.3d at 771-72 (Durham, C.J., dissenting) (citing statistics reporting that "of the 42% of Utah residents between the ages of 18 and 64 who were unmarried, 30% to 46% were currently cohabiting outside of marriage"); *see also Brown*, 947 F. Supp. 2d at 1210 (echoing Chief Justice Durham's analysis). And this includes couples where at least one member is married to another, "[e]ven outside the community of those who practice polygamy for religious reasons," "where one person is legally married to someone other than the person with whom he or she is cohabiting," *Holm*, 137 P.3d at 772 (Durham, C.J., dissenting)—especially, for instance, when the married partner is separated, or is awaiting a divorce, and may feel quite comfortable living with a new romantic partner.

Yet, as Chief Justice Durham points out, the State of Utah generally "perceives no need to prosecute nonreligiously motivated cohabitation, whether one of the parties to the cohabitation is married to someone else or not." *Id.* What seems likely to drive the decision to prosecute co-

habitants seems to be the cohabitant's decision to engage in a wedding ceremony, and not just a married person's living with another sexual partner. As the court below noted, summarizing defendant's answers to the court's questions at oral argument, "the essential difference between the adulterous cohabitation that 'goes on all the time' in the State and the cohabitation at issue in the Statute seems to be the existence of a wedding ceremony." *Brown*, 947 F. Supp. 2d at 1215.

Indeed, the State has agreed that it is a person's speech that makes him a bigamist. When pressed to explain the difference between felony bigamy and (unprosecuted) misdemeanor adultery, the government explained that a bigamous couple "claim[s] to be married" and "it's the expression of the fact that the person is a wife that makes it illegal." *Id.* at 1215 (quoting the record in *Holm*). The statute is thus triggered by what people say, not just by what they do.

B. Such Conduct-Plus-Speech Restrictions Are Treated as Restrictions on Speech

To be sure, a marriage will usually involve a marriage ceremony coupled with conduct: living together, having sex, often raising children. But punishing conduct only when it is accompanied by speech conveying

a certain message, as Utah does under the bigamy statute, constitutes restricting speech.

For instance, in *Street v. New York*, 394 U.S. 576 (1968), the Supreme Court overturned Street's conviction for burning a flag while saying, "We don't need no damned flag." *Id.* at 579, 587-89. The statute under which Street was prosecuted forbade "cast[ing] contempt upon either by words or act (any flag of the United States)," *id.* at 578, and the Court assumed without deciding that flagburning was constitutionally prohibitable. (This was twenty years before *Johnson*, 491 U.S. at 420, which held that flagburning was protected.)

But the Court nevertheless held that "we are still bound to reverse if the conviction could have been based upon *both* his words and his act." *Street*, 394 U.S. at 587 (emphasis added). When a person is charged under some statute with "having done both a constitutionally protected act and one which may be unprotected," a conviction for violating the statute produces "an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Id.* at 588 (internal citation omitted).

Such a danger materializes as a matter of course in bigamy prosecutions. In such prosecutions, a defendant is charged with "having done both a constitutionally protected act"—engaging in a ceremony—"and one which may be unprotected" by the First Amendment (such as living together or having sex with someone other than one's spouse). And the jury has to "rest[] the conviction on both [acts] together," unless it convicts based solely on the constitutionally protected speech (the wedding ceremony).

The same principle—that a conviction may not rest on the combination of constitutionally protected speech and constitutionally unprotected conduct—is repeated in many other cases. For example, in *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), the Supreme Court struck down an ordinance restricting door-to-door residential canvassing. *Id.* at 153-54. The conduct itself—going onto someone else's property, knocking on doors, ringing doorbells, distributing handbills—could likely have been restricted as applied to commercial door-to-door sales. *Id.* at 165. But because the ordinance restricted canvassing for any "cause," it likewise restricted constitutionally protected religious speech and political speech. *Id.* Thus,

the Court found that, as applied to this combination of speech (the advocacy) and conduct (going door-to-door), the ordinance was a content-based speech restriction. *Id.* at 165-66.

Similarly, in *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977), the Court held that a decision to fire an untenured teacher could not be based on his having disclosed a new school dress code policy to the press, "[e]ven though he could have [otherwise] been discharged for no reason whatever." *Id.* at 283. And indeed, in that case the teacher had engaged in a good deal of behavior that was likely not constitutionally protected, and for which he likely could have been fired: he referred to students as "sons of bitches," made an obscene gesture to two female students, and argued with another teacher to the point where the other teacher slapped him. *Id.* at 281-82. The Court took the view that such behavior, even if technically speech, would have been punishable by the government acting as employer. *Id.* at 286; *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that employees could be fired if their speech is sufficiently disruptive); *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that employees could be fired for speech on purely private matters).

Nevertheless, the Court held that the board could not have permissibly fired the teacher if the teacher's discussion with the press (constitutionally protected speech) had been a substantial factor in the board's decision. *Mt. Healthy*, 429 U.S. at 283-84. And this Court has likewise held that a government employer impermissibly restricts employee speech when, but for the employee's protected speech, she would not have been fired—even when the employee could have been fired for other, constitutionally unprotected, behavior. *Gardetto v. Mason*, 100 F.3d 803, 811-15 (10th Cir. 1996) (concluding that, when an employee said six things, four of which were constitutionally protected and two of which were not, the question was whether the employer would have fired the employee even in the absence of the constitutionally protected speech).

In this case, the bigamy statute applies only because the couple says to each other and to the community that the relationship is a marriage. Moreover, in contrast to the underlying conduct in *Watchtower*, *Mt. Healthy*, and *Street*, it is not even clear that prohibiting the underlying adulterous conduct in this case would be constitutional. *See Lawrence v.*

Texas, 539 U.S. 558, 578-79 (2003).[4] As noted above, Utah does not prosecute adultery—nor does an adultery misdemeanor carry the same penalties as a bigamy felony. Thus, even more than in *Watchtower*, *Mt. Healthy*, and *Street*, Utah's bigamy statute relies on speech and not conduct alone to define the prohibited behavior.

II. The Speech Restriction Embodied in the Statute Is Unconstitutional

A. The Restricted Speech Does Not Fall Within Any First Amendment Exception

1. The Bigamy Statute Is Not Limited to Marriages That Are Aimed at Defrauding a Party, the State, or Someone Else

Some speech entering into bigamous marriages, of course, is fraudulent. Spouse A may, for instance, marry spouse B without revealing to B that A is already married to someone else. Or, even if B knows about the preexisting marriage, A and B may pretend the new marriage is legally valid and fraudulently claim benefits available only to legally married spouses. This sort of fraudulent speech is constitutionally un-

[4] Nor, for that matter, is it clear that Utah could constitutionally restrict the freedom to live with whomever one chooses, at least outside of the zoning context. *See Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (holding that the decision of whom to live with is protected by the freedom of intimate association).

protected. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 623-24 (2003).

Utah's bigamy statute, though, is not limited to fraud. *See Brown*, 947 F. Supp. 2d at 1219, 1224-25. It applies even in the absence of a "desire for [legal] benefits," *Holm*, 137 P.3d at 738, or of other deception of any person or institution. And the First Amendment does not allow prophylactic statutes that bar a broad range of speech just because some instances of speech may be fraudulent. *See, e.g.*, *Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 798-99 (1988); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 969-70 (1984); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Schneider v. State*, 308 U.S. 147, 164 (1939). Instead, laws aimed at preventing fraud must be limited to fraudulent speech. *See, e.g.*, *Madigan*, 538 U.S. at 612-13, 617-18.

2. The Bigamy Statute Cannot Be Justified as an Attempt to Ban Conspiracies to Commit a Crime

There is also a First Amendment exception for speech creating or advancing certain kinds of illegal conspiracies. As the Supreme Court noted in *United States v. Williams*, 553 U.S. 285, 298 (2008), "[m]any long established criminal proscriptions—such as laws against conspiracy, in-

citement, and solicitation—criminalize speech . . . that is intended to induce or commence illegal activities." Conspiratorial speech, then, like solicitation and incitement, constitutes either (1) its own First Amendment exception, or (2) speech within the broader First Amendment exception for "speech integral to criminal conduct." *See United States v. Stevens*, 559 U.S. 460, 468-69 (2010). Most conspiracies conspire to commit acts that are independently criminal (such as murder, drug distribution, or theft).

The agreements forbidden by bigamy law, on the other hand, are agreements to love one another, and to live life together. They are not agreements to commit future felonies. The bigamy law is not limited, for instance, to situations where one of the parties is underage.

Nor can polygamy law be justified as a way of preventing conspiracies to commit adultery. Adultery laws, as noted *supra* p. 4 n.2, are apparently no longer enforced in Utah. And even if adultery is treated as a crime, conspiracies to commit adultery are commonplace: any enduring adulterous relationship that both parties know to be adulterous would involve the parties agreeing to commit adultery. Yet the bigamy statute singles out only those conspiracies to commit adultery that are accom-

panied by a wedding ceremony. This violates the First Amendment under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), since it unjustifiably singles out some assertedly punishable speech for prohibition based on its content.

3. The Bigamy Statute Cannot Be Justified as an Attempt to Ban Conspiracies to Engage in Noncriminal Conduct

Some conspiracies—and therefore words that create such conspiracies—can be punished if the parties are promising to commit acts that would be legal if done individually, but that are criminal if done in a coordinated way. A classic example of this sort of conspiracy is an agreement to restrain trade. *See, e.g.*, *California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 515 (1972) ("Certainly the constitutionality of the antitrust laws is not open to debate.").

But an agreement to love and cherish one another as husband and wife is very different from an agreement to fix prices. A marriage is not an agreement to stifle economic competition. And though marriage often has an economic dimension, it principally involves people coming together to fulfill broader emotional, familial, spiritual, and personal goals.

Indeed, the U.S. Supreme Court has drawn precisely this distinction between protected and unprotected agreements. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court held that the government's power to prohibit purely economic agreements did not extend to agreements to enter into political boycotts of white merchants. *Id.* at 913-15. Though the agreement in *Claiborne* had the immediate purpose and effect of restraining trade, it was constitutionally protected because its ultimate purpose was political. *Id.* at 914-15.

An agreement to love and to live life together is even more clearly constitutionally protected. The agreement is not aimed at committing future crimes. Nor is the agreement purely economic, as with an agreement to fix prices. Like the agreement in *Claiborne Hardware*, wedding vows are made for religious, spiritual, and romantic purposes that transcend economic gain. *Id.* at 907.

Moreover, regardless of whether a state legally recognizes polygamous marriages or provides various benefits to people in such marriages, multi-partner families remain constitutionally protected "intimate associations." The Constitution secures a right to enter into intimate associations, including multi-partner associations, because "individuals

draw much of their emotional enrichment from close ties with others," and "[p]rotecting these relationships . . . safeguards the ability independently to define one's identity." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). Thus, wedding vows (including polygamous vows) that make such relationships meaningful to their participants are made to "effectuate rights guaranteed by the Constitution itself." *Claiborne Hardware*, 458 U.S. at 914.

These limits on the conspiracy exception are consistent with the Court's acknowledgement that First Amendment exceptions are "well-defined and narrowly limited." *Stevens*, 559 U.S. at 468-69 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Just as there is no broad exception for false speech, but only for particular kinds of speech that cause particular harms to particular people, *see United States v. Alvarez*, 132 S. Ct. 2537, 2545-47 (2012), so too there is no general First Amendment exception for all agreements, but only for particular kinds that are tied to crime or focused on anticompetitive activity for economic gain.

B. The Statute Is Not Narrowly Tailored to Any Compelling Government Interest

Utah's bigamy statute is therefore a content-based speech restriction that covers speech outside any First Amendment exception. It is thus unconstitutional unless the government shows that the statute is narrowly tailored to serve a compelling government interest. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). This the government cannot do.

First, the statute is overinclusive as to the government's interest in preventing fraud, which means that the statute is not narrowly tailored. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-21 (1991). People need not claim (or otherwise represent) that their marriage is legal in order to count as "purport[ing] to marry" or "cohabit[ing]" under the statute. Indeed, people like the plaintiffs have instead "intentionally placed themselves outside the framework of rights and obligations that surround the [legal] marriage institution." *Brown*, 947 F. Supp. 2d at 1197 (internal quotation marks and citations omitted).

Second, the statute is also overinclusive as to the government's interest in preventing domestic violence, statutory rape, and other harms

to the wellbeing of minors. Criminal laws already punish such behaviors—which of course also arise in two-partner relationships, as well as in multi-partner relationships that do not involve a wedding ceremony. When those harms occur in polygamous relationships, they should be punished on the same basis. The "broad criminalization of . . . religious [polygamy] itself as a means of attacking other criminal behavior is not [justified]." *See Holm*, 147 P.3d at 775 (Durham, J., dissenting).

A content-based speech restriction fails strict scrutiny if the government cannot show a "direct causal link" between the forbidden speech and the compelling government interest. *Entm't Merchants Ass'n*, 131 S. Ct. at 2738. No such direct causal link is present here, since there is nothing in a wedding ceremony that directly causes domestic violence, statutory rape, or other physical harms. Moreover, there are far less speech-restrictive means of preventing such harms: prohibiting the harmful behavior itself, which Utah has already done. *See Ashcroft v. ACLU*, 542 U.S. 656, 667-668 (2004) (explaining that a statute criminalizing the posting of "patently offensive" material that is accessible by minors could not withstand strict scrutiny because there were less speech-restrictive alternatives).

C. Speech Cannot Be Restricted on the Grounds That It Tends to Persuade People to Engage in Supposedly Socially Harmful Behavior

The best explanation for the bigamy statute, and its specific targeting of wedding ceremonies, seems to be this: (1) Polygamous relationships, Utah believes, are bad for society. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166 (1879) (arguing that polygamy leads to the "patriarchal principle" in society); *Holm*, 137 P.3d at 744 ("The people of this State have declared monogamy a beneficial marital form and have also declared polygamous relationships harmful."). (2) Ceremonies that expressly aim to legitimize and sanctify polygamy tend to promote such polygamous relationships. (3) Therefore, the argument goes, such ceremonies should be banned, even if the actual sexual and romantic relationship is not itself outlawed.

This argument, though, is an attempt to resurrect the old bad tendency test, *Gitlow v. New York*, 268 U.S. 652, 671 (1925), under which speech could be restricted just because of its supposed tendency to cause social evils. The Supreme Court has expressly rejected that test, and has instead held that speech that has a tendency to lead to crime can be punished only if it is intended to and likely to produce "imminent law-

less action," *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969); *Hess v. Indiana*, 414 U.S. 105, 109 (1973), or solicits a specific crime, *Williams*, 553 U.S. at 299.

Indeed, as early as 1959, the Supreme Court held that speech (such as the distribution of the film *Lady Chatterley's Lover*) could not be punished on the ground that it promotes adultery, and therefore harms society. *Kingsley Int'l Pictures Corp. v. Bd. of Regents*, 360 U.S. 684, 689 (1959). Speech that promotes polygamy likewise cannot be punished, whether it generally advocates the propriety of polygamy, or celebrates a particular polygamous relationship as holy.

Nor can the government justify restricting speech that aims to sanctify and legitimize polygamous relationships on the grounds that such restrictions protect the symbolic meaning of the label "marriage." The Court has made clear that the government has no power to demand "that a symbol be used to express only one view of that symbol or its referents," *Johnson*, 491 U.S. at 417. That was true for the American flag involved in *Johnson*; it is likewise true in this case, for the word "marriage" or the symbolism involved in wedding ceremonies.

Finally, while this Court has held that the government has an important interest in protecting the institution of monogamous marriage, *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985), that interest is important "only insofar as marriage is understood as a legal status," *see Holm*, 137 P.3d at 771 (Durham, J., dissenting). In any event, for the reasons given above, the interest cannot be compelling enough to justify restricting speech that conveys a message that supposedly undermines monogamous marriage. Speech used to sanctify marriages that do not claim legal recognition thus remains constitutionally protected.

CONCLUSION

For these reasons, § 76-7-101 is unconstitutional as applied to the plaintiffs-appellees. This Court should therefore affirm the District Court's conclusion that "purports to marry" under § 76-7-101 should be read as limited to attempts to get legal recognition for polygamous marriages. And the Court should also affirm the District Court's conclusion that the cohabitation prong of § 76-7-101, as understood by defendant, is unconstitutional.

Respectfully Submitted,

s/ Eugene Volokh
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Cato Institute
Aug. 28, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,835 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

s/ Eugene Volokh
Attorney for the Cato Institute
Dated: Aug. 28, 2015

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s/ Eugene Volokh
Attorney for the Cato Institute
Dated: Aug. 28, 2015

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on Aug. 28, 2015, I caused this Brief of the Cato Institute as Amicus Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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