No. 14-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VALERIA TANCO, et al.,
Plaintiffs-Appellees,

v.

WILLIAM EDWARD "BILL" HASLAM, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee, No. 3:13-cv-01159 (The Honorable Aleta A. Trauger)

BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Plaintiffs-Appellees offer the following disclosures:

Plaintiffs-Appellees Valeria Tanco, Sophy Jesty, Ijpe DeKoe, Thomas Kostura, Matthew Mansell, and Johno Espejo, are all individuals; none is a corporation or a subsidiary or affiliate of a publicly-owned corporation.

No publicly-traded corporation has a financial interest in the outcome of this appeal.

DATED: June 9, 2014 /s/ *William L. Harbison*

Attorney for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT CASES

SIXTH CIRCUIT CASES

OTHER CASES

BRIEFS

STATUTES

TREATISES/LR ARTICLES

STATEMENT REGARDING ORAL ARGUMENT

The matter presented for review involves constitutional issues of exceptional importance. The challenged laws impose severe and ongoing harms on Tennessee's same-sex couples and their families. Plaintiffs-Appellees believe the case warrants oral argument.

ISSUES PRESENTED FOR REVIEW

The challenged Tennessee laws include a state statute and an amendment to the Tennessee Constitution (referred to herein as the "anti-recognition laws"), each of which prohibits recognition of legal marriages validly entered into by same-sex couples in other states. *See* Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113. The issues presented for review are:

1. Whether Tennessee's anti-recognition laws violate Plaintiffs' right to due process under the Fourteenth Amendment by depriving them of their constitutionally-protected liberty interests in their existing marriages and burdening their exercise of the freedom to marry.
2. Whether Tennessee's anti-recognition laws violate Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment by excluding all legally married same-sex couples from the protections and obligations of marriage on the basis of their sexual orientation and gender in order to treat same-sex couples and their children unequally.
3. Whether Tennessee's anti-recognition laws impermissibly burden Plaintiffs' constitutionally protected right to interstate travel.
4. Whether the District Court appropriately granted injunctive relief in this action.

5. Whether this Court should undertake plenary review of this case and remand with instructions for the District Court to enter final judgment and a permanent injunction in Plaintiffs' favor, given that this appeal concerns the purely legal question of whether Tennessee's anti-recognition laws facially violate constitutional protections including the Fourteenth Amendment's guarantees of equal protection and due process and the fundamental right to travel.

INTRODUCTION

Plaintiffs in this action are three married same-sex couples: Valeria Tanco and Sophy Jesty; Ijpe DeKoe and Thomas Kostura; and Matthew Mansell and Johno Espejo. Like thousands of other couples in Tennessee, they married in other states before making Tennessee their home. As the Supreme Court recently affirmed, Plaintiffs' lawful marriages share "equal dignity" with other couples' marriages and warrant the same protections the federal Constitution ensures for all other married couples. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

No opposite-sex couple who moved to Tennessee after living and marrying elsewhere would dream their marriage would be invalidated and treated as though it never existed simply because career or family circumstances led them to make their home in a new state. Tennessee law, however, does exactly that, solely because Plaintiffs are married to spouses of the same sex. In so doing, Tennessee "interfere[s] with the equal dignity" of Plaintiffs' marriages and the marriages of other same-sex couples living in Tennessee. *Id*.

Tennessee's anti-recognition laws require the state and its officers to treat the marriages of Plaintiffs and other same-sex couples as nullities, denying them all of the protections, benefits, obligations, and security that Tennessee readily provides for other couples who validly married in other states. No matter how deeply they care for one another or how long they have stood by one another,

Tennessee treats Plaintiffs and other married same-sex couples as legal strangers to one another. It communicates to them and to all the world that their relationships are not as real, valuable, or worthy as those of opposite-sex couples; that they are worthy of no recognition at all; and that they are not, and never can be, true families. Like the federal law struck down in *Windsor*, the anti-recognition laws' "avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples and their families. *Id*. at 2681.

For Plaintiffs, the price of moving to Tennessee was severe: deprivation of their status as married couples and as family members under state law. The federal Constitution, however, permits no such price to be imposed on Plaintiffs or other same-sex couples who move to Tennessee after marrying elsewhere. "A State cannot so deem a class of [families] a stranger to its laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

STATEMENT OF THE CASE

A. The Plaintiffs

Each of the Plaintiff couples entered into a valid marriage under the laws of other states before moving to Tennessee. Their circumstances are representative of the many personal and career situations in which families regularly find themselves, and which, in our mobile society, may cause married couples to relocate to a new state.

Plaintiffs Dr. Valeria Tanco and Dr. Sophy Jesty married in New York and subsequently moved to Knoxville, Tennessee, where both spouses had accepted teaching positions at the University of Tennessee College of Veterinary Medicine. (Declaration of Valeria Tanco in Support of Plaintiffs' Motion for Preliminary Injunction ("Tanco Decl."), Dkt. 32-1, Page ID #387-88; Declaration of Sophy Jesty in Support of Plaintiffs' Motion for Preliminary Injunction ("Jesty Decl."), Dkt. 32-2, Page ID #395-96.) Plaintiffs Army Reserve Sergeant First Class Ijpe DeKoe and Thomas Kostura married in New York while Mr. Kostura was residing in New York and Sgt. DeKoe was stationed at Fort Dix in New Jersey, preparing to be deployed to Afghanistan. (Declaration of Ijpe DeKoe in Support of Plaintiffs' Motion for Preliminary Injunction ("DeKoe Decl."), Dkt. 32-8, Page ID #452; Declaration of Thomas Kostura in Support of Plaintiffs' Motion for Preliminary Injunction ("Kostura Decl."), Dkt. 32-9, Page ID #457.) Following Sgt. DeKoe's return from Afghanistan, the couple moved to Memphis, Tennessee, where Sgt. DeKoe is now stationed. (DeKoe Decl., Page ID #452-53; Kostura Decl., Page ID #457-58.) Plaintiffs Matthew Mansell and Johno Espejo married in California while residing there, and moved with their children to Tennessee, when Mr. Mansell's employer, a large international law firm, transferred many of its administrative operations, including Mr. Mansell's position, from California to Nashville. (Declaration of Johno Espejo in Support of Plainitffs' Motion for

Preliminary Injunction ("Espejo Decl."), Dkt. 32-15, Page ID # 482; Declaration of Matthew Mansell in Support of Plaintiffs' Motion for Preliminary Injunction ("Mansell Decl."), Dkt. 32-16, Page ID #487.)

Before moving to Tennessee, each couple's marriage was respected by their states of residence on an equal basis with all other marriages. In addition, since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), their marriages have been recognized for most purposes by the federal government, including by Sgt. DeKoe's employer, the Army Reserves. Because of Tennessee's constitutional and statutory prohibitions on state recognition of marriages of same-sex couples, however, Defendants treat Plaintiffs' legal marriages as though they do not exist. (Tanco Decl., Page ID #388; Jesty Decl., Page ID #396; DeKoe Decl.; Page ID #453; Kostura Decl., Page ID #458; Espejo Decl., Page ID #483; Mansell Decl., Page ID #488.)

All of the Plaintiff couples have found themselves warmly welcomed by many Tennesseans, including their neighbors, colleagues, and employers. (*Id.*) But the State of Tennessee's refusal to respect their marriages strips them of a highly-protected legal status, disrupts the expectations and plans they have made in reliance on being married, denies them all of the many legal protections, obligations, and benefits available to other married couples under Tennessee law, and jeopardizes their eligibility for some important federal protections, including

Social Security benefits.[1] (*Id.*) In order to create even a small measure of protection for their families and marginally reduce the legal uncertainty created by Tennessee's refusal to respect their marriages, the Plaintiff couples are required to take costly steps to prepare powers of attorney, wills, and other documents; however, such steps provide only a tiny fraction of the comprehensive protections and mutual obligations Tennessee law automatically grants to married opposite-sex couples. (Tanco Decl., Page ID #389; Jesty Decl., Page ID #397; DeKoe Decl.; Page ID #453-54; Kostura Decl., Page ID #458; Espejo Decl., Page ID #483-84; Mansell Decl., Page ID #488-89.)

For example, Dr. Tanco and Dr. Jesty had a child in the spring of 2014. (Tanco Decl., Page ID #390; Jesty Decl., Page ID #398.) As the birth mother, Dr. Tanco was recognized as the child's legal parent. But had the District Court not enjoined Defendants from enforcing the anti-recognition law, Dr. Jesty would not have been recognized as a legal parent of her child, because she would not have been subject to the statutory presumption that both spouses are the legal parents of

[1] The Social Security Administration recognizes the marriages of same-sex couples for purposes of benefits under the Social Security Act, provided that the couple resides in a state that respects the marriages of same-sex couples. Program Operations Manual System, GN 00210.100, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210100. The Administration currently is holding spousal benefits claims filed by married same-sex couples living in states that do not respect their marriages and has not announced whether those benefits will be available to such couples. Program Operations Manual System, GN 00210.005, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210005.

a child born during a marriage. *See* Tenn. Code Ann. § 36-2-304. Tennessee's anti-recognition laws also deprive the couple of other important family protections. In preparation for their child's arrival, Dr. Tanco and Dr. Jesty attempted to enroll on a single health insurance plan that would cover their entire family. (Tanco Decl., Page ID #391; Jesty Decl., Page ID #399.) But their request for enrollment on a family plan as a married couple was denied because their employer is a state entity and participates in the State of Tennessee's group health insurance plan, and the state does not recognize the validity of their marriage. (*Id*.)

Beyond the many legal protections that are denied to the Plaintiff couples, the refusal by Tennessee and its officials to recognize their legal marriages continually communicates to Plaintiffs and other Tennesseans that the state regards Plaintiffs and their families as second-class citizens whose marriages are to be disregarded by every state official they may encounter. (Tanco Decl., Page ID #389; Jesty Decl., Page ID #397; DeKoe Decl.; Page ID #454; Kostura Decl., Page ID #459; Espejo Decl., Page ID #484; Mansell Decl., Page ID #489.) Mr. Mansell and Mr. Espejo are concerned that their young children will internalize these messages and begin to believe that their family is inferior and not entitled to the same dignity as other Tennessee families. (Espejo Decl., Page ID #485; Mansell Decl., Page ID #490.) Dr. Tanco and Dr. Jesty also want to protect their newborn child from growing up under discriminatory laws that mark their family as

different and less worthy than others. (Tanco Decl., Page ID #392; Jesty Decl., Page ID #401.) All of the Plaintiff couples wish to be treated as equal, respected, and participating members of society. (Tanco Decl., Page ID #387; Jesty Decl., Page ID #395; DeKoe Decl.; Page ID #452, 455; Kostura Decl., Page ID #457. 459; Espejo Decl., Page ID #482; Mansell Decl., Page ID #487.)

B. Procedural History

Because of the severe and irreparable harms caused by Tennessee's anti-recognition laws, Plaintiffs moved the District Court for a preliminary injunction barring enforcement of the laws against them. (Motion for Preliminary Injunction, Dkt. 29, Page ID #114; Memorandum in Support of Motion for Preliminary Injunction, Dkt. 30; Page ID #118.) On March 14, 2014, the District Court granted Plaintiffs' motion. (Memorandum Opinion, Dkt. 67, Page ID # 1415; Order, Dkt. 68, Page ID # 1435; Preliminary Injunction, Dkt. 69, Page ID # 1436.) The Court concluded that Plaintiffs are likely to succeed on the merits of their constitutional claims based in part on the many "thorough and well-reasoned cases" decided by various federal district courts in the months since *Windsor,* each of which held that state-law restrictions on marriage for same-sex couples "violate the Equal Protection Clause and/or the Due Process Clause, even under 'rational basis' review." *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, *5 (M.D. Tenn. Mar. 14, 2014). Specifically, the court noted:

> [D]efendants offer arguments that other federal courts have already considered and have consistently rejected, such as the argument that notions of federalism permit Tennessee to discriminate against same-sex marriages consummated in other states, that *Windsor* does not bind the states the same way that it binds the federal government, and that Anti–Recognition Laws have a rational basis because they further a state's interest in procreation, which is essentially the only "rational basis" advanced by the defendants here.

Id. Because it concurred with the decisions rejecting defendants' argument and concluded that the anti-recognition laws likely violate equal protection, the District Court did not reach Plaintiffs additional arguments that the law violates due process and deprives Plaintiffs of their constitutionally-protected right to interstate travel.

The District Court also concluded that the remaining considerations governing the issuance of preliminary injunctions supported enjoining enforcement of the anti-recognition laws as to Plaintiffs. The court found that Plaintiffs were likely to suffer irreparable harm in the absence of an injunction, observing that Tennessee's refusal to respect their marriages "de-legitimizes [Plaintiffs'] relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization." *Id.* at *7. The court further found that "the administrative burden on Tennessee from preliminarily recognizing the marriages of the three couples in this case would be negligible" and "that issuing an injunction would serve the public interest because the Anti–Recognition Laws are likely unconstitutional." *Id.*

at *8. Defendants appealed the District Court's order granting the preliminary injunction.

SUMMARY OF ARGUMENT

Tennessee's anti-recognition laws are unprecedented enactments that create an exception to Tennessee's long-standing rule that "'a marriage valid where celebrated is valid everywhere.'" *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1889)). Tennessee has created this unique exception for married same-sex couples not to achieve any important, or even legitimate, government objective, but simply to discriminate against married same-sex couples and subject their valid marriages to unequal treatment. In *Windsor*, the Supreme Court held that Section 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), required "careful consideration" under the Constitution's due process and equal protection guarantees because it represented an "unusual deviation" from long-standing federal practice by categorically denying recognition to the lawful marriages of same-sex couples. 133 S. Ct. at 2693. The Supreme Court held that Section 3 could not survive this inquiry because "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal," *id.* at 2694, and "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696.

Like Section 3 of DOMA, Tennessee's anti-recognition laws starkly depart from past practice and law—not for a legitimate purpose, but in order to treat same-sex spouses unequally by excluding them from the protections afforded to other married persons. The anti-recognition laws create an exception to the longstanding rule that, like every other state, Tennessee generally respects valid marriages from other states even if the marriage would not have been permitted in Tennessee. And like Section 3 of DOMA, that deliberate imposition of inequality on a subset of married couples violates "basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2693.

The anti-recognition laws violate due process by effectively stripping Plaintiffs' of their marital status, depriving them of the fundamental right to privacy and respect for their legal marriages and penalizing them for having exercised the fundamental freedom to marry the person of their choice. For similar reasons, the challenged laws violate equal protection by penalizing legally married same-sex couples—the same class targeted by the federal law struck down in *Windsor*—not to further a legitimate goal, but to express disapproval of that class. On their face, the anti-recognition laws discriminate based on sexual orientation and gender in order to disadvantage gay and lesbian persons. As the Supreme Court held in *Romer v. Evans*, "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare," and such measures violate

the requirement of equal protection in the most basic way. *Romer*, 517 U.S. at 633 (1996).

The anti-recognition laws also violate the "virtually unconditional personal right, guaranteed by the Constitution to us all," *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted), to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 499 (internal quotation marks omitted). Tennessee impermissibly has conditioned Plaintiffs' ability to accept a job transfer, pursue a new career opportunity, or even be stationed in Tennessee as a member of the Armed Forces on giving up all the state-law protections, benefits, and responsibilities of their existing marriages and being relegated to the status of legal strangers to one another. In effect, Tennessee requires married same-sex couples to sacrifice their marriages in order to live or even travel within its borders. Such a severe penalty on the right to interstate travel cannot stand.

In our federal system, in which interstate travel is ordinary, expected, and constitutionally protected, each state's power to marry couples within its borders is enhanced by the confidence that its conferral of marital status on couples will be respected by other states. A state's categorical exclusion of an entire class of

marriages from other states without adequate justification is an affront to our nation's federalism of a sort that has been rare in our constitutional tradition.

The Supreme Court has emphasized that federalism does not just safeguard the interests of the states and the federal government. Properly understood, "[f]ederalism [also] secures the freedom of the individual." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.* Tennessee's authority over the law of domestic relations does not include the authority to disregard Plaintiffs' marital status, which a sister state validly conferred and which the Fourteenth Amendment protects against unjustified deprivation by other states. "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida,* 134 S.Ct. 1986, at *15 (2014).

STANDARD OF REVIEW

This Court ordinarily reviews a district court's grant of a preliminary injunction for an abuse of discretion. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). While the ultimate decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, the Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635

F.3d 219, 233 (6th Cir. 2011). "This standard of review is 'highly deferential' to the district court's decision." *Id.* (quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007)). "The injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio,* 160 F.3d 310, 312 (6th Cir. 1998); *see also Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

In addition, in some circumstances, it is appropriate for this Court to undertake plenary review of a case even though the order appealed from is one granting or denying a preliminary injunction. When "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986). As this Court has held:

> It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the "scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately raised by the record, *including entry of final judgment*."

United States v. State of Michigan, 940 F.2d 143, 151-52 (6th Cir. 1991) (alterations in original and emphasis added) (citations omitted).

This is such a case. This appeal concerns the purely legal question of whether Tennessee's laws prohibiting the state from recognizing the valid marriages of same-sex couples who married in other states facially violate constitutional protections including the Fourteenth Amendment's guarantees of equal protection and due process. If they do, Plaintiffs are entitled "not only to a preliminary injunction, but a permanent one." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1060 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003). Plaintiffs respectfully request that the Court undertake plenary review and remand with instructions for the District Court to enter final judgment declaring that Tennessee's anti-recognition laws violate the United States Constitution and a permanent injunction barring enforcement of those laws.

ARGUMENT

I. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When, as here, "a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits

often will be the determinative factor.'" *Obama for Am.*, 697 F.3d at 436 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). All four of the relevant factors support the District Court's issuance of an injunction in this case. Indeed, the record demonstrates that Plaintiffs are entitled to final judgment and a permanent injunction prohibiting enforcement of Tennessee's anti-recognition laws.

II. TENNESSEE'S ANTI-RECOGNITION LAWS VIOLATE MULTIPLE GUARANTEES OF THE UNITED STATES CONSTITUTION.

A. Tennessee's Anti-Recognition Laws Create A Highly Unusual Categorical Exception To Tennessee's General Rule That The State Will Recognize Valid Marriages From Other States.

Tennessee's anti-recognition laws represent a stark departure from the state's longstanding practice of recognizing valid marriages from other states even if such marriages could not have been entered into within Tennessee. Tennessee has long applied the rule that "a marriage valid where celebrated is valid everywhere." *Farnham*, 323 S.W.3d at 134 (quoting *Pennegar*, 10 S.W. at 306). This rule—known as the "place of celebration rule"—is recognized in every state and is a defining element of our federal system and of American family law.

"[T]he concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013). Indeed, the "policy of the civilized world[] is to sustain marriages, not to upset

them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949); *see also In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

The place of celebration rule recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III *et al.*, *American Conflicts Law* 713 (5th ed. 2001). This rule of marriage recognition also "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* 398 (3d ed. 2002). The doctrine comports with the reasonable expectations of married couples that, in our highly mobile society, they may travel throughout the country secure in the knowledge that their marriage will be respected in every state and that the simple act of crossing a state line will not divest them of their marital status. *See Obergefell*, 962 F. Supp. 2d at 979 ("Couples moving from state to state have an expectation that their marriage and, more concretely, the property interests

involved with it—including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage—will follow them.").

For well over a century, Tennessee courts have held that marriages validly entered into in other jurisdictions will be honored in Tennessee even if the couple could not have married in Tennessee. For example, Tennessee has recognized: (1) common-law marriages entered into in another state and valid under the law of that state, even though common-law marriages are not recognized if entered into in Tennessee, *Shelby Cnty. v. Williams*, 510 S.W.2d 73, 74 (Tenn. 1974); *In re Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn Ct. App. 1994); *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966); (2) marriages validly entered into in another state by parties who do not satisfy the minimum age requirements to marry under Tennessee law, *Keith v. Pack*, 187 S.W.2d 618, 619 (Tenn. 1945); and (3) marriages that would have been deemed valid in the state where entered based on the doctrine of marriage by estoppel, even though Tennessee does not recognize that doctrine and the marriage would have been void and contrary to public policy if entered into in Tennessee, *Farnham*, 323 S.W.3d at 140.

The sole exception to this established rule has been for marriages that violate such strong principles of Tennessee public policy, designed to protect vulnerable spouses, that the parties to the relationship would be subject to criminal prosecution. Only in such circumstances have Tennessee courts concluded that

marriages lawfully contracted in another state should be denied recognition. *See, e.g.*, *Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (holding that an out-of-state marriage between a stepfather and a stepdaughter following the stepfather's divorce from the mother was void where such marriage could be prosecuted as a felony in Tennessee). And although Tennessee courts from time to time have withheld recognition from particular marriages that so offended public policy as to violate criminal prohibitions, Tennessee never previously enacted a measure that categorically denied recognition to an entire class of marriages.[2]

Defendants argue that Tennessee's anti-recognition laws do not subject the marriages of same-sex couples to different or unusual treatment because, they assert, Tenn. Code Ann. § 36-3-113(d) and Article XI, section 18 of the Tennessee Constitution silently changed over a century of prior law, and these provisions now categorically bar recognition by Tennessee of *any and all marriages* that could not be entered into in Tennessee. *See* Def. Br. at 18-20. Defendants cite to no authority in support of this position, and the text and history of these provisions make plain that Tennessee's anti-recognition laws were never intended and have

[2] Although Tennessee never enacted a statute or constitutional provision expressly barring recognition of interracial marriages from other states, as opposed to provisions barring entry into such marriages in Tennessee, the Tennessee Supreme Court did effectively preclude recognition of out-of-state interracial marriages by upholding the criminal prosecution of a white man for cohabiting with his African-American wife despite their valid marriage in Mississippi. *State v. Bell*, 66 Tenn. 9, 10 (1872).

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. *See* cases cited *infra* at 23.

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 Defendants' newfound interpretation 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, even if the marriage would not be permitted under Tennessee law. *See, e.g.*, *Farnham*, 323 S.W.3d at 140; *Lindsley v. Lindsley*, No. E2011-00199-COA-R3-CV, 2012 WL 605548, *1 (Tenn. Ct. App. Feb. 27, 2012); *Bowser v. Bowser*, No. M2001-01215-COA-R3CV, 2003 WL 1542148, *1 (Tenn. Ct. App. March 26, 2003); *Stoner v. Stoner*, No. W2000-01230-COA-R3-CV, 2001 WL 43211, *3 (Tenn. Ct. App. Jan. 18, 2001); *Payne v. Payne*, No. 03A01-9903-CH-00094, 1999 WL 1212435, *4 (Tenn. Ct. App. Dec. 17, 1999); *Ochalek v. Richmond*, No. M2007-01628-COA-R3-CV, 2008 WL 2600692, *6 n.9 (Tenn. Ct. App. Jan. 30, 2008).

In sum, Tennessee's anti-recognition laws represent a stark departure from its past and current treatment of out-of-state marriages. For the reasons explained below, Tennessee's refusal to recognize the marriages of an entire category of persons who validly married in other states, solely to exclude a disfavored group from the ordinary legal protections and responsibilities they would otherwise

enjoy, and despite the severe, harmful impact of that refusal, cannot withstand constitutional scrutiny.

B. Tennessee's Anti-Recognition Laws Deprive Plaintiffs Of Due Process.

As demonstrated below, Tennessee's denial of recognition to same-sex spouses cannot survive any level of constitutional review, much less the heightened scrutiny the anti-recognition laws require, because they interfere with two fundamental rights: (1) the fundamental right to privacy and respect for an existing marital relationship; and (2) the fundamental right to marry.

1. Tennessee's Anti-Recognition Laws Impermissibly Burden Plaintiffs' Fundamental Right To Privacy And Respect For Their Existing Marriages.

Windsor held that the federal government's refusal to recognize legally married same-sex couples deprived them "of the liberty of the person protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695. Like Section 3 of DOMA, Tennessee's anti-recognition laws treat the valid marriages of same-sex couples as nullities, denying them recognition for all purposes under state law, just as DOMA did under federal law. In both cases, the denial of recognition deprives legally married same-sex couples of their protected right to dignity and respect for their marriages, burdening "many aspects of married and family life, from the mundane to the profound," and subjecting these families to ongoing stigma and

harm. *Id*. at 2694. No legitimate, much less compelling reason, serves to overcome the deliberate infliction of those substantial harms.

a. Married couples have a fundamental liberty interest in their marriages.

Windsor's holding that married couples have a protected liberty interest in their marriages confirms longstanding and well-established law that spousal relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). In *M.L.B. v. S.L.J.*, the Supreme Court explained: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society," and laws that interfere with those relationships require "close consideration." 519 U.S. 102, 116-17 (1996) (internal citations and quotations omitted). As these and other similar cases show, the right to privacy and respect for an existing marital relationship is, in itself, a distinct fundamental right, independent of an individual's right to marry in the first instance. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring in the judgment) (noting difference between "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude" and "regulation of the conditions of entry into . . . the marital bond").

Under these precedents, married couples have a fundamental right to remain married and to have their marriages respected by the government. In *Griswold v. Connecticut*, the Supreme Court invalidated a state law forbidding married couples to use contraceptives, holding that such a measure impermissibly intruded into the protected privacy of the marital relationship. 381 U.S. 479, 485-86 (1965) (stating that "[t]he very idea [of enforcing such a law] is repulsive to the notions of privacy surrounding the marital relationship"). *See also Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (recognizing "marital privacy" as an established fundamental right); *Bell v. Ohio State University*, 351 F.3d 240, 250 n.1 (6th Cir. 2003) (same).

b. Married same-sex couples have the same fundamental interest in their marriages as others and must be treated with "equal dignity" under the law.

Windsor affirmed that marriage is a status of "immense import" and held that the government's refusal to recognize the legal marriage 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.

Appellants' 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 or state. 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).

As federal district courts hearing challenges to similar state anti-recognition laws have uniformly concluded, Plaintiffs have the same fundamental interest in their marriages as did the plaintiffs in *Windsor*, *Griswold*, *Loving v. Virginia*, 388 U.S. 1 (1967), and other cases involving attempts by the government to interfere with the relationships of married couples. *See Obergefell*, 962 F. Supp. 2d at 978 (finding that non-recognition violates "the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."); *Henry v Himes*, No.1:14-cv-129, 2014 WL 1418395, at *9 (S.D. Ohio Apr.14, 2014) (same); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (same); *Baskin v. Bogan*, No. 1:14-cv-00355, 2014 WL 1814064 (S.D. Ind. May 8, 2014) (same).

Like the plaintiff in *Windsor*, Plaintiffs are already legally married. The Plaintiff couples have demonstrated their commitment to one another by marrying in the state where they formerly resided. They seek to be treated as equal, respected, and participating members of society who—like others—are entitled to respect for their legal marriages. Tennessee's law is subject to, and cannot survive,

the same heightened scrutiny applied to other laws that burden the fundamental right to equal dignity, privacy, and autonomy in maintaining an existing marital relationship.

c. Tennessee's anti-recognition laws violate Plaintiffs' fundamental right to privacy and respect for their marriages.

Tennessee's refusal to recognize Plaintiffs' marriages constitutes an extraordinary disruption of their lives, stripping them of the marital protections and responsibilities they previously enjoyed in the state where they married. The negative impact on Plaintiffs' stability, security, and dignity is as severe as that caused by federal non-recognition in *Windsor*, exposing their families to continuing legal vulnerabilities and harms. Indeed, "nullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1125 (2009).

Defendants misconstrue key language from *Windsor* as supportive of their position, when in fact that language highlights the types of harm that discriminatory marriage recognition laws inflict and that the Constitution cannot tolerate. *See* Appellants' Brief at 16-17. The Court in *Windsor* found that DOMA

deviated 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." *Id.* 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. *Id.* 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." *Id*. at 2694.

2. Tennessee's Anti-Recognition Laws Deprive Plaintiffs Of Their Fundamental Right To Marry.

Tennessee's anti-recognition laws also impermissibly burden Plaintiffs' right to marry by penalizing each of them for having exercised that right to marry a person of the same sex. Plaintiffs do not assert a novel "right to same-sex marriage," as Appellants contend, but the same fundamental right to marry

repeatedly recognized by the Supreme Court. 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. *See Hogue v. Hogue*, 147 S.W.3d 245, 253 (Tenn. Ct. App. 2004) ("Neither gay parents nor heterosexual parents have special rights. They are subject to the same laws, the same restrictions."). It is equally impermissible to strip Plaintiffs of their marital status simply because they are same-sex couples.

Like other fundamental rights, "the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384 (internal quotations omitted). For many, it is "the most important relation in life." *Id*. It "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486.

The freedom to marry is protected by the Constitution precisely because the intimate relationship a person forms, and the decision whether to formalize such a relationship through marriage, implicate deeply held personal beliefs and core values. *Roberts*, 468 U.S. at 619-20. Permitting the government, rather than the individual, to make such personal decisions would impose an intolerable burden on individual dignity and self-determination. *Loving*, 388 U.S. at 12 ("Under our

Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."). As the California Supreme Court recognized when it became the first state supreme court to strike down a ban on marriage by interracial couples, people are not "interchangeable," and "the essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez v. Lippold (Perez v. Sharp)*, 198 P.2d 17, 21, 25 (Cal. 1948).

Same-sex couples have the same fundamental interests as others in the liberty, autonomy, and privacy that the fundamental right to marry protects. In *Windsor*, the Supreme Court confirmed that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013); *see also Bostic v. Rainey*, 970 F. Supp. 2d 456, 473 (E.D. Va. 2014) ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships" [which] "are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference."); *Wolf*

v. Walker, No. 14-cv-64-bbc, 2014 WL 2558444, at *19 (W.D. Wis. June 6, 2014) ("[T]he right to marry protected by the Constitution includes same-sex couples.").

Like the laws struck down in *Perez* and *Loving*, Tennessee's anti-recognition laws violate the Plaintiffs' dignity and autonomy by penalizing them for having exercised the freedom—enjoyed by all other Tennessee residents—to marry the person with whom each has forged enduring bonds of love and commitment and who, to each Plaintiff, is irreplaceable. The Plaintiffs ask to have their right to autonomy and privacy respected by the State of Tennessee to the same degree, and in the same way, as it does for other married couples—by recognizing their legal marriages.

C. Tennessee's Anti-Recognition Laws Deny Plaintiffs Equal Protection Of The Laws.

Tennessee's anti-recognition laws facially discriminate against legally married same-sex couples—the same class at issue in *Windsor*—in violation of equal protection. *See Windsor*, 133 S. Ct. at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by [a] State."). The Fourteenth Amendment's Equal Protection Clause ensures that the law "neither knows nor tolerates classes among citizens," so that the law remains neutral "where the rights of persons are at stake." *Romer*, 517 U.S. at 623 (citations and internal quotation marks omitted).

Tennessee's anti-recognition laws violate that basic proscription by discriminating against a class of Tennesseans based on their sexual orientation and gender.

Windsor requires that when a law intentionally disadvantages same-sex couples, courts must carefully scrutinize the law's effects and the state's reasons for enacting it. *Windsor*, 133 S. Ct. at 2693 (applying "careful consideration" to a law intended to treat same-sex couples unequally). Similarly, when a law discriminates on the basis of sex, courts apply heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 524 (1996) ("[A] party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification.") (internal citations and quotation marks omitted). Because Tennessee's anti-recognition laws intentionally discriminate against same-sex couples, they require the same careful scrutiny applied in *Windsor*, which in turn requires their invalidation.

Although the Supreme Court in *Windsor* did not refer to the traditional equal protection and due process categories of strict, intermediate, or rational basis scrutiny, it declared that DOMA's purposeful discrimination against married same-sex couples required "careful consideration," which indicates a heightened level of review. *Windsor*, 133 S. Ct. at 2693. As another Court of Appeals recently explained, based on the *Windsor* Court's reasoning and analysis, it is apparent that *Windsor* involved "something more than traditional rational basis review."

SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (citation and internal quotation marks omitted).

While this Court previously has held that laws that discriminate on the basis of sexual orientation are subject to rational basis scrutiny, all of those decisions predate *Windsor*. *See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). Unlike this Court's earlier cases, *Windsor* directly addressed the due process and equal protection analysis that must be applied when a law purposefully treats legally married same-sex couples unequally, as Tennessee's anti-recognition laws do. Therefore, it is *Windsor*'s analysis that must be applied in this case.[3]

[3] Application of heightened scrutiny is also supported by the factors traditionally applied by the Supreme Court to identify classifications triggering heightened scrutiny under the Equal Protection Clause: (1) whether a classified group has suffered a history of invidious discrimination; (2) whether the classification has any bearing on a person's ability to perform in or contribute to society; (3) whether the characteristic is immutable or an integral part of one's identity; and (4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976). Sexual orientation readily satisfies all of these factors, as many courts have acknowledged. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2nd Cir. 2012); *In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Obergefell*, 962 F.

Regardless, Tennessee's anti-recognition laws not only fail the heightened scrutiny test, they cannot satisfy even the more basic rational basis test. As every court to address the issue since *Windsor* has concluded, and as demonstrated in subsection D below, there is no rational connection between any purported governmental interest and Tennessee's refusal to extend the protections and obligations of civil marriage to same-sex couples who legally married in other states.

1. *Windsor* Invalidated A Law That Intentionally Treated Same-Sex Couples Unequally, Just As Tennessee's Anti-Recognition Laws Do.

In *Windsor*, the Supreme Court held that DOMA, which excluded married same-sex couples from federal benefits, violated "basic due process and equal protection principles" because it was enacted in order to treat a particular group of people unequally. 133 S. Ct. at 2693. The Court found that no legitimate purpose could "overcome" its discriminatory purpose and effect. *Id.* at 2696.

Windsor makes clear that, when considering a law that facially disadvantages same-sex couples—as Tennessee's anti-recognition laws plainly do—courts may not blindly defer to hypothetical justifications proffered by the State, but must carefully consider the purpose underlying its enactment and the

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Supp. 2d at 991; *De Leon v. Perry*, 975 F. Supp. 2d 632, 651-53 (W.D. Tex. 2014); *Henry v. Himes*, No. 1:14–cv–129, 2014 WL 1418395, *14 (S.D. Ohio Apr. 14, 2014).

actual harms it inflicts.[4] *Id.* Moreover, the court must strike down the law unless a "legitimate purpose overcomes" the "disability" imposed on the affected class of individuals. *Id.*

Windsor concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. *Id.* The Court also noted that DOMA exposed same-sex couples to serious harms: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways . . . from the mundane to the profound." *Id.* at 2694. This differential treatment "demeans the couple." *Id.*

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *id.* at 2694, 2695, so

[4] As shown in section II.A above, Defendants are incorrect in arguing that Tennessee's anti-recognition laws treat married same-sex couples the same as other couples married in other states whose marriages could not have been performed in Tennessee. Even if Defendants were correct, however, that the constitutional and statutory provisions challenged in this case 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. Even if Defendants' interpretation of the anti-recognition laws were correct, that would not change the fact that Tennessee *expressly* discriminates against all married same-sex couples, nor would it alter the fact that these laws were enacted for the improper purpose of disadvantaging married same-sex couples, which the Constitution forbids, as *Windsor* held.

too the purpose and effect of Tennessee's anti-recognition laws are to prevent same-sex couples from gaining the protections of marriage. Like DOMA, Tennessee's anti-recognition laws did not create any new rights or protections for opposite-sex couples; rather, their only purpose and effect are to treat same-sex couples unequally. *See, e.g.*, *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *13 (W.D. KY Feb. 12, 2014) ("Justice Kennedy's analysis [in *Windsor*] would seem to command that a [state] law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality."); *De Leon*, 975 F. Supp. 2d at 655 (same).

Moreover, like DOMA, Tennessee law inflicts serious harms on same-sex couples, depriving them of hundreds of rights and protections and stigmatizing their families as inferior and unworthy of respect. In a manner unprecedented in Tennessee's history, Tennessee's anti-recognition laws disregard the longstanding, deeply rooted, and otherwise universal rule that a marriage that is validly entered into by a couple in one state will be recognized in Tennessee unless there is a compelling reason not to do so. By treating legally married same-sex couples as legal strangers to one another, Tennessee disrupts their protected family relationships and forces them, unlike other married couples, to give up their marital status and be treated as unrelated individuals upon entering the state.

By design, Tennessee's anti-recognition laws deprive married same-sex couples of the certainty, stability, permanence, and predictability that other couples who married outside Tennessee automatically enjoy. Like DOMA, such a law requires, and cannot survive, "careful consideration," because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" a subset of married persons. *Windsor*, 133 S. Ct. at 2692, 2696. Indeed, as explained in subsection D below, it cannot survive any level of constitutional review.

2. Tennessee's Anti-Recognition Laws Impermissibly Classify On The Basis of Gender And Rely On Outdated Gender-Based Expectations.

Tennessee's anti-recognition laws openly discriminate based on gender. For example, Dr. Tanco's marriage would be recognized if Dr. Jesty were a man instead of a woman. Tennessee refuses to recognize Plaintiffs' marriages solely because of the sex of the spouses. *See Kitchen*, 961 F. Supp. 2d 1181, 1206 ("Amendment 3 [Utah's law excluding same-sex couples from marriage] involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); *Perry*, 704 F. Supp. 2d at 996 (state marriage ban discriminates based both on sexual orientation and gender).

Further, the fact that Tennessee's anti-recognition laws prohibit both men from marrying men and women from marrying women does not alter the

conclusion that they discriminate based on gender. In *Loving*, the Supreme Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid even though they affect all races); *Perez*, 198 P.2d at 20 ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups.").

That same reasoning applies to gender-based classifications. *See J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140-41 (1994) (holding that sex-based peremptory challenges are unconstitutional even though they affect both male and female jurors). Under *Loving*, *Powers*, and *J.E.B.*, the gender-based classifications in Tennessee's anti-recognition laws may not be upheld simply because they affect men and women as groups in the same way, while discriminating against individuals based on their gender.

The relevant inquiry under the Equal Protection Clause is whether the law treats an *individual* differently because of his or her gender. *Id.* "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities

are sometimes the mechanism by which the State violates the individual right in question)." *Id.* at 152 (Kennedy, J., concurring in the judgment).

Tennessee's anti-recognition laws also impermissibly seek to enforce a gender-based requirement that a woman should be married only to a man, and that a man should be married only to a woman. That gender-based restriction is out of step with Tennessee's own marriage laws, which otherwise treat spouses equally regardless of their gender. For many years, Tennessee law imposed differing duties and roles on husbands and wives. *See, e.g.*, *Prewitt v. Bunch*, 50 S.W. 748, 751 (Tenn. 1899) (describing husband's rights to wife's property during coverture, under which "marriage amounts to an absolute gift to the husband of all person goods of . . . the wife"). Under Tennessee's current law, however, the legal rights and responsibilities of marriage are the same for both spouses, without regard to gender. Act of Feb. 20, 1913, ch. 26, 1913 Tenn. Pub. Acts 59 (codified at Tenn. Code Ann. § 36-3-504) (abolishing doctrine of coverture); *Davis v. Davis*, 657 S.W.2d 753, 754, 759 (Tenn. 1983) (abolishing the doctrine of interspousal tort immunity, which was based in "antiquity, in which a woman's marriage rendered her a chattel of her husband," which is "now a historical oddity rather than a functioning concept of law") (internal quotation omitted); Tenn. Code Ann. § 36-5-101 ("either spouse" may be required to pay child support upon the dissolution of a marriage); Tenn. Code Ann. § 36-5-121 (providing that either spouse may be

required to pay spousal support and maintenance upon the dissolution of a marriage).

Similarly, recognizing women's entitlement to equality in all aspects of life, the Supreme Court has held that men and women must be on equal footing in marriage. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 202 (1977) (invalidating gender-based distinction between spouses in the Social Security Act); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975) (same); *cf. Reed v. Reed*, 404 U.S. 71, 74 (1971) (invalidating state statute requiring courts to give preference to men when appointing administrators of estates).

Because Tennessee's current marriage laws do not treat husbands and wives differently in any respect, Tennessee spouses have the same rights and obligations regardless of their gender. As such, there is no rational foundation for requiring spouses to have different genders. Today, that requirement is an irrational vestige of the outdated notion—long rejected in other respects by the Tennessee Legislature and the courts—that men and women have different "proper" roles in marriage.

Under settled law, gender-based classifications are presumed to be unconstitutional; such a law can be upheld only if supported by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 524 (internal quotation marks omitted). Tennessee's reliance on gender to exclude same-sex couples is not

supported by any exceedingly persuasive justification. To the contrary, as explained directly below, it cannot survive any level of constitutional review.

D. Tennessee's Anti-Recognition Laws Are Unconstitutional Under Any Standard Of Review Because They Do Not Rationally Advance Any Legitimate Government Interest.

As demonstrated above, Tennessee's anti-recognition laws require heightened scrutiny because: (1) they deprive gay and lesbian persons of fundamental due process rights; (2) they deliberately target same-sex couples in order to treat them unequally based on their sexual orientation; and (3) they expressly classify based on gender. No asserted justification for Tennessee's anti-recognition laws can satisfy this heightened scrutiny, just as the proffered justifications for DOMA failed to support that law.

But even if heightened scrutiny did not apply, the anti-recognition laws would also fail the rational basis test, as federal and state courts that have considered similar laws since *Windsor* have uniformly concluded. *See, e.g.*, *Kitchen*, 961 F. Supp. 2d at 1206-07 (holding that "because the court finds that [Utah's marriage ban and anti-recognition law] fails rational basis review, it need not analyze why Utah is also unable to satisfy the more rigorous standard" required by gender-based discrimination); *Bostic*, 970 F. Supp. 2d at 482 ("Virginia's Marriage Laws fail to display a rational relationship to a legitimate purpose, and so

must be viewed as constitutionally infirm under even the least onerous level of scrutiny.").

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 "ensuring that accidental pregnancies are more likely to occur within a stable family unit bound by marriage." Appellants' Br. at 26 n.15. Because same-sex couples cannot procreate "naturally," Defendants contend that "[b]iology alone" justifies Tennessee's refusal to recognize Plaintiffs' legal marriages. *Id.* at 25.

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. "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. Indeed, if supporting the raising of children

within stable family units is the purpose of marriage, Tennessee's anti-recognition laws undermine rather than advance that goal, because the sole effect of those laws is to *deny* protections to the children being raised by same-sex couples in Tennessee, including the children of Plaintiffs.

Nor can Tennessee's anti-recognition laws be justified by arguing that married opposite-sex couples make better parents than married same-sex couples. As an initial matter, the scientific consensus of national health care organizations charged with the welfare of children and adolescents—based on a significant and well-respected body of research—is that children and adolescents raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. *See* Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958.

Numerous courts have recognized this overwhelming scientific consensus. *See, e.g., Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 991 (N.D. Cal. 2012) ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents") (citations omitted); *Obergefell*, 962 F. Supp. 2d 968 at 994 n.20 (same); *DeBoer v.*

Snyder, 973 F. Supp. 2d 757, 770 (E.D. Mich. 2014) ("[T]here is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households."); *De Leon*, 975 F. Supp. 2d at 653 ("[Same-sex] couples are as capable as other couples of raising well-adjusted children.") (citations omitted).

But even if that scientific consensus did not exist, any attempt to justify Tennessee's anti-recognition laws based on asserted concerns about parenting or procreation would fail rational basis review for a more basic reason. Those assertions are not only completely unfounded, but they also have no rational or logical application to existing marriages or to children who are already being raised by legally married same-sex couples. As one district court recently explained: "Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not*, there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children." *Obergefell*, 962 F. Supp. 2d at 994 (emphasis in original).

There is a complete logical disconnect between refusing to recognize the legal marriages of same-sex couples and advancing any legitimate governmental objective related to procreation or parenting. For example, in striking down

DOMA, the First Circuit noted that "DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage." *Massachusetts v. United States Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012). "This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Id*. at 15 (internal citation omitted). These conclusions are equally true of Tennessee's anti-recognition laws. *See, e.g.*, *Bostic*, 970 F. Supp. 2d 456 at 478 ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest."); *see also Bishop v. United States ex. rel. Holder*, 962 F. Supp. 2d 1252, 1293-94 (N.D. Okla. 2014) (same); *Kitchen*, 961 F. Supp. 2d at 1211-12 (same); *Obergefell*, 962 F. Supp. 2d at 994-95 (same); *Bourke*, 2014 WL 556729, at *8 (same); *De Leon*, 975 F. Supp. 2d at 654-55 (same).

Moreover, the Constitution protects all individuals' rights, including those who do not wish to have children or are unable to do so because of age, infertility, or incarceration. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (invalidating restriction on prisoner's right to marry because procreation is not an essential aspect of the right). As Justice Scalia's dissenting opinion in *Lawrence v. Texas*

acknowledged, "the encouragement of procreation" cannot "possibly" be a justification for barring same-sex couples from marriage "since the sterile and the elderly are allowed to marry." 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting); *see also Bostic*, 970 F. Supp. 2d at 478-79 ("The 'for-the-children' rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."); *DeBoer*, 973 F. Supp. 2d at 771-72 (same).

In sum, no legitimate government interest justifies Tennessee's anti-recognition laws. Because Tennessee cannot offer a constitutionally sufficient justification for the serious harms inflicted by these laws, the state cannot permissibly exclude Plaintiffs' lawful marriages from its general rule of marriage recognition, nor can it strip them of an existing marital status simply because they married in another state. Tennessee's constitutional and statutory anti-recognition provisions are facially invalid under the due process and equal protection guarantees of the Fourteenth Amendment.

E. Tennessee's Anti-Recognition Laws Impermissibly Infringe Upon Plaintiffs' Exercise Of Their Constitutional Right To Interstate Travel.

The "virtually unconditional personal right, guaranteed by the Constitution to us all," *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quotation marks omitted), to "be free to travel throughout the length and breadth of our land uninhibited by

statutes, rules, or regulations which unreasonably burden or restrict this movement," *id.* at 499 (internal quotation marks omitted) "has repeatedly been recognized as a basic constitutional freedom."[5] *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974). The right to travel includes the freedom "to migrate, resettle, find a new job, and start a new life," as Plaintiffs have done in this case. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). It is a right "firmly embedded in" our country's jurisprudence," and one which is essential to our federal system of government, whereby each "citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein." *Saenz*, 526 U.S. at 498, 503-04 (quotation marks omitted).

The fundamental right to interstate travel is among those basic aspects of our federal system that enables the United States truly to be one indivisible nation. The ability to experience the United States as a single nation is currently being denied to many legally married same-sex couples, including Plaintiffs. Because of laws such as Tennessee's anti-recognition laws, there are today *two Americas* for married same-sex couples—a group of states where it is safe for them to travel with their families and a second group of states, including Tennessee, where it is

[5] As the Court explained in *Shapiro*, there is no "particular constitutional provision" that serves as the source for the right to travel. 394 U.S. at 630. The Supreme Court has identified, for instance, the Privileges and Immunities Clause of Art. IV, section 2, the Privileges or Immunities Clause of the Fourteenth

not safe for them to travel or resettle if they expect to be recognized and protected as a family. The right to interstate travel is impermissibly burdened for families such as Plaintiffs' families if states may condition residency on the absolute loss of marital status and the legal protections and obligations that this status guarantees.

"A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when," as here, "it uses any classification which serves to penalize the exercise of that right." *Attorney General of N.Y. v. Soto-Lopez, et al.*, 476 U.S. 898, 903 (1986) (internal quotation marks and citations omitted). Tennessee's statutory scheme severely penalizes Plaintiffs' migration to the state by nullifying their marital status for state-law purposes. It is difficult to imagine a penalty as severe as the penalty that Tennessee law visits upon married same-sex couples—the penalty of having their marriage nullified and the elimination of hundreds of legal protections that Tennessee offers to other married couples and their children. Plaintiffs all entered into valid marriages in other states before moving to Tennessee. All of the Plaintiff couples moved to Tennessee to pursue their careers, including a veteran of the war in Afghanistan now stationed at an Army base in Memphis. The anti-recognition laws penalize these couples for moving to Tennessee by denying them the many legal protections that other families may take for granted.

Amendment, the Commerce Clause, and the Due Process Clause of the Fifth

Because Tennessee law severely penalizes Plaintiffs for exercising their right to travel, and because the penalty affects sufficiently important rights, the state must justify the law with "a compelling state interest." *Maricopa Cnty.*, 415 U.S. at 258; *see also Shapiro*, 394 U.S. at 634. For all of the reasons discussed in the prior section, Tennessee cannot offer a legitimate, let alone compelling, interest to justify its refusal to recognize Plaintiffs' validly celebrated marriages. Plaintiffs therefore are entitled to prevail on their right to travel claim.

F. *Baker v. Nelson* Does Not Control This Case.

Defendants' reliance on the Supreme Court's summary dismissal of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), has no merit. A summary dismissal is dispositive only as to the "precise issues" presented in a case. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). At the time *Baker* was decided, no state permitted same-sex couples to marry. Therefore, *Baker* did not address the "precise issue" presented here: whether a state may categorically deny recognition to same-sex couples who legally married in other states.

Moreover, "doctrinal developments" have deprived *Baker* of precedential effect. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). *Baker* was decided more than forty years ago, before the Supreme Court held that heightened equal protection scrutiny applies to sex-based classifications. *See Craig v. Boren*, 429

Amendment depending on the circumstances of a particular case. *Id.* at 630 n.8.

U.S. 190, 197 (1976). At the time *Baker* was decided, the Supreme Court had not yet held that laws enacted for the express purpose of disadvantaging a particular group violate the requirement of equal protection, *see United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); applied that principle to laws that target gay people, *see Romer*, 517 U.S. at 635, and *Windsor*, 133 S. Ct. at 2693; held that same-sex couples have the same protected liberty interests in their relationships as others, *see Lawrence*, 539 U.S. at 578; affirmed that "the right to marry is of fundamental importance for all individuals," *see Zablocki*, 434 U.S. at 384; or held that even incarcerated persons who are unable to engage in procreative intimacy nonetheless have a protected right to marry, *see Turner v. Safley*, 482 U.S. 78, 94-97 (1987). In light of these profound developments since *Baker*, it is plain that the constitutional claims at issue in this case present substantial federal questions.

III. THE THREE REMAINING FACTORS ALSO SUPPORT THE DISTRICT COURT'S ENTRY OF AN INJUNCTION.

Plaintiffs are entitled to judgment on the merits on their constitutional claims, and the three remaining factors also strongly support injunctive relief in this action. *See Winter*, 555 U.S. at 20. First, the District Court correctly determined that the Plaintiffs will be irreparably harmed unless Defendants are enjoined from enforcing the anti-recognition law. *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, *7 (M.D. Tenn. Mar. 14, 2014). The loss of a constitutional right, "even for a minimal period[ ] of time, unquestionably

constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Further, "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001).

As the District Court properly concluded, "the evidence shows that plaintiffs are suffering dignitary and practical harms that cannot be resolved through monetary relief." *Id.* Although Defendants attempt to minimize these harms by characterizing them as merely "reputational," the Supreme Court has expressly held that the stigma and humiliation inflicted by non-recognition of one's marriage are harms of constitutional dimension. *See Windsor*, 133 S. Ct. at 2695-96. Nothing in *Windsor* suggests that the injury inflicted by non-recognition of an existing, legal marriage would somehow be mitigated or lessened when inflicted by the state, rather than the federal government. If anything, because most of the rights and obligations of marriage derive from state rather than federal law, having one's lawful marriage disregarded by the state inflicts an even more demeaning, stigmatizing, and oppressive injury. *See Obergefell*, 962 F. Supp. 2d at 980-81.[6]

[6] Defendants' attempt to analogize the profound constitutional injury inflicted in this case to the "reputational" injury discussed in *Sampson v. Murray*, 415 U.S. 61 (1974), serves only to highlight the irrelevance of that case—and the absence of relevant authority supporting Defendants' position. *Sampson* held that possible hypothetical injuries to a probationary employee's reputation as a result of alleged procedural irregularities in the employee's discharge did not constitute the type of irreparable injury necessary to support a preliminary injunction. As this

Those injuries concern not merely potential, incidental, or temporary harm to the professional reputation of a particular person, but the intentional imposition of a categorical, caste-like stigma upon an entire group of lawfully-married couples and their children, with respect to one of our society's most central, highly esteemed, and deeply personal institutions. *See Windsor*, 133 S. Ct. at 2694.

In addition, the District Court correctly concluded that Plaintiffs suffered irreparable injury by being deprived of the hundreds of protections given to legal spouses under Tennessee's statutory, constitutional, and common law. The purpose of marriage is, in large part, to provide married couples with the security of having a legally-protected, legally-binding relationship that enables the spouses to join their lives together in a way that is respected by the state and third parties and that protects them not only in everyday life but in times of illness, crisis, injury, or death. As the evidence established, and as the District Court properly found, Tennessee's anti-recognition laws deprive Plaintiffs of that security and expose them to grievous and irreparable harm.

For example, Defendants do not dispute that, absent the District Court's injunction, Dr. Jesty would not have been recognized as the legal parent of the

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Court has explained, "[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 v. United States*, 649 F.2d 449, 454 (6th Cir. 1981); *see also Howe v. City of Akron*, 723 F.3d 651, 662 (6th Cir. 2013).

child born to her wife, Dr. Tanco, shortly after the injunction went into effect. Defendants' erroneous suggestion that Plaintiffs somehow could replicate the protections offered to opposite-sex married couples ignores the many practical and dignitary injuries imposed on Plaintiffs by the anti-recognition laws. Private documents cannot replicate the comprehensive obligations and protections given to married parents and their children, including the certainty that both spouses have a legally-protected relationship with the couple's child from the moment of birth.[7]

With respect to the third factor in the injunctive relief analysis—the balance of equities—Defendants have not offered any evidence that they will suffer any harm, much less harm that outweighs the severe harm to Plaintiffs, if Defendants'

[7] A vast array of legal rights, benefits, and obligations are available only with a state-recognized parent-child relationship, including, among many others: the right to have both parents involved in medical decision-making, *see* Tenn. Code Ann. §§ 36-6-101, 36-6-103; the ability to obtain health insurance and other employment-related benefits from both parents, *see* Tenn. Code Ann. §§ 56-7-2301, 36-5-101; the right to child support from both parents, *see* Tenn. Code Ann. § 36-5-101; the requirement that the state must meet strict requirements before terminating the parent-child relationship of either parent, *see* Tenn. Code Ann. §§ 36-1-113, 37-1-147; the right to receive Social Security benefits as a surviving child from both parents, *see* 42 U.S.C. § 402; the right to worker's compensation benefits in the event of either parent's death, *see* Tenn. Code Ann. § 50-6-210; the right to intestate inheritance from both parents, *see* Tenn. Code Ann. § 31-2-104; the right to bring a wrongful death suit in the event of either parent's death, *see* Tenn. Code Ann. § 20-5-107; and numerous other statutory, common law, and constitutional protections that attach only to a legal parent-child relationship. Plaintiffs are substantially injured by any requirement that they employ separate (and often uncertain and inadequate) methods to replicate a fraction of these legal protections rather than being treated the same as other married couples who have children.

enforcement of Tennessee's anti-recognition laws is enjoined. They do not identify any burden to the state or its agencies that would arise if the state is required to recognize the marriages of Plaintiffs and other same-sex couples. In any event, "[n]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (affirming district court order granting preliminary injunction where city did not identify "any particular irreparable harm that it faces") (citation and internal quotation marks omitted); *Obergefell*, 962 F. Supp. 2d at 997.[8]

For similar reasons, the fourth and final factor—the public interest—also strongly supports the District Court's injunction. "It is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

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[8] *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." Def. Br. at 32. 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 standard for issuing injunctions, which grants no special deference to state actors or state domestic policy.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the decision of the District Court and remand with instructions to enter final judgment and a permanent injunction prohibiting enforcement of Tennessee's Anti-Recognition Laws.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6 Cir. R. 32(a), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,802 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Word 2013 in 14 point Times New Roman.

Dated: June 9, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on June 9, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *William L. Harbison*

DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees designate the following district court documents:

District Court Docket No.	Description of Document	Page ID No.
1	Complaint	1
27	Answer to Complaint	94
29	Motion for Preliminary Injunction	114
30	Memorandum in Support of Motion for Preliminary Injunction	118
32	Notice of Filing in Support of Motion for Preliminary Injunction (Attachments: #1 Declaration of Valeria Tanco, # 2 Declaration of Sophy Jesty, #3 Exhibit A to Declaration of Sophy Jesty, #4 Exhibit B to Declaration of Sophy Jesty, #5 Exhibit C to Declaration of Sophy Jesty, #6 Exhibit D to Declaration of Sophy Jesty, #7 Exhibit E to Declaration of Sophy Jesty, #8 Declaration of Ijpe Dekoe, #9 Declaration of Thomas Kostura, #10 Declaration of Kellie Miller-Devillez, #11 Exhibit A to Declaration of Kellie Miller-Devillez, #12 Exhibit B to Declaration of Kellie Miller-Devillez, #13 Exhibit C to Declaration of Kellie Miller-Devillez, #14 Attachment Declaration of Vanessa Miller-Devillez, #15 Declaration of Johno Espejo, #16 Declaration of Matthew Mansell)	383
35	Response in Opposition to Motion for Preliminary Injunction	496

District Court Docket No.	Description of Document	Page ID No.
37	Notice of Filing in Opposition to Motion for Preliminary Injunction (Attachments: #1 Goins Declaration and Exhibit A, # Walden Affidavit and Exhibits A & B)	713
46	Reply to Response to Motion for Preliminary Injunction	792
67	Memorandum Opinion	1415
68	Order	1435
69	Preliminary Injunction	1436
74	Notice of Appeal	1517