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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CHRIS SEVIER, JOHN GUNTER JR., and WHITNEY KOHL Plaintiffs, v. BRYAN E. THOMPSON, in his official capacity as Clerk of Utah County; GARY R. HERBERT, in his official capacity as Governor of Utah; SEAN REYES, in his official capacity as Attorney General of Utah. Defendants.	**STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AND SUPPORTING MEMORANDUM** Case No.: 2:16-cv-00659-DN Judge: David Nuffer Magistrate Judge: Evelyn J. Furse

Pursuant to Federal Rules of Civil Procedures 8(a), 12(b)(1), and 12(b)(6), Defendants Utah Governor Gary R. Herbert and Utah Attorney General Sean Reyes ("State Defendants") move to dismiss Plaintiffs Chris Sevier, John Gunter Jr., and Whitney Kohl's ("Plaintiffs") Amended Complaint.

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INTRODUCTION

Unhappy with the courts' recent expansion of the definition of marriage, Plaintiffs ask this Court to overturn rulings of the United States Supreme Court and the 10th Circuit Court of Appeals and limit the definition of marriage to one man and one woman.[1] The Court should dismiss Plaintiffs' claims for relief because it lacks the authority to overturn the decisions of the United States Supreme Court and the Tenth Circuit.

Arguing in the alternative, Plaintiffs contend that because the courts have recognized same-sex individuals' right to marry, this Court should further expand the right to marry to include unions between a person and a laptop computer and unions between multiple partners. Although their Amended Complaint is far from a model of clarity, it appears Plaintiffs claim the State has violated their constitutional rights to due process, equal protection and the free exercise of religion by denying them the right to marry an inanimate object or multiple partners. These claims are untenable as a matter of law because Plaintiffs lack standing to bring these claims and the right to marry has not been indefinitely expanded, nor should it be. Simply put, marrying a laptop computer or multiple partners are not rights protected by the Constitution.

The Court should dismiss Plaintiffs' claims against the State Defendants because 1) Plaintiffs' Complaint does not comply with Rule 8; 2) Plaintiffs failed to join a necessary party; 3) Plaintiffs lack standing to bring their Section 1983 claims on behalf of themselves or others; and 4) Plaintiffs fail to state any valid constitutional injuries upon which relief may be granted.

[1] *See* Pls.' Am. Compl. Doc. 46, pp. 10, 12.

PROCEDURAL BACKGROUND

On February 16, 2016, Sevier filed a Complaint seeking similar relief.[2] Defendants moved to dismiss.[3] In response, Sevier sought to amend his Complaint.[4] The Court denied Sevier's request as untimely and ruled that his original Complaint was the operative Complaint.[5] On June 22, 2016, Sevier moved to voluntarily dismissed his Complaint.[6] Sevier based his request for dismissal on his assertion that "Judge Pead is clearly engaging in intellectual dishonesty despite his circular self-justifying proclamation that he takes his integrity seriously" and his belief "that Judge Pead wants to keep these matters at the original complaint stage because he feels that it is his purpose on the bench to get rid of controversy and collect a paycheck in exchange for what amounts to dishonorable dereliction of duty that enables judicial fraud, waste, mismanagement, and abuse."[7] Sevier further questioned whether "Judge Pead has the backbone for the kind of honesty it is going to take to clear up what amounts to unbridled judicial corruption; racketeering in fraud and obscenity; and even treason."[8] Notwithstanding plaintiff's repeated attacks on the integrity of the courts, the court properly analyzed the motions before it and dismissed his complaint.[9]

On June 20, 2016, Sevier filed a substantially similar Complaint.[10] Defendants again moved to dismiss.[11] In response, Sevier again sought to amend his Complaint.[12] The Court

[2] *See* Sevier v. Herbert et al, Case No. 2:16-cv-00124-JNP-DBP (doc. 3).
[3] *Id*. doc. 16.
[4] *Id*. doc. 18.
[5] *Id*. doc. 33.
[6] *Id*. doc. 37.
[7] *Id*. at 2, 3.
[8] *Id*. at 5.
[9] *Id*. doc. 4.
[10] *See* Compl. 12, doc. 1.

allowed Sevier to amend his Complaint, but noted the proposed Amended Complaint[13] did not satisfy the requirements of Federal Rules of Civil Procedure 8 and 12(f).[14] Accordingly, the Court specifically instructed Sevier that his Amended Complaint must comply with the Federal Rules of Civil Procedure.[15] On May 2, 2017, Plaintiffs filed their Amended Complaint.[16] And, for the third time, Defendants move to dismiss the Amended Complaint.

FACTUAL BACKGROUND

The following facts taken from Plaintiffs' Amended Complaint are treated as true for the purposes of this motion only:

1. Plaintiffs are residents of Utah and reside in Utah County, Utah.[17]
2. Defendant Gary R. Herbert is the Governor of the State of Utah and, in his official capacity, is the chief executive officer of the State of Utah.[18]
3. Defendant Sean Reyes is the Attorney General for the State of Utah, and his official capacity, is the chief legal officer of the State of Utah.[19]
4. In 2004, the Utah Legislature enacted Utah Code Ann. § 30-1-2(5), which prohibited and declared void marriages between persons of the same sex, and Utah Code Ann. § 30-1-4.1, which stated that it was the policy of the State of Utah to recognize marriage "only as the legal union of a man and a woman." Further, the statutes stated that "[e]xcept for the

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[11] *See* doc. 19, 20.
[12] *See* doc. 24, 28.
[13] *See* doc. 24-1.
[14] *See* doc. 45, at 7.
[15] *Id.*
[16] *See* doc. 46.
[17] Pls.' Am. Compl. doc 46, ¶ 14.
[18] Pls.' Am. Compl. doc 46, ¶ 20.
[19] Pls.' Am. Compl. doc 46, ¶ 21.

relationship of marriage between a man and a woman . . . this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married."

5. In 2004, the Utah Legislature also passed a Joint Resolution of Marriage proposing as an Amendment to the Utah Constitution, a provision stating "(1) [m]arriage consists only of the legal union between a man and a woman, and (2) [n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."[20]
6. The Lieutenant Governor of the State of Utah was directed to submit the proposed amendment to the "voters of the state at the next regular general election in the manner provided by law," and if the proposed amendment "is approved by a majority of those voting on it at the next regular general election" the amendment would take effect on January 1, 2005.[21]
7. Amendment 3 passed with approximately 66% of the vote and became Article I, section 29 of the Utah Constitution.[22]
8. In 2013, six same-sex couples filed suit against the Governor and Attorney General of the State of Utah challenging the three provisions of Utah law relating to same-sex marriage – Utah Code Ann. 30-1-2, 30-1-4.1, and art. I, § 29 of the Utah Constitution.[23]

[20] Utah Const. art. I, § 29, held unconstitutional by *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.2014).
[21] Laws 2004, H.J.R. 25, §§ 2-3.
[22] *See Kitchen v. Herbert*, 755 F.3d 1193, 1200 (10th Cir. 2014).
[23] *Id.*; *see also Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013).

9. The district court held that art. I, § 29 of the Utah Constitution denied same-sex couples equal protection and declared art. I, § 29 of the Utah Constitution and the Utah laws defining marriage as between one man and one woman unconstitutional. The court further permanently enjoined enforcement of the challenged provisions.[24]
10. In 2014, the Tenth Circuit affirmed the district court's holding.[25]
11. In 2015, the United States Supreme Court held, in *Obergefell v. Hodges*, that "States are required by the Constitution to issue marriage licenses to same-sex couples" and "same-sex couples may exercise the fundamental right to marry in all States."[26]
12. Plaintiff Sevier self-identifies as a "machinist," meaning that he is sexually oriented to machines.[27]
13. At some unspecified time, Plaintiff Sevier believes that he married an inanimate object under New Mexico law.[28] On June 16, 2016, Plaintiff Sevier applied for a marriage license from the Utah County Clerk's office, but was denied.[29]
14. Plaintiff Sevier sought a marriage license for himself and a machine.[30]
15. Plaintiffs Kohl and Gunter desire to enter into a marriage relationship with more than two spouses.[31]

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[24] *Id.*; *see also Kitchen v. Herbert*, 961 F.Supp.2d at 1204.
[25] *Id.* at 1199.
[26] *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2607-08 (2015).
[27] Pls.' Am. Compl. doc 46, ¶¶ 2, 18.
[28] Pls.' Am. Compl. doc 46, ¶ 35.
[29] Pls.' Am. Compl. doc 46, ¶ 37.
[30] Pls.' Am. Compl. doc 46, ¶¶ 2, 18, 37.
[31] *Id.*

16. Plaintiff Gunter and Kohl requested that the Utah County clerk issue a marriage license for them and another female spouse (who is unnamed in this action).[32]

17. The Clerk denied their marriage request because they were one man seeking to marry two women.[33]

LEGAL STANDARDS GOVERNING DISMISSAL

A. Standard for Dismissal Under Rule 8.

Under Rule 8, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[34] Further, to state a viable claim, the "complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's action harmed him or her; and, what specific legal right the plaintiff believes the defendant violated."[35] Absent these basic elements, Defendants lack the sufficient information to prepare a defense and the court lacks the specificity necessary for adjudication.[36] A complaint is further susceptible to dismissal under Rule 8 when it is "'so verbose, confused and redundant that its true substance, if any, is well disguised.'"[37]

B. Standards for Dismissal Under Rule 12.

Federal Rule of Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. Dismissal for lack of subject-matter jurisdiction is proper when the claim is

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[32] *Id.* ¶ 38.
[33] *Id.*
[34] Fed. R. Civ. P. 8(a)(2); *see also* DUCivR 3-5 (complaint "should state the basis for the court's jurisdiction, the basis for the plaintiff's claim or cause for action, and the demand for relief.").
[35] *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10 Cir. 2007).
[36] *Id.*
[37] *Mitchell v. City of Colo. Springs, Colo.*, 194 Fed. Appx. 497, 498 (10th Cir. 2006) (dismissing complaint for being "verbose, prolix and virtually impossible to understand" and a "rambling, massive collection of facts . . . completely lacking in clarity and intelligibility.").

"so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy."[38] "When a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."[39] The party asserting jurisdiction bears the burden of proving jurisdiction exists.[40] A court can find that subject-matter jurisdiction is lacking based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."[41]

Dismissal under Federal Rule of Procedure 12(b)(6) is proper when a plaintiff's complaint fails to state a claim upon which relief can be granted. In reviewing a 12(b)(6) motion to dismiss, the court assumes the truth of well-pleaded facts and draws reasonable inferences in a light most favorable to the plaintiff.[42] But a claim survives only if "there is plausibility in the complaint."[43] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[44] The plaintiff's factual allegations must be enough to "raise a right of relief above the speculative level," upon the assumption that all the factual allegations in the complaint are

[38] *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 777, 39 L.Ed.2d 73 (1974); see also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359, 79 S.Ct. 468, 473, 3 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).
[39] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).
[40] *Middleton v. Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014).
[41] *Barnson v. U.S.*, 531 F.Supp. 614, 617 (D. Utah 1982).
[42] *See Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011).
[43] *Hall v. Witteman*, 584 F.3d 859, 863 (10th Cir. 2009) (citations and quotations omitted).
[44] *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

true.[45] Courts will not accept as true mere conclusory allegations or legal conclusions masquerading as factual allegations.[46]

In reviewing a motion to dismiss, the Court may rely on the facts as alleged in the complaint, but may also rely on all documents adopted by reference in the complaint, documents attached to the complaint, or facts that may be judicially noticed.[47] In the context of a motion to dismiss, this Court may take judicial notice of court dockets and filings.[48]

C. Standard for Dismissal Under Rule 19.

"The standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied 'in a practical and pragmatic but equitable manner.'"[49] Determining whether an absent party is indispensable requires a two-part analysis.[50] The court must first determine under Rule 19(a) whether the party is necessary to the suit and must therefore be joined if joinder is feasible.

Whether a party is a necessary party under Rule 19(a) requires assessment of three factors. The court must consider (1) whether complete relief would be available to the parties already in the suit, (2) whether the absent party has an interest related to the suit

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[45] *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 at 555.

[46] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding Court will not "accept as true a legal conclusion couched as a factual allegation.").

[47] *See* Fed. R. Civ. P. 10(c); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007); *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991).

[48] *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp*., 605 F.2d 1169, 1172 (10th Cir. 1979). ("[I]t has been held that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.").

[49] Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 94 F.3d 1407, 1411 (10th Cir. 1996)(quoting *Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873, 878 (10th Cir.1981). *See also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106–07, 88 S.Ct. 733, 736–37, 19 L.Ed.2d 936 (1968)).

[50] *See id*.; Francis Oil & Gas, 661 F.2d at 877–78.

which as a practical matter would be impaired, and (3) whether a party already in the suit would be subjected to a substantial risk of multiple or inconsistent obligations.[51]

"If an absent party is necessary but cannot be joined, the district court must then ascertain 'whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed.'"[52] If the district court concludes the action cannot proceed "in equity and good conscience," it must deem the absent party indispensable and dismiss the suit.[53]

ARGUMENT

1. Plaintiffs' Amended Complaint Continues to Violate Fed. R. Civ. P. Rule 8 and Rule 12(f)

In its order allowing Sevier to amend his Complaint, the Court expressly instructed Sevier to pay special attention to Rules 8 and 12(f) of the Federal Rules of Civil Procedure and warned that "Mr. Sevier's Complaint must provide the Defendants with fair notice of his claims and the grounds upon which his claims rest."[54] The Court also noted that "[w]hile courts generally construe pro se pleadings liberally … the Court does not accord the same leniency to Mr. Sevier because he is an attorney."[55] The Court specifically explained the infirmities in Plaintiff's proposed Amended Complaint:

> Mr. Sevier's Proposed Amended Complaint violates Rule 8 because it consists of conclusory allegations and extended legal and philosophical arguments that do not help state Mr. Sevier's claims. Further, the Court notes that Mr. Sevier's Proposed Amended Complaint violates Rule 12(f). "[I]f the complaint or other pleadings are abusive or contain offensive

[51] *Id.* (citing Fed. R. Civ. P. 19(a)

[52] *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999) (quoting Fed.R.Civ.P. 19(b)).

[53] *See* id.*; see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

[54] Order Granting Pl. Mot. to Am., doc 45, p. 6.

[55] *Id.* (citations omitted).

> language, they may be stricken *sua sponte* under the inherent powers of the court." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (quoting *Phillips v. Carey*,638 F.2d 207, 208 (10th Cir. 1981)). "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Mr. Sevier must further focus his amended complaint and remove immaterial, redundant, or offensive language. Mr. Sevier's Complaint must provide the Defendants with fair notice of his claims and the grounds upon which his claims rest.[56]

Plaintiffs have ignored the Court's instructions and failed to comply with Rules 8 or 12(f). Plaintiffs' Amended Complaint is not a short and plain statement of Plaintiffs' claims showing entitlement to relief. Plaintiffs have not removed "immaterial, redundant or offensive language . . . ."[57] Instead, the Amended Complaint primarily consists of irrelevant statements, ad hominem attacks and unsupported legal conclusions.[58] Plaintiffs' Amended Complaint is a

[56] Doc. 45 at 7

[57] *Id.*

[58] For example, Plaintiffs' Amended Complaint states that "[w]hen an individual says 'love is love' what they really mean is that they are perfectly ok with government assets being used to crush anyone who finds homosexuality to be immoral, obscene, or subversive to human flourishing." (Pls.' Am. Compl. doc 46, ¶8); "It is not just the Defendants who are on trial here. It is unquestionably the Courts themselves for their unconstitutional decision to selectively codify fiction." (*Id.* at ¶9); "The continuation of judicial cover up and deliberate intellectual dishonesty is simply not going to be allowed, since the Senate Judiciary has eyes on this action for cause. The Court's duty here is not to "save face" but to enforce the United States Constitution." (*Id.*at ¶7); "The United States is a nation of second chances and this Court has been given the opportunity to break rank from the prior Courts and actually tell the truth in light of the fact that *the current legal definition of marriage is completely invalid from a Constitutional perspective*." (*Id.* at ¶11, emphasis added); "Homosexuality, zoophilia[ ], machinism, and polygamy are all equally part of the church of post-modern western moral relativism and expressive individualism. They are separate but equal sects within one overall religion." (*Id.* at 28).

diatribe condemning homosexuality and attacking the integrity of the courts.[59] Because Plaintiffs' Amended Complaint does not comply with Rule 8 or Rule 12(f), the Court should dismiss Plaintiffs' Amended Complaint.

2. The Court Must Dismiss Gunter's and Kohl's Claims for Failure to Join a Necessary Party.

Gunter and Kohl contend the Utah County's denial of a marriage license to join Gunter, Kohl, and an unidentified third person in a polygamous union violates their constitutional rights. The person whom Gunter and Kohl seek to marry is a necessary party under Rule 19(a). Complete relief is not available to Gunter and Kohl without the third member of their desired polygamous marriage participating in the lawsuit and seeking the same relief. Undeniably, the absent and unidentified party has an alleged interest related to this lawsuit, i.e, obtaining a marriage license, which as a practical matter would be impaired if the case were to proceed without their participation.

Without knowing the identity of the indispensable third party, they cannot be joined. The Tenth Circuit has clearly held: "If an absent party is necessary but cannot be joined, the district court must then ascertain 'whether in equity and good conscience the action should

[59] For example, Plaintiff states that "the prior courts wrongfully shoehorned gay rights into the 14th amendment narrative box, when *the truth is that sexual orientation has nothing to do with immutability but is nothing less than an implicitly religious orthodoxy*." (Pls.' Am. Compl. doc 46, ¶9, emphasis added); "the homosexual community feel that the Plaintiffs marriage request threatens their[] *fake gay rights civil rights crusade*" (*Id.* at ¶46, emphasis added); "by legally recognizing gay marriage" the state "subject[s] Christians and others … to religious persecution" (*Id.* at ¶58); "homosexuality, beastiality, polygamy, zoophilia, and machinism all equally violate community standards of decency *and are categorically obscenity in action.*" (*Id.* at ¶45, emphasis added); "man-man marriage discriminates against women on the basis of gender by telling them that they are not good enough to be a wife and mother… woman-woman marriage discriminates against men by telling them that they are not good enough to be a father and husband." (*Id.* at ¶81).

proceed among the parties before it, or should be dismissed.'"[60] This case cannot proceed "in equity and good conscience," without the participation of the absent party. A challenge to the state's prohibition against polygamy cannot exist without at least three parties seeking a marriage license. Moreover, Plaintiffs cannot prove, nor can Defendants contest, whether more than two individuals requested a marriage license or whether the County clerk denied the license. Because the action cannot proceed "in equity and good conscience," the Court must deem the absent party indispensable and dismiss the suit.[61]

3. The Court Lacks Subject-Matter Jurisdiction Over Plaintiffs' Claims Because They Do Not Have Standing to Assert Them.

Article III of the United States Constitution limits federal courts' jurisdiction to actual "cases" and "controversies."[62] Courts developed the standing doctrine to "give meaning to Article III's case-or-controversy requirement."[63] To satisfy Article III standing, a plaintiff must show: (1) an injury-in-fact; (2) that is traceable to the defendant's challenged conduct (causation); and (3) that is likely to be redressed by a favorable decision in the district court (redressability).[64] These elements are "an indispensable part of the plaintiff's case."[65] The party seeking to invoke federal jurisdiction bears the burden of establishing all three elements.[66] If a

[60] *Davis*, 192 F.3d at 959 (quoting Fed. R. Civ. P. 19(b)).
[61] *See id*.; see also *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, (1968).
[62] U.S. CONST. art. III, § 2; *see* also *Brown v. Buhman*, -- F.3d --; docket no. 14-4117, *18 (10th Cir., April, 11, 2016).
[63] *Board of County Commissioners of Sweetwater County v. Geringer*, 297 F.3d 1108, 1111-12 (10th Cir. 2002).
[64] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*. (TOC), Inc., 528 U.S. 167, 180–81 (2000); *see also Brown*, --F.3d---, docket no. 14-4117, *21.
[65] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).
[66] *Id*.

party lacks standing to bring a claim, the court lacks subject-matter jurisdiction over that claim.[67]

In addition to the requirements of Article III, standing also encompasses prudential standing requirements which embody judicially self-imposed limitations on the exercise of federal jurisdiction.[68] Prudential standing includes the general prohibition on a litigant raising another person's rights or asserting generalized grievances, and it requires that the complaint fall within the zone of interests protected by the law invoked.[69]

Here, Plaintiffs fail to establish both Article III and prudential standing. Plaintiffs have not established any of the three elements required to confer Article III standing. First, Plaintiffs cannot show an injury-in-fact. An injury- in-fact is "an invasion of a legally protected interest which is . . . concrete and particularized."[70] Plaintiffs merely allege that they attempted to secure marriage licenses—or achieve recognition of a previously issued marriage license—to a laptop computer and to multiple spouses.[71] However, there is no legally protected interest in securing a marriage license to a laptop computer or to multiple spouses.[72] Because Plaintiffs have no legally protected interest in polygamous marriage or marriage to a laptop computer, the State cannot interfere with this non-existent right in a manner sufficient to constitute an injury-in-fact to establish standing.

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[67] *See* *Hollingsworth v. Perry*, -- U.S. --, 133 S. Ct. 2652, 2668, (2013); *Tennille v. W. Union Co*., 809 F.3d 555, 559 (10th Cir. 2015).
[68] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).
[69] *Id*. at 12.
[70] *Id.* at 560.
[71] Pls.' Am. Compl, doc 46, ¶¶ 35-38.
[72] *See* Section F (discussing Plaintiff's failure to state an equal protection or due process claim upon which relief can be granted because there exists no fundamental right to polygamous marriage or to marry an inanimate object).

Second, Plaintiffs' claimed injuries were not caused by either Governor Herbert or Attorney General Reyes. Plaintiffs specifically allege that they sought marriage licenses from the Utah County Clerk.[73] County clerks within the State of Utah are tasked with issuing marriage licenses, not the Governor or the Attorney General. *See* Utah Code § 17-20-5(1).[74] Therefore, Plaintiffs' Amended Complaint does not allege any injury traceable to the State Defendants' conduct.

Third, Plaintiffs' alleged injuries cannot be redressed by an injunction against the State Defendants. As already discussed, the State Defendants are not charged with exercising any duties relating to the issuance of marriage licenses. Therefore, any relief this Court could provide in this suit against the State Defendants will not remedy the purported injury. Accordingly, Plaintiffs fail to satisfy the redressability prong of standing.

To the extent, Plaintiffs purport to bring claims on behalf of all "different-sex" individuals, or all polygamists, for their purported injuries, Plaintiffs lack standing to do so. The prudential requirements of standing prohibit Plaintiffs from asserting claims on behalf of such unidentified third parties.[75] Further, while Plaintiffs Kohl and Gunter allege that they are seeking a license for a polygamist marriage with a third party, that third party has not been added as a Plaintiff and indeed, has not even been identified in Plaintiffs' Amended Complaint. To the extent that a third party seeking to marry Plaintiffs Kohl and Gunter actually exists, prudential

[73] Pls.' Am. Compl, doc 46, ¶¶ 35-38.

[74] Utah Code § 17-20-5(1) provides that the "county clerk shall . . . issue all marriage licenses and keep a register of marriages as provided by law."

[75] *Elk Grove*, 542 U.S. at 12; *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("Ordinarily one may not claim standing in [court] to vindicate the constitutional rights of some third party."); see also *Singleton v. Wulff*, 428 U.S. 106, 114 (1976)); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961).

standing bars them from asserting that third party's rights on that third party's behalf.[76] Accordingly, this Court should dismiss Plaintiffs' claims against the State Defendants pursuant to Fed. R. Civ. P. 12(b)(1).

4. District Court Judges Lack Authority to Overturn Decisions Rendered by the 10th Circuit Court of Appeals and the United States Supreme Court.

The district of Utah, like all federal district courts, is bound by Supreme Court and Tenth Circuit precedent. Thus, Plaintiffs are not entitled to the relief they seek – overturning the decisions in *Obergefell v. Hodges*[77] and *Kitchen v. Herbert*.[78] Federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.[79] District court decisions cannot be treated as authoritative on issues of law.[80] "The reasoning of district judges is of course entitled to respect, but the decision of a district judge cannot be a controlling precedent."[81]

Plaintiffs make it clear throughout their complaint that they view polygamy, homosexuality, machinism, and zoophilia as disgusting, immoral acts which undermine the fabric of society.[82] Plaintiffs also make it clear that they view the Supreme Court's recognition of

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[76] *Elk Grove*, 542 U.S. at 12.
[77] *See U.S. v. Kirby*, 490 Fed. Appx. 113, 115 (10th Cir. 2012).
[78] 755 F.3d 1193, 1200 (10th Cir. 2014).
[79] *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).
[80] *Garcia v. Tyson Foods, Inc.*, 534 F.3d 1320, 1329 (10th Cir. 2008).
[81] *Id*. *Bank of Am., N.A. v. Moglia*, 330 F.3d 942, 949 (7th Cir.2003) (quotation omitted).
[82] *See*, Pls.' Am. Compl, doc 46, ¶¶27-28 ("Upon information and belief, the government of the United States was never designed to be used by moral relativist[s] to codify their religious beliefs in an effort [to] make them feel less inadequate and ashamed about a lifestyle and belief system that is otherwise *self-evidently removed from reality, exploitative, depersonalizing, dehumanizing, and immoral.* Homosexuality, zoophilia[ ], machinism, and polygamy *are all equally part* of the church of post-modern western moral relativism and expressive individualism.") (emphasis added); *see also Id*. at ¶45 ("Homosexuality, beastiality, polygamy, zoophilia, and machinism *all equally violate community standards of decency and are categorically obscenity in action.*") (emphasis added).

same-sex couples' right to marry as illegal, unconstitutional, and immoral.[83] Plaintiffs' real objective, therefore, is not to obtain marriage licenses for unions they themselves see as unlawful and unconscionable, but rather a desire to restrict homosexuals' right to marriage. Plaintiffs confirm their true objective by asking seven different times for this Court to overturn the Supreme Court's decision in *Obergefell* and restrict the definition of marriage to "one man and one woman."[84] Plaintiffs also repeatedly ask this Court to enter declarations that are calculated to undermine the rights of homosexuals.[85] In seeking these remedies, Plaintiffs have failed to state a

[83] "To suggest that sexual orientation is based on immutability like race is an act of fraud that is racially exploitative and intellectually dishonest." *Id.* at ¶34; "The superseding cause of the Plaintiffs injuries was the federal and state governments legal recognition of homosexual orthodoxy." *Id.* at ¶47; "The United States is a nation of second chances and this Court has been given the opportunity *to break rank from the prior Courts and actually tell the truth in light of the fact that the current legal definition of marriage is completely invalid from a Constitutional perspective*." *Id.* at ¶11 (emphasis added).

[84] *E.g.*, *Id.* at ¶C (asking the Court to "declare that all forms of marriage other than man-woman marriage violate the first amendment establishment clause"), ¶D (asking the court to "enjoin[ ] all marriages outside the definition of 'one man and one woman'…), ¶F ("enjoin[ ] the state from recognizing gay marriage because doing so is subversive to the racial civil rights and other forms of rights that are actually protectable under the 14th amendment…"), ¶H ("the Plaintiffs ask[ ] that the Court enter a Declaratory Judgment… that all laws that codify marriage outside the scope of man-woman marriage violate the first amendment establishment clause and other provisions of the United States Constitution."), ¶K ("enter an order directing Defendants to not recognize marriage request[s] and marriages beyond man-woman…"), ¶M (asking the court to enter a declaratory judgment that "Amendment 3, the Marriage Discrimination Statutes, …does not violate … the United States Constitution.").

[85] *Id.* at ¶F (seeking an order "[d]eclar[ing] that sexual orientation is a religious doctrine predicted on unproven faith based assumptions . . . and that sexual orientation is not based on immutability"; I (seeking an order "enjoining the Defendants from enforcing any law or policy that that seeks to establish the legal cognizability of gay marriage, gay rights, sexual orientation rights, and other forms of unproven religious mythology that is designed to haul the Nation under a caliphate of moral relativism in a pathetic effort to legislate away feelings of shame and guilt that naturally come from engaging in objectively immoral and subversive behavior"; ¶N (seeking "a declaration [that] sexual orientation . . . is not predicated on 'immutable traits' . . . ."); , ¶P (seeking a declaration that "all forms of marriage outside the traditional definition violate the state and federal obscenity statutes and whether the state has a compelling interest to uphold the community standards of decency or whether the 14th amendment pre-empts the state's obscenity codes"); and ¶Q ("Enter a declaration [that]

plausible claim for relief because the district court lacks authority to overturn the United States Supreme Court or the Tenth Circuit. Any decision made in favor of Plaintiffs would not have binding power even within the district of Utah. Therefore, Plaintiffs' claims fail and should be dismissed.

5. Sevier's Factual Allegations Are Not Plausible.

Sevier's factual allegations are not plausible. For example, Sevier's contention that he lawfully married an inanimate object in New Mexico is not plausible. A wedding ceremony where one party is entirely unable to consent is not a valid marriage.[86]

Further, Sevier cannot show plausible factual support for his allegation that the only purpose in denying him a marriage license in Utah County was discrimination based on his sexual preference for machines. Under Utah law, Sevier's computer is not a party legally capable of entering into a solemnized marriage and cannot meet the consent requirement of the unsolemnized marriage statute.[87] Furthermore, even if that were not the case, unless Sevier's computer has attained the age of fifteen it is too young to marry under Utah law.[88] Therefore, Sevier cannot satisfy even the most basic requirements for a valid marriage under Utah law. His factual allegations are not plausible, and his claims should be summarily dismissed.

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homosexuality, transgenderism, zoophilia, machinism, and polygamy are obscene and violate the community standard . . .."")

[86] *See Dion v. Rieser*, 285 P.3d 678, 682 (N.M. Ct. App. 2012) (In New Mexico, "[m]arriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential.); *Pierson v. Long*, No. 32,688, 2013 WL 4538119, at *1 (N.M. Ct. App. July 23, 2013); NMSA 1978, § 40–1–1 (1915); NMSA 1978, § 40–1–1 (1862).

[87] *See* Utah Code Ann. §§ 30-1-9 and 30-1-4.5.

[88] *See* Utah Code Ann. § 30-1-9.

6. Plaintiffs do Not State a Constitutional Injury for Which Relief May be Granted.

A. Plaintiffs Have Not Alleged a Violation of Their Substantive Due Process Rights.

Plaintiffs claim that Amendment 3 to the Utah Constitution violated their substantive due process rights.[89] Specifically, Plaintiffs contend that because Plaintiff Sevier cannot marry his laptop computer and Plaintiffs Kohl and Gunter cannot obtain a marriage license, they are denied the fundamental right to marry guaranteed by the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment demands that no state "deprive any person of life, liberty, or property, without due process of law."[90] In order to state a valid substantive due process claim, a plaintiff must first allege facts showing a deprivation of a protected liberty interest.[91] "Substantive due process' analysis must begin with a careful description of the asserted right, *for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field*."[92] Consequently, the Court cautions that the judiciary must "carefully formulat[e]" the liberty interest, and define it "narrowly," which requires "careful description of . . . the asserted liberty interest," and a showing that the asserted right is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[93]

Here, the Court should dismiss Plaintiffs' claims because they have not alleged facts

[89] The Supreme Court's decision on *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) struck down Amendment 3 as unconstitutional.
[90] *See* U.S. CONST. amend. XIV, § 1.
[91] *See Judkins v. Jenkins*, 996 F.Supp.2d 1155 (D. Utah 2014) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972)).
[92] *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citation and internal quotations omitted) (emphasis added).
[93] *Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997).

that show a deprivation of a protected liberty interest. In *Obergefell*, the Supreme Court recognized that the liberty interest in marriage, as protected by the United States Constitution, "requires a State to license a marriage between **two people** of the same sex and to recognize a marriage between **two people** of the same sex when their marriage was lawfully licensed and performed out-of-State."[94] But *Obergefell* does not establish a constitutionally protected right to marry a laptop computer or marry more than one person.[95] Nor does any decision of any court expand the right to marry to such a result. Simply put, there is no substantive due process liberty interest in marrying an inanimate object, or in marrying multiple people. Accordingly, Plaintiffs' purported substantive due process claims based on being denied the ability to marry a computer or marry polygamously fail as a matter of law.

B. Plaintiffs Have Not Alleged a Violation of Their Equal Protection Rights.

Plaintiffs contend that Defendants' refusal to allow them to marry a laptop computer or marry polygamously deprives them of equal protection of the law.[96] The Equal Protection Clause of the Fourteenth Amendment commands that no state shall deny to any person within its jurisdiction the equal protection of the laws.[97] To state a valid claim for violation of one's equal protection rights, a fundamental right or suspect classification must be implicated.[98] Accordingly, "if a law neither burdens a fundamental right nor targets a suspect class," a court will uphold the law.[99]

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[94] 135 S. Ct. 2584, 2588 (2015)(emphasis added).
[95] *See id*.
[96] Pls.' Am. Compl., doc 46, ¶77.
[97] *See* U.S. CONST. Amend. XIV, § 1.
[98] See *Heller v. Doe by Doe*, 509 U.S. 312, 312 (1993).
[99] *U.S. v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

Regarding equal protection and marriage, the district courts within the Tenth Circuit have held, following Obergefell, that States must allow same-sex couples to marry "on the same terms and conditions as opposite-sex couples."[100] In *Obergefell*, the Supreme Court observed that, concerning the right to marry, due process and equal protection rights are inherently intertwined.[101] Accordingly, the same reasons Plaintiffs fail to state a substantive due process claim upon which relief may be granted dictate that Plaintiffs also fail to state an equal protection claim upon which relief may be granted— primarily, that they have no fundamental right to marry more than one person or to marry a laptop computer.

While courts have long recognized the right to marry as a fundamental right, the Court in *Obergefell* did not rule that sexual orientation is a suspect class. In reaching its decision regarding the equal protection claim, the Court did not analyze the issue of class- and scrutiny-tiers in the context of same-sex marriage at all.[102] Because Plaintiffs do not belong to a suspect or quasi-suspect class, rational basis scrutiny applies to the decision to prohibit the marriage of Sevier and his laptop and the polygamous marriage of Kohl, Gunter, and an unnamed third party.[103]

The rational bases that support the prohibition on marrying inanimate objects are voluminous. The right to marry one's computer is not objectively, deeply rooted in the nation's

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[100] *Obergefell*, 135 S. Ct. at 2608 (emphasis added); see also *Roe v. Patton*, case no. 2:15-cv-00253-DB, 2015 WL 4476734, *3 (D. Utah, July 22, 2015) (opinion not selected for publication); *Marie v. Moser*, 122 F.Supp.3d 1085, 1112 (D. Kansas 2015).

[101] *See Obergefell*, 135 S. Ct. at 2602–05 ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. The Court's cases touching upon the right to marry reflect this dynamic.").

[102] *See generally Obergefell*, 135 S. Ct. 2584.

[103] *See Romer*, 517 U.S. at 631 (citing *Heller*, 509 U.S. at 319–320).

history and tradition such that it qualifies as a protected interest.[104] The rational basis for prohibiting marriages between people and inanimate objects also mirror those reasons set out by the Supreme Court in *Obergefell*. For instance, neither the person nor the computer reaps any of the benefits conferred by states as a recognition of society's support for a marriage, such as:

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.[105]

Because Sevier has no fundamental right to marry his laptop computer, does not belong to either a suspect or quasi-suspect class, and a myriad of rational bases for denying marriage to an inanimate object exist, Sevier fails to state an equal protection claim upon which relief may be granted. Accordingly, the Court should dismiss his equal protection claim pursuant to Fed. R. Civ. P. 12(b)(6).

Further, the rational bases that support the prohibition on polygamous marriage are also voluminous. The right to engage in polygamous marriage is not objectively, deeply rooted in the nation's history and tradition such that it qualifies as a protected interest.[106] Further, polygamous marriages fall outside the "*two-person union* unlike any other in its importance to the committed individuals" which the *Obergefell* court referenced.[107] Since Kohl and Gunter have no fundamental right to engage in a polygamous marriage, do not belong to either a suspect or quasi-suspect class, and a myriad of rational bases for denying polygamous marriage exist,

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[104] *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).
[105] *Obergefell*, 135 S. Ct. at 2601.
[106] *Id*.
[107] *Obergefell*, 135 S. Ct. at 2499 (emphasis added).

Plaintiffs Kohl and Gunter fail to state an equal protection claim upon which relief may be granted. Accordingly, the Court should dismiss their equal protection claims.

In addition, even if the Court determined that Kohl and Gunter have a protected interest in marrying an unidentified third-party under the umbrella of a broadly-tailored fundamental right to marriage, the State's prohibition of marriage to multiple people is narrowly tailored to further a compelling state interest. "When a statutory classification significantly interferes with the exercise of a fundamental right," it can be upheld if it is "supported by sufficiently important state interests and is closely tailored to effectuate only those interest."[108] The State has a compelling interest in prohibiting polygamous marriage because of the danger it poses to women and children.[109]

In fact, polygamous marriage harms women and children physically (through abuse and increased health risks)[110] and emotionally.[111] While plural marriage could, in theory, occur between a woman and multiple men, in the overwhelming majority of cases polygamy has

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[108] *See*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

[109] *See*, Richard A. Vazquez, Note, The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting *Reynolds* in the Light of Modern Constitutional Jurisprudence, 5 N.Y.U.J. Legis. & Pub. Pol'y 225, 233 (2001) ("The courts have an interest in protecting women and children form the strikingly real crimes committed in polygamous communities.")

[110] *E.g.* Symposium, *Divorce Reform: Rights Protections in the New Swaziland*, 8 Geo. J. Gender & L. 883, 898 n. 89 (2007) ("People in polygamous relationships tend to be very poor. The most vulnerable children come from polygamous relationships.") (quoting Interview with Phindile Weatherson, Bank Peronnel, in Ezulwini, Swaz. (Mar. 7, 2006)); *see also*, *Reference re: Section 293 of the Criminal Code of Canada*, [2011] B.C.S.C. 1588, ¶8 (Can. B.C.S.C.) (observing that women in polygamous marriages "are more likely to die in childbirth and live shorter lives than their monogamous counterparts").

[111] *See*, Salman Elbedour et al., The Effect of Polygamous Marital Structure of Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature, 5 Clinical Child and Family Psychol. Rev. 255, 259 (2002) ("[T]he stress of polygamous family life predisposes mothers and children to psychological problems."); *see* also, Alean Al-Krenawi & John R. Graham, A Comparison of Family Funcitoning, Life and Marital Satisfactions, and Mental Health of Women in Polygamous and Monogamous Marriages, 52 Int'l J. Soc. Psychiatry 5, 10 (2006).

manifested as polygyny (one man marrying multiple women), which violates norms of gender equality and is rooted in deeply patriarchal principles.[112] In many cases, "[w]omen in polygamous marriages are in an inherently vulnerable and unequal position in social and economic terms, and are more likely to be victims of domestic violence."[113] These trends have held steady across several ethnic and religious groups, adopting diverse interpretations of plural marriage.[114] Polygamous marriages have also been found to pose an increased health risk to children,[115] and to be harmful to their emotional health.[116] The dangers presented by polygamous marriage, in contrast to the benefits of monogamous unions extolled by *Obergefell*, are sufficient to afford the State a compelling interest in protecting women and children from the threat posed

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[112] *See*, Nicholas Bala, *Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy*, 25 Can. J. Fam. L. 165, 182 (2009) ("[T]he social reality today is that polygyny is the only form of polygamy that is widely practiced, and many of the concerns about polygyny are based on the inherent inequality in a relationship where one man has two or more wives. The recognition of the importance of monogamy and gender equality, combined with the negative psychological and physical health effects on women and children, help explain why there is a growing international trend to prohibit or restrict polygamy.") *See also Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("[P]olygamy leads to the patriarchal principle… which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.")

[113] *Id.* at 192 (quoting "Committee on Polygamous Issues, Life in Bountiful: A Report in the Lifestyle of a Polygamous Community" 12 (Apr. 1993)).

[114] *E.g.* Muslim communities, *see* Dena Hassouneh-Phillips, *Polygamy and Wife Abuse: A Qualitiative Study of Muslim Women in America*, 22 Health Care for Women Int'l 735, 744 (2001); Christian communities, *see* "Committee on Polygamous Issues, Life in Bountiful: A Report in the Lifestyle of a Polygamous Community" 12 (Apr. 1993).

[115] Elbedour et al., supra note 93, at 258 ("Considerable research demonstrates that children of polygamous families experience a higher incidence of marital conflict, family violence, and family disruptions than do children of monogamous families.").

[116] *Id.* at 258-259 ("Development outcomes of children predicted by marital problems include the following: poor social competence, a poorly developed sense of security, poor school achievement, misconduct and aggression, and elevated heart rate reactivity."); *see also*, Bala, *supra* note 94, at 198 ("Although children are surrounded by many sibling role models and may receive care from more than one maternal figure, they receive less care and attention as more children are added to the family: both mother and father become less available, and the bonds between parent and child weaken.").

by polygamy, an interest which may only be furthered through the narrow means of denying legal recognition to multiple partner marriages.[117]

C. Plaintiffs Has Not Alleged a Tenable Violation of the Establishment Clause.

The Establishment Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion."[118] The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion."[119] The definition of marriage given in *Obergefell* is neutral regarding religion. Yet, Plaintiffs strain to imbue the definition with religious meaning, primarily by defining all secular purposes as endorsements of the "religious dogmas" and "implicitly religious" "unproven faith based assumptions" of moral relativism.

Although the Tenth Circuit has "assume[d], without deciding, that atheism is a religion for First Amendment purposes,"[120] this does not mean that a generally applicable law defining marriage as between two consenting adult human beings is tantamount to teaching atheism. The heavy weight of authority from federal circuit courts has uniformly rejected arguments similar to Plaintiffs' claims regarding the purported establishment of anti-theist or secular humanist religion.[121] Although "the state may not establish a 'religion of secularism' in the sense of

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[117] *See State v. Holm*, 137 P.3d 726, 744 (Utah 2006) ("[M]arital relationships serve as the building blocks of our society. The State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful.")

[118] U.S. Const. amend. I, cl. 1; *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15 (1947).

[119] *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

[120] *Wells v. City and Cnty. of Denver*, 257 F.3d 1132 (2001).

[121] *See*, e.g., *Brown v. Woodland Joint Unified Sch.*, 27 F.3d 1373 (9th Cir. 1994); *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 687 (7th Cir. 1994); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058

affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'" the neutrality the Establishment Clause mandates does not itself equate with hostility towards religion.[122]

By defining moral relativism and "the dogma of sexual orientation" as a religion, Plaintiffs ask this Court to adopt an Establishment Clause test that has already been rejected by other courts. To that end, the Court need not accept Plaintiffs' definition of moral relativism for the purposes of a motion to dismiss because their definition is conclusory. Because "moral relativism" and "the dogma of sexual orientation" are not religions, Plaintiffs cannot state a plausible claim for relief under the Establishment Clause. On that basis alone, the Court should dismiss Plaintiffs' Establishment Clause claims.

In addition, because Plaintiffs cannot show that "sexual orientation" is a religion, Plaintiffs' claims cannot satisfy the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as modified by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).[123] To satisfy this test, "the governmental action (1) 'must have a secular legislative purpose,' (2) its 'principal or primary effect must be one that neither advances nor inhibits religion,' and (3) it 'must not foster an excessive government entanglement with religion.'"[124]

(6th Cir. 1987); *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985).

[122] *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963); *see also Smith*, 827 F.2d at 692.

[123] *See Bauchman for Bauchman v. West High School*, 132 F.3d 542, 551-54 (10th Cir. 1997).

[124] *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1031 (10th Cir. 2008) (quoting *Lemon*, 403 U.S. at 612-13).

i. The "Purpose" Prong.

The "purpose" prong tests "whether the government's 'actual' purpose is to endorse or disapprove of religion."[125] The stated purpose of adopting an expanded definition of marriage to include same-sex marriage was not to endorse or disapprove of religion, but to offer a fundamental right to similarly situated persons, a wholly appropriate purpose under the Establishment Clause.[126] Plaintiffs cannot show a government violation of the first prong of the *Lemon* test.

ii. The "Primary Effect" Prong.

The "primary effect" prong tests "whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of "government endorsement or disapproval" of religion.[127] Because it is an objective inquiry, it is irrelevant "whether particular individuals might be offended by [the government action]."[128] "[N]ot every governmental activity that confers a remote, incidental, or indirect benefit upon religion is constitutionally invalid."[129]

In this case, Plaintiffs allege that defining marriage to include same-sex couples will "subject Christians and others … to religious persecution."[130] However, Plaintiffs have failed to show that the expanded definition of marriage is a religious matter, or how religious ideologies will be imposed on everyone else in the way Plaintiffs allege. Plaintiffs' allegations are complete

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[125] *Bauchman*, 132 F.3d at 551 (citing *Edwards*, 482 U.S. at 585; *Wallace v. Jaffree*, 472 U.S. at 56).
[126] *See Obergefell v. Hodge*, 135 S.Ct. 2584, 2599-2600 (2015).
[127] *Id*. at 551-52 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 779-81 (O'Connor, J., concurring)).
[128] *Id*. at 555.
[129] *Id.*; *see also Lynch v. Donnelly*, 465 U.S. 668 at 683; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).
[130] Pls.' Am. Compl., doc. 46, ¶58.

conjecture. On this basis alone, the Court should find that Plaintiffs have not alleged that the primary effect of adopting the definition of marriage, as stated in *Obergefell*, is to advance or inhibit religion.[131]

But, even taken at face value, Plaintiffs' Amended Complaint falls short of alleging that the expanded definition of marriage to include same-sex marriage will have the primary effect of advancing or inhibiting religion. Defining marriage to include same-sex marriage conveys a message of neutrality: the definition neither endorses "secularism" as a religion, nor does it discredit theistic religion as a system of belief.[132] Accepting all of Plaintiffs' factual allegations as true, Plaintiffs cannot show a government violation under the second prong of the *Lemon* test.

iii. The "Excessive Entanglement with Religion" Prong.

The final prong of the *Lemon* test considers the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[133] In other words, "neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."[134] Accordingly, the entanglement prong of the *Lemon* test "typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution."[135]

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[131] *See Bowen v. Kendrick*, 487 U.S. 589, 612 (1988) (stating that it has not been the Court's practice to strike down statutes under the Establishment Clause "in anticipation that particular applications may [be] unconstitutional"); *Bauchman*, 132 F.3d at 554 ("We will not infer an impermissible purpose or effect in the absence of any supporting factual allegations."); see also *Lynch*, 465 U.S. at 680; *O'Connor v. Washburn University*, 416 F.3d at 1227; *Weinbaum*, 541 F.3d at 1038.

[132] *See Smith*, 827 F.2d at 694.

[133] *Lemon*, 403 U.S. at 615.

[134] *Everson*, 330 U.S. at 16; *see also Lee v. Weisman*, 505 U.S. 577, 602 n.3 (1992).

[135] *Bauchman*, 132 F.2d at 556; *see also Lemon*, 403 U.S. at 615.

As discussed previously, Plaintiffs failed to show that *Obergefell's* definition of marriage involves the State of Utah in any recognized religious institution or activity. Although a definition of marriage that includes same-sex marriage does not coincide with Plaintiffs' particular religious beliefs, this definition of marriage does not excessively entangle the state with religion. Similarly, Plaintiffs' conclusory assertion that the lawful recognition of gay marriage "subjects Christians and others . . . to religious persecution for not subscribing to or supporting and enabling the homosexual worldview" is not sufficient to state a plausible claim for relief under the Establishment Clause.[136] Thus, Plaintiffs cannot show a government violation of the third prong of the *Lemon* test. Therefore, Plaintiffs fail to state a plausible claim for relief under the Establishment Clause and the Court should dismiss their claims.

D. Plaintiffs Cannot State a Plausible Claim for Relief for Violation of § 1983 as an Independent Cause of Action.

Section 1983 does not itself establish any federally protected right. Instead, it creates a cause of action for plaintiffs to enforce federal rights created by the United States Constitution or, in some cases, other federal statutes.[137] In other words, § 1983 provides a procedural vehicle for plaintiffs to assert a claim for relief against a defendant who, acting under the color of state law, violated the plaintiff's federal rights. In addition, § 1983 provides the exclusive available federal remedy for violation of federal constitutional rights under the color of state law. Plaintiffs cannot bring claims directly under the Constitution, but must use § 1983 as a means for bringing

[136] *See* Pls.' Am. Compl., doc. 46, ¶58.
[137] *See Albright v. Oliver*, 510 U.S. 266, 271 (1994).

all constitutional claims.[138] Therefore, there is no independent cause of action for violation of § 1983 and Plaintiffs' third cause of action fails to state a claim.

CONCLUSION

For the reasons set forth above, State Defendants Governor Gary Herbert and Attorney General Sean Reyes respectfully request that the Court dismiss Plaintiffs' Amended Complaint in its entirety, with prejudice.

DATED: May 30, 2017.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ David N. Wolf
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Assistant Attorney General
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[138] *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989).

CERTIFICATE OF MAILING

I certify that on **May 30, 2017** I electronically filed the foregoing, **STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AND SUPPORTING MEMORANDUM**, and I also certify that a true and correct copy of the foregoing was sent by United States mail, postage prepaid, to the following:

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