

The above named Plaintiffs, through counsel of record, hereby respond to the Court's show cause order dated October 28, 2011, directing the parties to show cause whether the United States should not be joined as a required party under Fed. R. Civ. P. 19(a)(1)(B)(i).

The Plaintiffs respectfully submit that they do not believe that Rule 19(a)(1)(B)(i) is material to this lawsuit in requiring the joinder of the United States. The United States is not "a person [with] an interest relating to the subject of the action" in that a decision striking down the state law at issue would have no bearing on the conditions for Utah's statehood.

Before Utah became a state, Congress stated in Section Three of the Utah Enabling Act of 1894, Ch. 138, § 3, 28 stat. 107, ("the Enabling Act") that the then territory of Utah must guarantee

the perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: Provided, That polygamous or plural marriages are forever prohibited.

The language of the Act itself rebuts any argument that the United States has an interest, let alone a mandatory interest, as a party under Rule 19. First, the statute simply required the prohibition of "polygamous or plural marriage." The Browns have expressly and repeatedly stated in their Complaint and later filings that they are not challenging the Utah Constitution's prohibition on recognizing plural marriage. They have not sought, and do not now seek, recognition of their spiritual relationships or beliefs by the State. They are asking to be left alone by the State in their private associations between consenting adults. There is only one marriage license in the Brown family and that license is between two consenting adults in conformity with state law.

Second, there is a difference between criminalization and recognition. Utah Code Ann. § 76-7-101(1) makes it a crime when a person, "knowing he has a husband or wife or knowing the

other person has a husband or wife . . . purports to marry another person or cohabits with another person.” Utah Code Ann. § 76-7-101 (West 2010). The state statute is not designed to deny recognition of plural marriage but to punish anyone living under conditions considered “cohabitation.” This lawsuit seeks to challenge only the criminalization of this family structure and, therefore, would not interfere with the right of the state define recognized marriage in its licensing decisions as it deems fit. Thus, the state will continue to be in full compliance with the Enabling Act.

Third, the Enabling Act established the conditions to entry into the Union. Utah met that condition for entry and became a state. The provision is now unenforceable in the way suggested by the Defendants. Congress cannot create conditions for particular states that continue to make state status conditional for all perpetuity in fundamentally different ways than other states. Ironically, the federal government has long argued that a state could not withdraw from the Union for a failure of the federal government to satisfy a condition or prerequisite from a state. It fought a war on that issue. The same is true for the federal government. Once a state is admitted, it remains a state in this Union. That commitment runs both ways.¹

Finally, when Utah entered the Union, it benefitted from countervailing protections of state sovereignty over its own laws as guaranteed by federalism principles. U.S. Const. amend. X. Congress cannot create new enumerated powers by statute to bind individual states in unique ways outside of the Constitution. Congress remains limited in its intrusion into the inherent authority of state governments. *See generally United States v. Morrison*, 529 U.S. 598,

¹ The alternative would lead to bizarre complications. When most states were admitted to the Union, minorities and women could not vote and other archaic conditions existed. References to the race or gender of citizens did not create continuing limitations on states as related laws and values changed.

627 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *United States v. Lopez*, 514 U.S. 549, 551 (1995). Likewise, as the very line in the Enabling Act above attests, the State is expected to uphold constitutional rights of free exercise and free speech – rights that evolve under decisions by the Supreme Court. This action seeks to bring the state in compliance with existing case precedent, including but not limited to *Lawrence v. Texas*, 539 U.S. 558 (2003). The Enabling Act did not suggest that Utah’s law would be frozen in amber while other states would proceed to evolve with changing precedent and legal values.

As with Rule 19, Rule 5.1 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403 are equally inapplicable as a basis for any required or necessary joinder of the United States. Since the Plaintiffs are not challenging the constitutionality of a federal statute, no notice was required to the United States. The United States can always intervene in a case as an amicus. However, it is not a party in this dispute. The federal statute in question set conditions for entry in the Union. Those conditions were satisfied. They would continue to be satisfied if the relief sought in this case were granted, even assuming they continue to have binding effect over a century after entry of the state.

In light of the foregoing, the Plaintiffs respectfully submit that no notice or joinder is appropriate in this case for the United States as an interested party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to LCvR 5.3, I hereby certify that, on December 12, 2011, I electronically filed with the Clerk of the Court the foregoing Proof of Service of PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE using the CM/ECF system, and service was effected electronically pursuant to LCvR 5.4(d) on the following parties:

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