IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VALERIA TANCO and SOPHY JESTY, IJPE DeKOE and THOMAS KOSTURA, KELLIE MILLER and VANESSA DEVILLEZ, and JOHNO ESPEJO and MATTHEW MANSELL,	)	
Plaintiffs,	)	Case No. 3:13-cv-01159
v.	)	Judge Aleta A. Trauger
HASLAM, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs respectfully submit this reply in further support of their motion for a preliminary injunction.

ARGUMENT

I. DEFENDANTS HAVE NOT REBUTTED PLAINTIFFS' SHOWING OF A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Tennessee's Marriage Recognition Laws Are "Subject to Constitutional Guarantees" and "Must Respect the Constitutional Rights of Persons."

Defendants have failed to rebut Plaintiffs' showing that they are entitled to preliminary injunctive relief that would require the Defendants, while this litigation is pending, to recognize the lawful marriages into which the Plaintiff couples entered while residing in other states before moving to Tennessee to make their homes in this state. Pervading Defendants' Opposition are a basic error of constitutional doctrine and a shortsightedness regarding the interests of individuals and states in the interplay of different states' marriage laws in our federal system.

First, the basic constitutional error flowing throughout Defendants' Opposition is the incorrect assumption that Tennessee's authority to regulate marriage is "absolute." Opp. at 1. The Supreme Court has expressly rejected the argument that "the regulation of marriage should be left to exclusive state control." *Loving v. Virginia*, 388 U.S. 1, 7 (1967). Indeed, in landmark cases that frame our basic understanding of some of the most important *limits* on state power, the Supreme Court has repeatedly invalidated state marriage laws that violate the Fourteenth Amendment's guarantees of equal protection and due process. *See Loving*, 388 U.S. at 12; *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987). In the Supreme Court's most recent landmark marriage ruling, *United States v. Windsor*, the Court once again unequivocally affirmed that state laws regarding marriage are "subject to constitutional guarantees" and "must respect the constitutional rights of persons." 133 S. Ct. 2675, 2691, 2692

(2013). Contrary to Defendants' argument, Tennessee's Anti-Recognition Laws are not immune from those limits.

Second, Defendants' and Amicus's skewed version of federalism does not match the realities of how principles of sovereignty, comity, and liberty have interacted in our nation's history in connection with marriage recognition, including the basic premise that except in the rarest of circumstances, a couple who legally marries in one state can be assured that their marriage will be recognized in other states, regardless of where they choose to travel or live.[1] Federalism not only safeguards the various interests of the states and the federal government, but also "secures the freedom of the individual." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). That assurance—that states will respect the sovereignty of other states to determine their own marriage laws by respecting marriages that are validly entered into in any state—is a bedrock principle of our federalist system on which married couples have long relied.

States respect marriages from other states except where there is a compelling reason not to because they expect that other states will respect their marriages. Interstate transportability of marriages has long been a defining feature of American law and one that is essential to stability, order, and the basic functioning of our highly mobile society. For one state to treat another state's valid marriages as null and void without adequate justification is not only an affront to the rights of individuals, it is also an affront to the equal sovereignty of other states. Thus, rather than lending

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[1] Although judicial decisions concerning recognition of marriages often refer to the existence of a public policy exception permitting states to deny recognition to certain out-of-state marriages, the very existence of such an "exception" underscores that as a general rule, states universally recognize lawful marriages from other states. Moreover, in practice that exception has been applied only in rare and extreme cases. *See* Pl. Op. Br. at 11-14. Until the issue of marriage for same-sex couples emerged in the late 20th century, states had never before enacted broad prohibitions categorically denying recognition to large classes of married persons – with the notable and shameful exception of certain states' anti-miscegenation laws. *See id.*

support to Defendants' position, the *Windsor* Court's emphasis on states' authority over marriage underscores why Tennessee's Anti-Recognition Laws constitute an extraordinary departure from basic principles of federalism, as well as of due process and equal protection.[2]

B. The Anti-Recognition Laws Violate Due Process.

1. Legally Married Same-Sex Couples Have a Liberty Interest in their Existing Marriages that Is Protected Against Unjustified Deprivations by any Level of Government, Federal or State.

Citing no authority, Defendants contend that Plaintiffs' "protected interest . . . in their existing marriages exists solely by virtue of the laws of New York and California and is limited to those States." Opp. at 8. That argument flies in the face of decades of Supreme Court decisions holding that the marital relationship is entitled to the highest level of constitutional privacy and protection. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (marriage is among "the most intimate" of protected relationships); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (a person's interest in an existing marriage is "fundamental"). The notion that a person's protected constitutional interest in an existing marital relationship exists only within the geographical confines or the jurisdictional ambit of the state in which the marriage took place finds no footing

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[2] Defendants suggest in a footnote that DOMA's Section 2 gives Tennessee *carte blanche* to exclude the marriages of same-sex couples from recognition. Opp. at 7 n.6. Regardless of what Section 2 purports to authorize, Tennessee's Anti-Recognition Laws must satisfy the Fourteenth Amendment's commands of due process and equal protection of the laws. No statute passed by Congress can exempt Tennessee from those fundamental requirements. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) ("Congress may not authorize the States to violate the Equal Protection Clause."), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.") (internal quotations omitted).

Moreover, the basis of the Court's invalidation of Section 3 in *Windsor* applies equally to Section 2. Like Section 3, Section 2 is an unprecedented law that targets an entire class of legally married same-sex couples for disfavored treatment. Furthermore, in finding animus, the Court cited statements made in the House Report for DOMA, as well as the title of the statute itself, which apply equally to Section 2 as to Section 3. *See Windsor*, 133 S. Ct. at 2693. In light of the Court's analysis in *Windsor*, it would be anomalous to conclude that section 2 of DOMA was not equally infected with the animus that the Court found with respect to section 3 of DOMA.

in this country's constitutional jurisprudence. In *Loving*, for example, the Court did not suggest that the couple's protected interest in their marriage existed "solely by virtue of the laws of [the District of Columbia]," or was "limited to [that jurisdiction]," Opp. at 8. *See* 388 U.S. at 12. Rather, the Court held that Virginia's refusal to recognize the couple's marriage violated the married couple's due process rights. *Id.*

Windsor affirmed that marriage is a status of "immense import" and held that the government's refusal to recognize the legal marriages of same-sex couples violates their due process rights. 133 S. Ct. at 2692. Nothing in *Windsor* suggests that, for constitutional purposes, the marriages of same-sex couples are somehow different from the marriages of opposite-sex couples. To the contrary, the Court emphasized that the marriages of same-sex couples and opposite-sex couples are entitled to "equal dignity." *Id.* at 2693.

Defendants' argument that *Windsor*'s holding applies only to the federal government has no merit. A protected liberty interest in a family relationship is safeguarded from unjustified intrusion by any level of government—federal, state, or local. For example, a person's protected interest in maintaining parent-child bonds exists regardless of whether that interest is threatened by the federal government or a state. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (invalidating state law that impermissibly infringed upon parental rights).

Defendants misconstrue key language from *Windsor* as helping their case, when in fact that language highlights the types of harm that discriminatory marriage recognition laws effect and that the Constitution cannot tolerate. *See* Opp. at 6-7. In striking down Section 3, the Court in *Windsor* found one of DOMA's chief defects to be its deviation from "the long-established precept that the incidents, benefits, and obligations of marriage *are uniform for all married couples within each State*." *Windsor*, 133 S. Ct. at 2692 (emphasis added). Tennessee's Anti-Recognition Laws share

such a defect. The federal government recognizes the marriages of the Plaintiff couples for almost all federal "incidents, benefits, and obligations of marriage." But Tennessee denies the Plaintiff couples access to "incidents, benefits, and obligations of marriage" under Tennessee law. Thus, the Anti-Recognition Laws create a situation in which "the incidents, benefits, and obligations of marriage" are *not* "uniform for all married couples within [the] State" of Tennessee. All opposite-sex married couples enjoy the protections that both Tennessee and the federal government guarantee for married couples. Same-sex couples, however, have access to federal spousal protections, but are denied access to state law spousal protections. As in *Windsor*, this unequal treatment "places same-sex couples in an unstable position of being in a second-tier marriage." 133 S. Ct. at 2694.

2. The Anti-Recognition Laws also Violate Due Process Because they Burden Plaintiffs' Exercise of their Fundamental Right to Marry.

The Anti-Recognition Laws also impermissibly burden Plaintiffs' right to marry. Plaintiffs do not assert a novel "right to same-sex marriage," as Defendants contend, *see* Opp. at 11-12, but the same fundamental right to marry that the Supreme Court has recognized repeatedly. The right at issue here is no more a new "right to same-sex marriage" than the right in *Loving* was a "right to interracial marriage" or the right in *Turner* was a "right to prisoner marriage." The scope of a fundamental right does not depend on who is exercising it. For example, Tennessee could not strip a person of parental rights simply for being gay or lesbian. It is equally impermissible for the state to strip Plaintiffs of their marital status simply because they are same-sex couples.

C. The Anti-Recognition Laws Impermissibly Infringe upon Plaintiffs' Exercise of their Constitutional Right to Interstate Travel.

In responding to Plaintiffs' argument that the Anti-Recognition Laws impermissibly burden Plaintiffs' constitutionally protected right to travel, Defendants completely ignore

Plaintiffs' demonstration that the Anti-Recognition Laws "penalize the exercise of that right," *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), in one of the most severe ways possible—by essentially nullifying for state-law purposes the couples' marriages and by treating them as legal strangers to each other. The resulting burden on Plaintiffs' exercise of the right to travel is profound. Tennessee requires that same-sex couples surrender their marital status as the price of migrating into and resettling in the state for any reason—whether to pursue a new job opportunity, to care for an elderly or ill family member, or simply to make a fresh start in a new place. The right to travel is rendered largely meaningless for married same-sex couples when it is conditioned on sacrificing their marital status.

Defendants assert that the right to travel encompasses only three components and that Plaintiffs' claim does not implicate any of those components. Opp. at 17. The right to travel, however, has never been limited to those three components. Rather, in *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court stated that "[t]he 'right to travel' discussed in [its] cases embraces *at least* three different components." *Id*. at 500 (emphasis added). Thus, *Saenz* did not purport to provide an exhaustive enumeration of what the right to travel encompasses. Nor has the Sixth Circuit interpreted those three components as exhaustive. When addressing a claim that a local ordinance violated a federal constitutional right to travel *within* a state, the Sixth Circuit noted the three components listed in *Saenz*, acknowledged that the Supreme Court had not addressed whether the Constitution protects the right to travel *within* a state, and nevertheless went on to hold that "the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage." *Johnson v. City of Cincinnati*, 310 F.3d 484, 496-98 (6th Cir. 2002). Like the right discussed in *Johnson*, the freedom of spouses "to migrate, resettle, find a new job, and start a new life" together, *Shapiro*, 394 U.S. at 629, "enjoys a unique and protected

place in our national heritage," *Johnson*, 310 F.3d at 498. For opposite-sex married couples, it would be inconceivable that the price of relocating to another state would be the relinquishment of their marital status. Yet, that is exactly the penalty the Anti-Recognition Laws seek to impose on same-sex couples.

Defendants contend that the Anti-Recognition Laws do not implicate the right to travel because the laws treat same-sex couples the same regardless of how long they reside in Tennessee, and that the Constitution does not require that "newcomer[s] . . . be given benefits superior to current residents of a state" Opp. at 19 (citation omitted). The essence of Defendants' argument is that the constitutional right to travel cannot be implicated here because Tennessee supposedly is treating the Plaintiff same-sex couples just as poorly as it treats all other same-sex couples who reside in the state. *See id*. at 18. Defendants' effort to use Tennessee's near-wholesale discrimination against same-sex couples who live within the state as a shield against Plaintiffs' right-to-travel claim misses the mark. First, a state's refusal to recognize a couple's existing marital status imposes unique harms that are related to, but not the same as, harms experienced by couples whom the state will not permit to marry. Plaintiffs have explained in depth in their opening memorandum the unique and severe harms to couples and their children that flow from a government's refusal to recognize their marriages, as emphasized in *Windsor*. Second, a state's refusal to recognize the existing marriage of a same-sex couple that wishes to move into a state "implicates the right to travel" because it "deters travel," *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007), by requiring sacrifice of marital status as the price of migration.

Because Tennessee law severely penalizes Plaintiffs for exercising their right to travel, the Anti-Recognition Laws cannot stand absent a showing by Defendants that the laws are narrowly

tailored to serve "a compelling state interest." *Mem'l Hosp. v. Maricopa Cnty.,* 415 U.S. 250, 258 (1974); *see also Shapiro,* 394 U.S. at 634. Defendants have not rebutted Plaintiffs' showing that Defendants cannot meet that burden and that Plaintiffs therefore will prevail on their right-to-travel claim.

D. The Anti-Recognition Laws Deny Plaintiffs Equal Protection of the Laws.

1. The Anti-Recognition Laws Discriminate Based on Sexual Orientation.

Defendants argue that the Anti-Recognition Laws do not discriminate against Plaintiffs because, they assert, Tenn. Code Ann. § 36-3-113(d) and Article XI, section 18 of the Tennessee Constitution bar recognition by Tennessee of any marriage that could not be entered into in Tennessee. Opp. at 8 (asserting that Plaintiffs' marriages are "but one of many types of marriages not recognized by the State"). No legislative history or other authority is proffered in support of this position because the Anti-Recognition Laws were never intended and have never been applied to invalidate an opposite-sex marriage. Instead, Tennessee continues to recognize as a matter of course out-of-state marriages that could not have been entered into in Tennessee, unless those marriages are between same-sex couples.

Defendants' position is belied by the very language of the Amendment and the act that contained Section 113(d), each of which expressly restricts its scope to marriages of same-sex couples. The Amendment expressly limits recognition to opposite-sex marriages, stating: "The . . . relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state"; and "[i]f another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state *by the provisions of this section*, then the marriage shall be void and unenforceable in this state." (emphasis added).

Section 113(d) is restricted by the caption of the act of which it was a part. That caption candidly states that it is "AN ACT to amend Tennessee Code Annotated, Title 36, Chapter 3, *relative to same sex marriages* and the enforceability of *such* marriage contracts." 1996 Tenn. Pub. Acts 1031 (emphasis added). Under article II, section 17 of the Tennessee Constitution, the subject of a legislative act must be accurately expressed in its caption. *See Tenn. Mun. League v. Thompson*, 958 S.W.2d 333, 338 (Tenn. 1997). Defendants' interpretation of Section 113(d) to prohibit recognition by Tennessee of any out-of-state marriage inconsistent with Tennessee law would render the statute void under Article II, section 17. *See id.* Not surprisingly, no court has adopted—or been asked to adopt—Defendants' position since the enactment of Section 113(d) in 1996. Instead, Tennessee courts have continued to recognize and apply the longstanding rule that a marriage validly entered into in another state will be treated as valid in Tennessee as well, even if the marriage would not be permitted under Tennessee law. *See, e.g.*, *Farnham v. Farnham*, 323 S.W.3d 129, 140 (Tenn. Ct. App. 2009); *Lindsley v. Lindsley*, 2012 WL 605548, *1 (Tenn. Ct. App. Feb. 27, 2012); *Bowser v. Bowser*, 2003 WL 1542148, *1 (Tenn. Ct. App. March 26, 2003); *Stoner v. Stoner*, 2001 WL 43211, *3 (Tenn. Ct. App. Jan. 18, 2001); *Payne v. Payne*, 1999 WL 1212435, *4 (Tenn. Ct. App. Dec. 17, 1999); *Ochalek v. Richmond*, 2008 WL 2600692, *6 n.9 (Tenn. Ct. App. Jan. 30, 2008).

Even if Defendants were correct, however, that section 36-3-113(d) changed over a century of case law and created a broad new rule barring recognition of *all* out-of-state marriages that do not comply with Tennessee's own marriage laws, the Anti-Recognition Laws would still violate equal protection. A law that facially discriminates against a particular group is not insulated from challenge under the Equal Protection Clause merely because other laws may *also* subject other classes of persons to adverse treatment. As described above, multiple provisions of the Anti-

Recognition Laws specifically exclude married same-sex couples. Thus, even if Defendants' interpretation of Section 113(d) were correct, that would not change the fact that Tennessee *expressly* discriminates against all married same-sex couples and so denies same-sex couples equal protection.

2. *Windsor* Requires that the Anti-Recognition Laws Must Be Subjected at Least to Careful Consideration.

Defendants state their opposition to Plaintiffs' position that Tennessee's Anti-Recognition Laws are subject at least to the same "careful consideration" applied in *Windsor*, 133 S. Ct. at 2693, but Defendants have not supported their position with any substantive argument. Like Section 3 of DOMA, the Anti-Recognition Laws depart from Tennessee's longstanding recognition of marriages from other states in order to subject legally married same-sex couples to unequal treatment. *See id*. at 2694 (holding DOMA's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal"). Accordingly, under *Windsor*, the Anti-Recognition Laws may be upheld only if Defendants can demonstrate that these laws advance a legitimate purpose that is sufficiently important and substantial to "overcome[] the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696. This is true regardless of the level of scrutiny that applies to laws that discriminate on the basis of sexual orientation. As shown below, Defendants have failed to offer a sufficient justification for upholding the Anti-Recognition Laws under any standard of review, let alone the "careful consideration" required under *Windsor*, *id.* at 2693.[3]

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[3] Defendants also argue that Plaintiffs' claims are precluded by *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed w/o op.*, 409 U.S. 810 (1972), but *Baker* involved issues different from those that this case presents. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (holding that the precedential effect of summary dispositions by the Supreme Court extends only to "the precise issues presented and necessarily decided by those actions"). *Baker* was decided long before any state permitted same-sex couples to marry and therefore did not consider—much less address—the constitutionality of a law barring recognition of valid marriages of same-sex

3. The Anti-Recognition Laws Discriminate on The Basis of Sexual Orientation and Therefore Are Subject to Heightened Scrutiny.

Defendants acknowledge that "Plaintiffs make an argument for why this Court should not follow . . . Sixth Circuit precedent" applying rational basis review to government action that discriminates on the basis of sexual orientation, Opp. at 13, but they offer no substantive response to Plaintiffs' argument. Nor do they respond to Plaintiffs' argument that sexual orientation satisfies all of the considerations that the Supreme Court historically has applied in determining whether to apply heightened scrutiny. As Plaintiffs demonstrated in their opening brief, Sixth Circuit cases applying rational basis review to state action that discriminates based on sexual orientation were expressly based on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was overruled in *Lawrence*, and those cases are also irreconcilable with the Supreme Court's application in *Windsor* of "careful" review of the state's asserted justifications for a law that discriminates against same-sex couples. Accordingly, this Court should follow more recent Supreme Court authority, rather than older circuit cases that are "irreconcilable" with that Supreme Court precedent. *See Sierra Club v. Korleski*, 681 F.3d 342, 352 (6th Cir. 2012); *see also Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012).

4. The Anti-Recognition Laws Discriminate on the Basis of Gender.

Defendants assert that "Plaintiffs cannot have it both ways" by arguing that the Anti-Recognition Laws discriminate on the basis of both sexual orientation and gender, Opp. at 13, but laws that discriminate against same-sex couples properly may be viewed as discriminating on both

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couples entered into in other jurisdictions. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 982 n.5 (holding *Baker* was "irrelevant" in a case in which plaintiff was "already married" and argued that government was constitutionally required to recognize her existing marriage). Moreover, *Baker* was decided before *Lawrence v. Texas*, 539 U.S. 558 (2003), *Windsor*, and other cases made clear that the relationships of same-sex couples and opposite-sex couples are entitled to equal dignity. Therefore, subsequent doctrinal developments have substantially undermined *Baker's* relevance.

of these bases at the same time. Sexual orientation is a relational concept that is defined by whether a person is attracted to persons of the same gender, the opposite gender, or both. Because the very concept of sexual orientation incorporates a gender-based framework, recognizing that discrimination against same-sex couples discriminates on both sexual orientation and gender is logical. *See Golinski*, 824 F. Supp. 2d at 982 n.4. Moreover, discrimination based on sexual orientation and discrimination based on gender are both rooted in gender stereotypes, including the stereotype that a man should only be attracted to, enter into an intimate relationship with, and marry a woman, and vice versa. *See* Pl. Mem. at 34-35.

Defendants also argue that the Anti-Recognition Laws do not discriminate based on gender because they equally prevent both men and women from having their marriage to a person of the same sex recognized in Tennessee. *See* Opp. at 13. A virtually identical argument was made and rejected in *Loving v. Virginia*, 388 U.S. 1, 8 (1967). Defendants offer no principled basis to apply a different analysis to the gender-based restriction at issue here than the Supreme Court applied to the restriction in *Loving*.

E. Regardless of the Applicable Level of Scrutiny, Defendants Offer No Constitutionally Sufficient Justification for the Anti-Recognition Laws' Discrimination Against Married Same-Sex Couples.

Defendants proffer only one purported governmental interest which they claim justifies Tennessee's refusal to recognize the marriages of same-sex couples. One purpose of marriage, they assert, is "to ensure that procreation would occur only within the confines of a stable family unit." Opp. at 15. Because same-sex couples cannot procreate "naturally," Defendants contend that "[b]iology alone" justifies Tennessee's refusal to recognize Plaintiffs' legal marriages.

This same so-called "responsible procreation" justification was among the governmental interests asserted in defense of Section 3 of DOMA. *See* Brief on the Merits for Respondent the

Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *44-*47. The Supreme Court found this asserted interest insufficient to support DOMA's categorical denial of federal recognition, holding that "no legitimate purpose overcomes [DOMA's] purpose and effect to disparage and to injure" married same-sex couples. *Windsor*, 133 S. Ct. at 2696. "Responsible procreation" provides no greater justification for Tennessee's official denigration of married same-sex couples and their families, or for its withholding from those couples of the many legal protections and benefits of marriage, than it did for the federal government's action in refusing to recognize same-sex couples' marriages in Section 3 of DOMA.

Simply stated, there is no rational connection between Tennessee's Anti-Recognition Laws and the promotion of "responsible procreation" by opposite-sex couples. To the extent the benefits and protections of marriage encourage opposite-sex couples to marry before having children, those incentives existed long before the Anti-Recognition Laws were enacted, and they would continue to exist if the Anti-Recognition Laws were struck down. *See Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012) ("DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before."); *see also Golinski*, 824 F. Supp. 2d at 998.

Defendants contend that they need not show that the *exclusion* of same-sex couples from marriage would advance the asserted state interest in responsible procreation. *See* Opp. at 16 n.11. Defendants are incorrect; the exclusion of same-sex couples from the protections of marriage is precisely what requires a sufficient justification, which Defendants cannot offer. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) (holding

"responsible procreation" argument failed to "explain how denying benefits to same-sex couples will reinforce heterosexual marriage"); *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009) ("[T]he County fails to address the real issue in our required analysis of the objective: whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation?") (emphasis in original).

The fact that same-sex couples procreate only through planned conception or adoption does not provide a rational basis for excluding those couples and their children from the many protections marriage provides. Indeed, the asserted governmental interest in encouraging procreation and child-rearing to occur within the stable family context that marriage provides applies just as strongly to same-sex couples and their children as it does to opposite-sex couples. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 339 (D. Conn. 2012); *In re Marriage Cases*, 43 Cal.4th 757, 828, 183 P.3d 384, 433 (2008).

Furthermore, marriage in Tennessee is tied to a wide array of governmental programs and protections, many of which have nothing to do with child-rearing or procreation. The fact that same-sex couples do not engage in unplanned procreation does not provide a rational basis for excluding married same-sex couples from all of the other protections provided to married couples under Tennessee law. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, as in *Romer*, "[t]he breadth of the [Anti-Recognition Laws] is so far removed from these particular justifications that [it is] impossible to credit them." *Id.* at 635. In short, Defendants' "responsible procreation" argument fails to provide even a rational justification for Tennessee's refusal to recognize the marriages of same-sex couples, let alone a justification strong enough to overcome the Anti-

Recognition Laws' "purpose and effect to disparage and to injure" those couples and their children, as *Windsor* requires. 133 S. Ct. at 2696.

F. Plaintiffs' Claims Are Not Time-Barred.

In asserting that Plaintiffs' claims are untimely, Defendants concede that all lawfully married same-sex couples, including Plaintiffs, are immediately and cognizably harmed the moment that they enter Tennessee's borders. On this point, Plaintiffs agree—as soon as Plaintiffs and other married same-sex couples moved to Tennessee, they suffered immediate and cognizable injury. Plaintiffs disagree, however, that the state can continue to injure them without recourse being available to Plaintiffs. The harms that Tennessee's Anti-Recognition Laws imposed when Plaintiffs moved to Tennessee are ongoing and the laws also cause new injuries on a continual basis each day those laws remain in effect. Plaintiffs' claims are not time-barred.

Defendants erroneously contend that the claims of three of the Plaintiff couples are barred because the statute of limitations period is one year, and the couples moved to Tennessee more than a year before filing their complaint. Opp. at 19-20. Plaintiffs agree that their Section 1983 Claims and Claims for Declaratory Relief are subject to a one-year limitations period. *See* Tenn. Code Ann. § 28-3-104(a)(3); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 547 (6th Cir. 2000). The injuries that the Anti-Recognition Laws cause to Plaintiffs, however, are not limited to those they suffered the day they moved to Tennessee. Rather, Plaintiffs suffer harm every day that Tennessee continues to deny recognition of their lawful marriages.[4]

As the Sixth Circuit has made plain, "'[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.'" *Kuhnle Bros. v. County of Geauga*, 103

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[4] Contrary to Defendants' unsupported assertion, Tennessee does not perform a one-time act of recognition or non-recognition when a married couple moves to Tennessee; rather, Tennessee either recognizes a couple's marital status on an ongoing basis for all state law purposes or denies recognition on an ongoing basis.

F.3d 516, 522 (6th Cir. 1997) (citations omitted). "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within [a particular time period]." *Id.* Instead, when a law is the source of a constitutional deprivation, "'a new injury [i]s inflicted on plaintiffs each day . . . . Consequently, a new limitations period [begins] to run each day as to that day's damage.'" *Id.* (citations omitted). In *Kuhnle Bros.*, the Sixth Circuit applied these principles to revive the plaintiff's Section 1983 claim alleging a violation of its constitutional right to travel because the challenged ordinance impinged on plaintiffs constitutional rights each day that it was in effect, just as the Anti-Recognition laws impinge each day on Plaintiffs' constitutional rights here. *Id.* at 521-22.

Plaintiffs' claims are also timely because Defendants' unconstitutional conduct constitutes continuing violations, each of which restarts the running of the clock. The continuing violation doctrine "applies when (1) the defendant's wrongful conduct continued after the precipitating event that began the pattern; (2) injury to the plaintiff continued to accrue after that event; and (3) further injury to the plaintiff must have been avoidable if the defendants had at any time ceased their wrongful conduct." *Hight v. Cox*, No. 3:13-CV-00367, 2013 WL 6096784, at *8 (M.D. Tenn. Nov. 20, 2013). All three elements are met here. First, Defendants concede that they continue to enforce the Anti-Recognition Laws to deny recognition of Plaintiffs' marriages. Second, Plaintiffs continue to suffer both practical and dignitary harms, as detailed in their Complaint and Declarations.[5] Third, Plaintiffs' continuing injuries would be avoided if Defendants ceased enforcement of the Anti-Recognition Laws, thereby enabling Plaintiffs to have the same

[5] While Defendants assert that courts are reluctant to apply the doctrine to § 1983 cases, as this Court has explained, that is because such cases "generally involve discrete and identifiable injuries." *Hight*, 2013 WL 6096784, at *27 (M.D. Tenn. Nov. 20, 2013) (involving false arrest). That is not the case here where continued enforcement of the challenged laws subjects Plaintiffs to continuing injuries.

protections available to all other married persons in Tennessee and to have their marriages treated with "equal dignity." *Windsor*, 133 S. Ct. at 2693.

Rather than discussing cases that involve challenges to the continued harm caused by the enforcement of unconstitutional laws, Defendants rely exclusively on Title VII cases challenging the *discrete acts* of state actors, which have no bearing in the very different context of challenges alleging ongoing constitutional harms such as those at issue here. Opp. at 19-20. Moreover, even if the Court were to consider those cases, "'[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act.'" *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 480 F.3d 410, 417 (6th Cir. Tenn. 2007) (citations omitted); *see also Simpkins v. Corrs. Corp. of Am.*, No. 3:07-0948, 2007 WL 3012964, at *4 (M.D. Tenn. Oct. 10, 2007) (same). Here, Plaintiffs have been denied rights pursuant to discrete acts of the Defendants within one year before the filing of the Complaint on October 21, 2013, with each such violation giving rise to an actionable claim. (All Decls. ¶¶ 9-14 (ongoing dignitary harms); Tanco & Jesty Decls., ¶¶ 15-19, 24 (parentage, insurance, and tenancy by the entirety); K. & V. Miller-DeVillez Decls. ¶¶ 18, 19-22 (tenancy by the entirely, license with married surname)). Accordingly, Plaintiffs' claims are timely under either calculation.

II. PLAINTIFFS HAVE ESTABLISHED THAT THEY WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

There is one point upon which Plaintiffs, Defendants, and Amicus Curiae all agree: Marriage is a unique institution that plays a central social, legal, and economic role in American society. Given the undisputed importance of marriage, it is evident that Tennessee's refusal to recognize Plaintiffs' legal marriages once they moved to Tennessee causes them irreparable harm. The state's rejection of Plaintiffs' most significant relationship stamps them as inferior and sends a message to their children that their parents' love is unworthy of recognition in the eyes of the

state. The damage caused by the Anti-Recognition Laws to Plaintiffs and their families cannot be undone or compensated with money. That damage is real and cognizable, as Defendants concede when they take the position that Plaintiffs' causes of action accrued the moment they entered Tennessee, and as the Supreme Court has made clear. *See Windsor*, 133 S. Ct. at 2694 (describing how DOMA similarly "demeans" married same-sex couples and "humiliates" their children). Defendants, however, claim that Tennessee's refusal to recognize Plaintiffs' marriages supports only "monetary damages." Opp. at 22. Not surprisingly, Defendants do not and cannot suggest how the Court could place a monetary figure on the rejection of Plaintiffs' legal marriages and the resulting stigma, humiliation, loss of privacy and autonomy, and exclusion from hundreds of tangible rights and protections.

Defendants attempt to minimize the harms to Plaintiffs by calling them "speculative." Opp. at 23. Defendants contend that Drs. Tanco and Jesty, who are expecting a child in early 2014, must wait until their newborn child actually faces an emergency healthcare decision and Dr. Jesty is not allowed to make a critical decision before they can assert a cognizable harm. *Id.* Defendants similarly contend that Ms. Miller-DeVillez and Ms. DeVillez must wait until one of them dies before asserting harm from the legal uncertainty caused by Tennessee's Anti-Recognition Laws regarding the title to their homes. *Id.* at 24. These arguments are not only unavailing; they prove that Plaintiffs are being irreparably harmed. A man and woman legally married in another state would never have to worry about any of these issues with their children, their home, or their spouse. Tennessee would recognize their marriage, and they would immediately enjoy the comprehensive protections that marriage provides, which cannot be replicated through a patchwork of powers of attorney, alternative insurance plans, or other documents. In itself, that Plaintiffs must go through burdensome efforts to obtain even a small fraction of the rights and benefits that automatically are

bestowed upon opposite-sex couples married in other states shows irreparable harm. Alternatively, Defendants try to minimize Plaintiffs' harms as merely "reputational." *Id.* But the Supreme Court has already found that the stigma and humiliation inflicted by non-recognition of one's marriage are cognizable harms of constitutional dimension. *See Windsor*, 133 S. Ct. at 2695-96.

In contesting Plaintiffs' showing of irreparable injury, Defendants rely to no avail on *Sampson v. Murray*, 415 U.S. 61 (1974), and *Gilley v. United States*, 649 F.2d 449 (6th Cir. 1981), which are both cases involving federal employees' challenges to personnel decisions. The Sixth Circuit discussed *Sampson* in *Gilley* and explained that "[t]he Supreme Court has established standards for judging claims of irreparable harm in federal personnel cases which are more stringent than those applicable to other classes of cases." *Gilley*, 649 F.2d at 454; *see also Howe v. City of Akron*, 723 F.3d 651, 662 (6th Cir. 2013).[6]

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A PRELIMINARY INJUNCTION.

As shown above, Plaintiffs will suffer irreparable injury if the requested relief is not granted. By contrast, Tennessee will not suffer any countervailing harm. Defendants misconstrue the Supreme Court's recent decision in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 134 S. Ct. 506 (2013). *See* Opp. at 25. *Abbott*'s determination that the State had an "interest in enforcing a valid law" was dependent upon its finding that the State was "likely to prevail on the merits of the constitutional question." 134 S. Ct. at 506-07. The converse is true here; "[N]o substantial harm can be shown in the enjoinment of [the Anti-Recognition Laws']

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6 Moreover, *Gilley* does not in any way call into doubt Plaintiffs' showing of irreparable injury. In *Gilley*, although a federal Bureau of Prisons employee claimed that "being temporarily separated from his family" due to a job transfer constituted irreparable harm, the Sixth Circuit found that "transfers [were] a regular part of life for Bureau employees" and that, by the time of the hearing, it had become possible for the employee's wife to join him in the new location. 649 F.2d at 452, 455.

unconstitutional policy." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (internal quotation omitted).

Similarly, *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), did not establish, as Defendants assert, that "the public interest favors federal courts denying extraordinary injunctive relief that may affect state domestic policy." Opp. at 25. Rather, the Supreme Court held that principles of comity prohibited federal courts from exercising jurisdiction where a plaintiff had initiated parallel state proceedings and, after an unfavorable ruling, attempted a collateral attack in federal court rather than appealing through the state system. Likewise, both *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926), and *Hawks v. Hamill*, 288 U.S. 52 (1933), are jurisdictional cases in which the Supreme Court ruled that each case should be *dismissed*. None of these cases alter the contemporary standard for issuing preliminary injunctions, which grants no special deference to state actors or state domestic policy.

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs' opening brief, Plaintiffs respectfully request the Court to grant their motion for preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing was accomplished through the Court's Electronic Filing System this 20th day of December, 2013, upon the following:

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