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[redacted]

March 15, 2017

The Hon. Gary Herbert
Governor, State of Utah
Utah State Capitol Complex
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By overnight mail

RE: Veto of House Bill 99
relating to the criminal
prosecution of polygamists

Dear Governor Herbert:

This letter will urge that you veto House Bill 99 on criminal prosecutions of Fundamentalist Mormons for bigamy. I understand that it passed the State Senate 15-14 in the final moments of the 2017 session and is on your desk.

I am not a member of the Utah Bar but I read HB 99 as amending Utah Code Section 76-1-101 concerning the crime of bigamy, described as cohabiting and "purporting to marry" with a person in addition to a legal spouse. It is a third degree felony, carrying a sentence of up to five years in prison. If the defendant is also charged with another of a listed offense[1] it becomes a second degree felony, carrying a sentence of

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1 They are fraud, domestic abuse, child abuse, sexual abuse, human trafficking, and human smuggling.

one to fifteen years in prison. Both carry up to a $10,000 fine.

What follows is (1) a summary of my personal experience and observations with the Fundamentalist Mormon community, (2) some practical problems with prosecution under the law, (3) why I believe it is unconstitutional under current Supreme Court constitutional law, and (4) some summary thoughts. I am deliberately footnoting to a lot of source material.

There are two legal aspects to plural marriage. One, can it be criminalized, subjecting those who believe in and practice it to criminal prosecution? Two, should it be recognized by the State through the issuance of marriage licenses and other regulatory procedures? This letter deliberately only addresses criminalization but recognition issues will come up.

(1). What I bring to this issue: You are entitled to know my point of view. I am sixth generation member of the Church of Jesus Christ of Latter-day Saints (LDS) with two generations of plural marriage in my family tree, both criminally prosecuted in the late 1880s. I am an active member of the Atlanta Ward of the Atlanta Stake of the LDS Church, and was raised in the Deep South. I am a career criminal defense lawyer specializing in defending death penalty cases in Florida, Texas, and Georgia, now retired. I have had a lot of experience litigating constitutional law.

I also have an LL.M. in legal history from the University of Wisconsin. I came to the program with an interest in the nineteenth century legal campaign directed against

Mormons and had begun to publish on the subject[2]. It was a thesis program and, at the suggestion of my major professor, Dr. Dirk Hartog, a family law and legal historian[3], I wrote about a notorious 1955 Utah Supreme Court decision on the rights of polygamous parents, In re Black,[4]

In January 1988, before beginning my LL.M. work, I showed up unannounced in historic Short Creek, by then incorporated as Colorado City, Arizona, and Hildale, Utah[5]. (This group did not come to be widely known as the Fundamentalist Church of Jesus Christ of Latter-Day Saints, or FLDS, until some years later.) Some surprised locals turned me over to Colorado City Mayor Dan Barlow, son of the late Fundamentalist Mormon leader John Y. Barlow[6], and we have remained good friends to this day[7].

Over the years I have built many close friendships in the Fundamentalist Mormon

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2 Ken Driggs: "The Prosecutions Begin: Defining Cohabitation in 1885," *Dialogue: A Journal of Mormon Thought.* 21(Spring 1988) at 109-125; "The Mormon Church-State Confrontation in Nineteenth Century America," *Journal of Church and State*, 30(Spring 1988), 273-289; "Lorenzo Snow's Appellate Court Victory," *Utah Historical Quarterly*, 58(Winter 1990), 81-93; " 'Lawyers of Their Own to Defend Them' : The Legal Career of Franklin Snyder Richards," *Journal of Mormon History,* 21(Fall 1995), 84-125.

3 Hendrik Hartog, *Man & Wife in America: a history.* Cambridge: Harvard University Press, 2000.

4 3 Utah2d 315, 283 P.2d 887, cert. denied, 350 U.S. 923 (1955). A portion of my thesis was published at Ken Driggs, " 'Who Shall Raise the Children?' Vera Black and the Rights of Polygamous Parents in Utah," *Utah Historical Quarterly*, 60(Winter 1992): 27-46.

5 See Ken Driggs, " 'This Will Someday Be the Head and Not the Tail of the Church': A History of the Mormon Fundamentalists at Short Creek," *Journal of Church and State*, 43(Winter 2001): 49-80.

6 1874-1949.

7 See David Isay, *HOLDING ON.* New York*:* W. W. Norton & Company*,* 1996. *"*Dan Barlow: Fundamentalist Mormon and Mayor of Colorado City, Arizona," at 169-1173.

world. I have been invited into many homes; been a guest of several nights at a time in some; attended a variety of church services; social functions, and funerals; and have been given access to their historical archives. I have never witnessed a "marriage" or other ordinance work they regard as sacred. I built many close friendships in the Apostolic United Brethren (AUB)[8] including their late leader Owen Allred whom I was very fond of[9]. I also know people in the Davis County Cooperative; what is now known as a Centennial Park which broke off from the FLDS in the 1980s; the Ivan Neilsen group; and many "Independents." While the groups are divided by separate leadership there are many more similarities than differences. Among my acquaintances are plural wives who are published historians, licensed physicians, attorneys who are members of the bar, and other professionals.

I brought the usual stereotypes about these people in with me but extended exposure has shown me how wrong those stereotypes are. There are many strong, very accomplished women in this world. Often times I felt the women were stronger personalities than the men. I found them to overwhelmingly be good, decent, caring, family-oriented, industrious people, sincere in their beliefs. You don't have to agree with them to see the good qualities in their lives.

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8 This community incorporated in Utah as a charitable religious society as the Apostolic United Brethren on February 18, 1975.

9 1914-2005. Note Brooke Adams, "Followers, Critics Profess Respect for Polygamist Leader," *Salt Lake Tribune*, February 16, 2005, at 1A.

Other than the distinct dress of the FLDS[10], most would blend in with the larger community, both rural and urban. I suspect most Utahs know and do business with Fundamentalist Mormons without realizing it. I have found them in Utah, Arizona, Nevada, Idaho, Montana, Texas, Mexico. and Canada. I am told there are a handful of AUB in Europe and I have met European converts who emigrated to the Mormon West.

Stereotypes come from somewhere, there is always some bad apple that outsiders see as representative. I casually know FLDS "Prophet" Warren Jeffs, who succeeded his late father Rulon Jeffs[11]. I am of the opinion he is right where he needs to be, serving life-plus-twenty in a Texas prison[12]. It is hard to deny that he is a pedophile who used his position and other people's blind faith to further his perversions[13]. He has become the public poster child for bad-boy polygamy and has done enormous harm to the whole community. I suspect it is no accident that Rep. Mike Noel represents a district near the

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10 See Shannon E. Spafford, "The Changing and Unchanging Nature of Fundamentalist Mormon Clothing Styles," in *the persistence of polygamy: Fundamentalist Mormon Polygamy From 1890 to the Present.* Newell G. Bringhurst and Crag L. Foster, editors , John Whitmer Books, 2015, at 310-327.

11 1909-2002. See also Michael Janofsky, "Mormon Leader Is Survived By 33 Sons, and a Void," *New York Times*, September 15, 2002, at 16A. For some discussion on leadership succession issues among the FLDS see Ken Driggs, "Imprisonment, Defiance, and Division: The History of Mormon Fundamentalism in the 1940s and 1950s," *Dialogue: A Journal of Mormon Thought.* 38(Spring 2006): 65-95, at 91-95.

12 See Ken Driggs, " 'TEXAS HAS ITS OWN VIEW OF POLYGAMISTS' THE TEXAS FLDS RAIDS AND TRIALS," *Sunstone*, August 2013, at 6-16. Jeffs is currently imprisoned as inmate #01726705, dob 12-03-1955, in the Powledge Unit outside Palestine, Anderson County, Texas.

13 Ken Driggs, "HOW WARREN JEFFS MAINTAINS HIS HOLD OVER THE FLDS," *Sunstone*, Spring 2016, at 32-37.

FLDS home world.

I have read news accounts surrounding HB 99 where sponsors claimed that domestic violence was common among Fundamentalist Mormons. I have done enough divorces in my career to know that there probably is some instance of domestic violence, just as there is in the public at large, including LDS Temple marriages. I have no reason to believe it is more prevalent in plural marriages. I have never personally observed it there.

I have also read news accounts of HB 99 proponents alleging human trafficking among Fundamentalist Mormons. I have never observed anything even remotely close to that in my time among them. If trafficking were truly established I would be thunderstruck.

Six times I have agreed to testify as an expert witness about Fundamentalist Mormons, although I only hit the witness stand twice[14]. Most recently I agreed too testify for the Justice Department in the FLDS Utah Food Stamp Fraud cases which plead out.

I have published extensively about them and over the years have been interviewed by CNN, CNN International, CBS, MSNBC, NPR, FOX, and a variety of other local television and print media on the subject.

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[14] I testified on May 18, 1995, during a Parowan bench trial. See Jeffs et al v. Stubbs et al, 970 P.2d 1234 (Utah 1998). Also in Williams v. Williams, case no. D0 99-4004, Mohave County, Arizona, in Kingman, in June 2001. The trial judge would not allow me to testify in the 2003 Washington County Rod Holm trial. Holm v. State, 2006 Utah 31, 137 P.3d 726, 749 (Ut. 2006).

(2). Some practical problems with the new law.

If HB 99 does become law some prosecutor will likely bring a case under it even though s/he should be on notice of its constitutional defects. Such a trial would get pounced on by freak show journalists and present Utah and Mormons in general in a bad light. This has always been the case in the past.

During the In re Black drama the State lost the high ground, and public support for the action, with the well publicized seizure of Vera Black's children. The action was heavily publicized with photos of a tearful mother and her terrified children[15]. The tide was turned and the children were returned to their mother in the hope she would quietly go away. The whole family have since lived out their lives in Short Creek. Vera, who I found to be a very spunky lady, is still alive and living in Short Creek, though very elderly and incapacitated.

About the same time the last of 263 children seized by Arizona authorities in the 1952 Short Creek Road were also released from custody.

And there were the Tom Green trials in 2000 and 2001. Because of the proximity of the 2002 Winter Olympics these trials drew considerable International publicity[16].

One cannot help but see the hypocrisy of HB 99.

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15 An FLDS contact of mine yesterday advised me of an 8 mm film of these events.

16 See State v. Green, 2004 Utah 76, 99 P.3d 820 (Utah 2004) and State v. Green 2005 Utah 9, 108 P.3d 710 (Utah 2005). Note also the David Kingston trial in that same time frame. See State v. Kingston, 2002 Utah App. 103, 46 P.3d 761 (Utah (2002).

The Supreme Court has already held that private consensual sexual relations between adults is protected from government restriction. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). The opinion observes:

> . . . adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty *protected by the Constitution* allows homosexual persons the right to make this choice.

123 S.Ct. at 2478 (emphasis added).

In Utah it is a crime to make purely personal vows to and not involve the State no matter how these vows might strengthen the family group. It has been my experience that "sister wives" are seen as co-parents by children in these homes. And on the other hand consensual sexual relationships where the parties may not even know each others names and come together strictly for sexual relations, are not criminalized by the State, in fact, they may not do so.

Utah does not have common law marriage. If a Utah couple consider themselves

married but lack a State approved ceremony they must go to court and seek the State's approval[17]. In order to keep the State out of their business they must maintain a legally undefined relationship with or without regard to the presence of children.

Sex for money, a commercial short-term sexual relationship, is not considered much of a threat under Utah law. A first offense is a class B misdemeanor carrying six months in jail and up to a $1,000 fine. Two prior offenses can earn you a class A misdemeanor carrying twelve months in jail and up to a $2,500 fine[18]. Compare that with the wildly disproportionate penalties set out in HB 99.

In the majority of jurisdictions bigamy is a crime of fraud. Wife number one does not know about wife number two. If multiple marriage licenses are applied for it involves the State in the fraud. It is marital cheating.

In Georgia where I live, bigamy is defined as: "A person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another person or carries on a bigamous cohabitation with another person."[19]

Utah attempts to trademark, to patent, the word "marriage", saying by law that only the State may use the word, and that the State gets to define the term.

It is Orwellian.

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17 Utah Code Ann. Sec. 30-1-4.5.

18 Utah Code Ann. Sec. 76-10-1302, 1303, 1313.

19 Ga. Code Ann. 16-6-20(a).

(3). Constitutional Problems:

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment is clear. Government action may not favor or advance any religious tradition over others no matter what public opinion and local religious culture may be. *Government action must be neutral towards religion*. It is hard for me to believe that any Mormon who understands even the smallest bit of LDS history cannot grasp the importance of this.

The author and prime mover of the bill, State Representative Mike Noel, was frequently quoted in the press. He has very publicly identified as LDS. Among other quotes I have read in the *Salt Lake Tribune* he says he was personally offended by the term ”Fundamentalist Mormon” and that “They are an apostate group and they are not part of my religion.” He has called the whole Fundamentalist Mormon world a form of organized crime. Similar statements are all over news accounts of the bill and in Legislative debate.

This is not new. A *Time* magazine account of the 1944 polygamy raids observed

"The . . . solidly respectable Mormon Church has learned that polygamy dies hard." The one page article went on to observe "Last week's polygamy crackdown was prompted by an appeal by Mormon leaders themselves."[20]

Any court challenge to HB 99 will make liberal use of Noel's and other Utah Legislators' comments on this bill in a religious context. I have no idea what the position of the LDS Church is on the bill but one cannot deny that a prime motive for HB 99 was Mormons trying to win a conflict with a related rival religious tradition. This brings the Establishment Clause to the forefront.

Church of the Lukumi Babalu Ayer Inc. v. City of Hialeah, 508 U.S. 520, 111 S.Ct. 2217, 124 L.Ed.2d 472 (1993), concerned local efforts to shut down worship by a community of South Florida "Santeria" followers who sacrificed small animals as part of their rituals. The Supreme Court invalidated the local ordinances on Free Exercise grounds. Even with a facially neutral statute the Supreme Court held that the courts can review extrajudicial sources for guidance:

> "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."

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20 "Fundamentalists," *Time*, March 20, 1944, at 55.

The opinion then goes on to set out Legislative discussion justifying the law as reasons why it violates then Free Exercise Clause, writing: "The patterns we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct that is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion." Lukumi Babalu, 111 S.Ct. at 2230-2231.

The second paragraph of Justice Kennedy's opinion states:

> "Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs."

Lukumi Babalu, 113 S.Ct. at 2222.

In Wisconsin v. Yoder, 406 U.S. 216, 92 S.Ct. 1526, 33 L.Ed.2d 15 (1972), held that sincere legitimate Amish religious beliefs prevailed over state law on compulsory school attendance for children. The record amply established the beliefs in question. Justice Warren Burger wrote:

> ". . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims of the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion of subordination of all other interests."

92 S.Ct. at 1533. In reviewing evidence of the religious belief in question, Justice Burger goes on to write:

> ". . . the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. . . ."

Ibid. Another thought from Yoder which I personally think is relevant and applies to the

Fundamentalist Mormon community is ". . . the case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." 92 S.C. at 1541.

Any prosecutions will also have to contend with the Federal Restoration of Religious Freedom Act (RFRA)[21].

(4). Summary thoughts

This religious community is not going away. There have been clusters of prosecutions in Arizona in 1935, a multi-state State and Federal Raid in 1944 that produced three decisions from the United States Supreme Court[22], the 1952 Short Creek Raid[23], and a smattering of other prosecutions. These Raids produced convictions and prison sentences. They also drove the community underground, scattered families, terrified children, and generated a fear of all government institutions.

It has been asserted that criminal prosecution of Fundamentalist Mormons cannot

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21 This legal issue has been muddied by Employment Division v. Smith, 484 U.S. 872 (1990) which congress effectively reversed with the Religious Freedom Restoration Act (RFRA), at 42 U.S.C. 2000bb which was itself limited at City of Boerne v. Flores, 521 U.S. 507 (1997). However Lawrence was decided subsequently.

22 Chatwin v. United States, 326 U.S. 455 (1946); Cleveland v. United States, 329 U.S. 14 (1946); and Musser et al v. Utah, 333 U.S. 95 (1948). One significant Fundamentalist win came at United States v. Barlow et al, 56 F.Supp. 795 (D. Utah 1944), cert. denied, 323 U.S. 805 (1944). See also Ken Driggs, "Imprisonment, Defiance, and Division: The History of Mormon Fundamentalism in the 1940s and 1950s," *Dialogue: A Journal of Mormon Thought.* 38(Spring 2005): 65-95.

23 Dr. Martha S. Bradley, *Kidnapped From That Lan*d: *The Government Raids on the Short Creek Fundamentalists*. Salt Lake City: University of Utah Press, 1993, in paperback.

succeed without some sort of special Fundamentalist Mormon criminal code which HB 99 tries to create. That is poppycock and certainly unconstitutional. Abuses in the past have been successfully prosecuted using ordinary criminal law established for the population as a whole. By abuses I mean sexual misconduct with children, fraud, domestic violence, and other offenses prosecuted with the public in general.

I have also heard people say that because polygamy is expressly prohibited in the original Utah State Constitution that these people somehow are not afforded meaningful rights. *The Utah Supreme Court does not think so*. A 1991 opinion where they refused to block an FLDS family from adopting, said "The fact that our constitution requires the state to prohibit polygamy does not necessarily mean that the state must deny any or all civil rights and privileges to polygamists."[24]

I am 68 years old. I was born in North Carolina and grew up in the Deep South in the time of bitter segregation. My Tallahassee, Florida, high school was the first in town to integrate. I vividly recall that time and the overt racism that justified segregation. Regrettably, this was at a time when the LDS Church was still segregated and these prejudices existed in the branches I attended as well.

I now attend the Atlanta Ward which is about half black, in the Atlanta Stake

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24 In the Matter of W.A.T., et al, 808 P.2d 1083, 1085 (Utah 1991). The adopting family was Vaughn Fischer and his plural wife. The Fischer's were represented by David Nuffer, now a United States District Court Judge, and Steve Snow, now LDS Church Historian. Both were bishops in St. George at the time. See also Ken Driggs, UTAH SUPREME COURT DECIDES POLYGAMIST ADOPTION CASE," *Sunstone*, September 1991, at 67-68. The case was a national news story.

which is about a quarter black and presided over by an African American Stake President. But Mormon history on race is still around and effects how we are received by African Americans.

I see parallels with Fundamentalist Mormons and polygamy. Utah Mormon Legislators and some of the public are prepared to believe things that simply are not true about these people in order to justify a bias against them. I carried some of those same prejudices before I actually came to know them. HB 99 is born of those prejudices and assumes practices and experiences that simply are not true, or exist only with the most extreme fringe. It is a solution in search of a problem.

And it is contrary to established constitutional law. It will not survive court challenge.

Governor, you should exercise your constitutional power to veto this bad law.

Sincerely,

Ken Driggs

KDD/