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
Case No. 3:13-cv-00159 (Hon. Aleta A. Trauger)

AMICUS CURIAE BRIEF OF PROFESSOR MARK P. STRASSER IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1(a), Amicus Curiae offers the following disclosures:

Amicus Curiae Mark P. Strasser is an individual and is not a corporation or a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation or its affiliate with a substantial financial interest in the outcome of this appeal whose interest is aligned with that of Amicus Curiae Mark P. Strasser.

Dated: June 16, 2014

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(b), Mark P. Strasser, the Trustees Professor of Law at Capital University Law School in Columbus, Ohio, submits this amicus brief in support of Plaintiffs-Appellees. Professor Strasser is an expert in family law, bioethics, and constitutional law, and is the author of numerous articles addressing the intersection of the constitutional right to travel and a state's refusal to recognize marriages between individuals of the same sex.[1] Professor Strasser submits this brief to provide the Court with an analysis of the scope of the fundamental constitutional right to travel and migrate and the wide-

[1] *See* Mark Strasser, *Same-Sex Unions Across the United States* 175-200 (2011); Mark Strasser, *On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads* 55-74 (2002); Mark Strasser, *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections* 201-04 (1999); Mark Strasser, *Windsor, Federalism, and the Future of Marriage Litigation*, 37 Harv. J.L. & Gender 1 (2013); Mark Strasser, *Let Me Count the Ways; The Unconstitutionality of Same-Sex Marriage Bans*, 27 BYU J. Pub. L. 301 (2013); Mark Strasser, *Federal Courts, Misdirection, and the Future of Same-Sex Marriage Litigation*, 23 Kan. J.L. & Pub. Pol'y 73 (2013); Mark P. Strasser, *DOMA and the Constitution*, 58 Drake L. Rev. 1011 (2010); Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 Wis. J.L. Gender & Soc'y 1 (2010); Mark Strasser, *What if DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 Cal. W. Int'l L.J. 249 (2010); Mark Strasser, *The Legal Landscape Post-DOMA*, 13 J. Gender Race & Just. 153 (2009); Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 Cap. U. L. Rev. 363 (2002); Mark Strasser, *The Privileges of National Citizenship: On* Saenz, *Same-Sex Couples, and the Right to Travel*, 52 Rutgers L. Rev. 553 (2000); Mark Strasser, *Unity, Sovereignty, and the Interstate Recognition of Marriage*, 102 W. Va. L. Rev. 393 (1999); Mark Strasser, *For Whom the* Bell *Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. Cin. L. Rev. 339 (1998); Mark Strasser, Loving *the* Romer *out for* Baehr*: On Acts in Defense of Marriage and the Constitution*, 58 U. Pitt. L. Rev. 279 (1997).

ranging impact of the laws challenged herein on the ability of same-sex spouses to exercise that right.[2]

INTRODUCTION

Perhaps no relationship carries greater legal import than marriage. Indeed, for many, marriage is "the most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (citation omitted). When two individuals marry, they become subject to a host of laws that create rights, protections, and obligations around which they can build their families and their lives. "For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 312 (2003). When the plaintiffs in this case married their spouses in New York and California, they reasonably expected to be able to rely upon those rights, protections, and obligations in planning and building their lives together.

Because Tennessee and other states with similar laws deny recognition to the lawful marriages of same-sex couples performed in other states, however, the rights, protections, and obligations of legal marriage are confined by geography for

[2] No party's counsel authored this brief in whole or in part, and no person other than the amicus curiae and his counsel contributed money that was intended to fund the preparation and submission of this brief. This brief is filed with the consent of all parties.

same-sex spouses and their children. Upon entering a state like Tennessee that does not recognize valid marriages entered into by same-sex couples in other states, same-sex spouses become legal strangers while within that state. They can move to, visit, or travel through such a state only if they are willing to risk losing nearly all of the protections, rights, and obligations afforded to them by their marriage.

As explained in Plaintiffs-Appellees' brief, the laws challenged in this appeal, pursuant to which Tennessee refuses to recognize marriages of same-sex couples validly performed in other states (hereinafter Tennessee's "anti-recognition laws"), are subject to heightened constitutional scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Brief of Plaintiffs-Appellees, at 24-42. But this Court should recognize that Tennessee's anti-recognition laws also significantly burden same-sex spouses' fundamental constitutional right "to travel from one State to another and to take up residence in the State of [their] choice." *Jones v. Helms*, 452 U.S. 412, 418 (1981); *see Crandall v. Nevada*, 73 U.S. 35, 47 (1867).

By ensuring that citizens "have the right to pass and repass through every part of [the United States] without interruption," the right to travel—like the closely-related Commerce Clause—ensures that "[f]or all the great purposes for which the Federal government was formed we are one people, with one common

country." *Id.* at 48-49. By forcing married same-sex couples to choose between either exercising their constitutional right to travel through, visit, or migrate to Tennessee or retaining the rights, obligations, and protections afforded by their legal marriage, Tennessee's anti-recognition laws directly undermine that foundational constitutional principle and create two Americas: one in which legally married same-sex couples are free to travel and relocate without sacrificing their marital status, and one in which they place that status at risk the moment they cross a state line.

Because Tennessee's anti-recognition laws impose a heavy burden on same-sex spouses' constitutional right to travel, they are permissible only if necessary to further a compelling state interest. *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 n.4 (1986). As explained in Plaintiffs-Appellees' brief, the challenged laws cannot survive such scrutiny. The Court should therefore affirm the decision below.

ARGUMENT

I. Tennessee's Anti-Recognition Laws Impose A Heavy Burden On Same-Sex Spouses' Constitutional Right To Travel And Migrate

A. State Laws That Deter Or Penalize Interstate Travel Or Migration Burden The Fundamental Constitutional Right To Travel And Are Subject To Heightened Scrutiny

It is "well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by

the Federal Constitution." *Jones*, 452 U.S. at 418; *see also Soto-Lopez*, 476 U.S. at 902 ("[T]he freedom to travel includes the freedom to enter and abide in any State in the Union.") (citation omitted); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1971) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution."); *Crandall*, 73 U.S. at 47.

"From whatever constitutional provision this right may be said to flow, both its existence and its fundamental importance to our Federal Union have long been established beyond question." *Oregon v. Mitchell*, 400 U.S. 112, 237-38 (1970) (Brennan, J.) (citations and footnote omitted). At its core, the right to travel embodies the principle that, following the Constitution's ratification, the country is a single Nation rather than an alliance of independent sovereign states. The right thus includes the "right to go from one place to another" without obstacle, as well the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999). The right to travel ensures that citizens retain the right and ability to pass through and settle within every state that has joined the Union, and that the states do not implement laws to help them "select their citizens" from among those who hold national citizenship. *Id.* at 511. "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens 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." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *Soto-Lopez*, 476 U.S. at 902 (right to travel and migrate between and within states reflects "the unquestioned historic acceptance of the principle of free interstate migration, and . . . the important role that principle has played in transforming many States into a single Nation"). Because it reflects a core structural principle that underlies the Constitution as a whole, the right to travel and migrate throughout the United States without undue burden is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Saenz*, 526 U.S. at 498 (citation omitted).

As both the Supreme Court and this Circuit have recognized, a state law can burden the right to travel in three different ways. "A state law implicates the right to travel when it actually deters travel, when impeding travel is its primary objective, or when it uses a classification that serves to penalize the exercise of the right." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007); *see also Soto-Lopez*, 476 U.S. at 903 (same). In determining whether a particular law burdens the right to travel to the degree required to trigger heightened constitutional scrutiny, the Supreme Court considers the particular manner in which the law deters travel or "serve[s] to penalize the exercise of the right to travel." *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 256-57

(1974). Where the law does so by denying or limiting access to "basic" or "essential" governmental privileges and benefits, it "must be justified by a compelling state interest." *Id.* at 258-59; *see also Soto-Lopez*, 476 U.S. at 904 n.4 ("[O]nce we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.").

B. The Challenged Laws Force Same-Sex Spouses To Forfeit Nearly All Of The Legal Rights, Protections, And Obligations Of Marriage As A Condition Of Entering Tennessee

In this case, Tennessee's refusal to recognize marriages of same-sex couples validly performed in other states serves as a significant deterrent to any decision by same-sex spouses to travel through, visit, or migrate to Tennessee, and penalizes any exercise of that constitutional right. Pursuant to the challenged laws, validly married same-sex couples are stripped of nearly all of their legal rights and obligations as married partners while they are in Tennessee, and are treated instead as legal strangers.

The consequences of that loss of rights are profound. In the medical context, for example, marriage conveys substantial protections that are lost when same-sex spouses travel into states like Tennessee that do not recognize their marriages. Should one spouse be admitted to the hospital, the healthy spouse may be denied visitation rights, and may ultimately be unable to make medical decisions for an

incapacitated spouse. *See* Patience Crozier, *Nuts and Bolts: Estate Planning and Family Law Considerations for Same-Sex Families*, 30 W. New Eng. L. Rev. 751, 755 (2008); Tenn. Code Ann. §68-11-1806(c)(3)(A) (according preference for service as medical surrogate to patient's "spouse"). If a child is born to a married same-sex couple in such a state, the non-birth mother will not be recognized as the child's presumed legal parent. *See* Tenn. Code Ann. §36-2-304; Brief for Plaintiffs-Appellees, at 8-9. She will be treated as a total stranger with respect to her child, and not permitted to make medical or other decisions for the child. Further, non-birth parents who, by virtue of their marriage, are accorded full parental rights in states such as California and New York, risk being treated as total strangers to their children when they travel to Tennessee.

Same-sex spouses also face life-altering financial consequences for moving to a state like Tennessee that refuses to recognize their marriage. They may be forced to pay inheritance taxes on a shared home, may not be able to file joint income tax returns at the state level, and are generally unable to pursue wrongful death or loss of consortium suits based on their spousal relationship. Additionally, they may be excluded from state benefits programs that depend on marital status, and may be denied federal benefits to the extent those benefits depend on the

state's classification of a person as married or unmarried.[3] And if a spouse's employer-based health insurance plan relies upon state definitions of marriage to determine eligibility for family coverage, his or her spouse and children may be ineligible for coverage. *See, e.g.*, Brief of Plaintiffs-Appellees, at 9.

The burdens facing same-sex spouses who move to a state where their marriage is not recognized continue even when the spouses determine that the marriage should be dissolved. Because their marriage does not exist in the eyes of their new home state, they may be unable to obtain a divorce. Mark Strasser, *What If DOMA Were Repealed?*, 41 Cal. W. Int'l L.J. at 266-67. Likewise, the orderly system for allocating parental rights and responsibilities following a divorce may be unavailable to them. And without a state-recognized marriage, one spouse may be able to evade familial support obligations such as child support or alimony. Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 1-3 (2005).

[3] The Social Security Administration, for example, currently holds spousal benefits claims by same-sex spouses living in states that do not recognize their marriages, and has not determined whether spousal benefits will be available to such couples. U.S. Social Security Administration, Program Operations Manual System, GN 00210.005, *available at* https://secure.ssa.gov/poms.nsf/lnx/0200210005. By contrast, the Administration recognizes the marriages of same-sex spouses living in states that recognize their marriages. U.S. Social Security Administration, Program Operations Manual System, GN 00210.100, *available at* https://secure.ssa.gov/poms.nsf/lnx/0200210100.

Beyond these concrete consequences of state anti-recognition laws, same-sex spouses suffer an additional dignitary harm when stripped of legal recognition of their marriages. By refusing to recognize the legal marriages of same-sex couples that travel through or migrate to Tennessee, Tennessee conveys to such couples the message that their marriages are not "worthy of dignity in the community equal with all other marriages." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). This denial harms the adult spouses in those marriages, and also "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* at 2694. Tennessee's refusal to recognize the marriages of same-sex couples who validly married in other states conveys the strong message that same-sex spouses and their children are not welcome in that state.

Tennessee's refusal to recognize the lawful unions of same-sex couples who married in other states harms not only same-sex spouses who relocate to Tennessee, but also those who merely visit or travel through the state. Such couples lose their rights as married spouses for so long as they remain in Tennessee—even if they are coming from and traveling to states whose laws accord them all of the rights and obligations of legally married spouses. For example, if one same-sex spouse were to fall ill during a layover in Memphis or while visiting family members who reside in Tennessee, and were thereafter hospitalized in a Tennessee hospital, the healthy spouse could be denied visitation

rights and the right to make critical medical decisions simply because the illness occurred in Tennessee.

Given the significant and profound consequences of Tennessee's "outright denial" of the rights, protections, and obligations of legal marriage to same-sex spouses who exercise their constitutional right to travel and in doing so enter Tennessee, *Saenz*, 526 U.S. at 504, there can be no reasonable dispute that the challenged laws deter travel by same-sex spouses to Tennessee and penalize any exercise of their constitutional right to travel through or migrate to that state.[4] The penalty for exercising the right to enter and settle in Tennessee—one must surrender one's marriage—is significantly greater in scope and significance than other penalties that the Supreme Court has previously invalidated as impermissible burdens upon the right to travel, such as a capitation tax of one dollar imposed upon individuals departing from a state, *Crandall*, 73 U.S. at 36, 39, 49, or a one-year residency requirement for receipt of welfare assistance, *Shapiro*, 394 U.S. at 621-22. Because Tennessee's anti-recognition laws require same-sex spouses to

[4] Where the deterrent effect of a state law on interstate travel is readily apparent on the law's face, as is the case here, there is no need for additional evidence regarding specific individuals who "were deterred from traveling by the challenged restriction." *Memorial Hosp.*, 415 U.S. at 257-59. Empirical evidence nonetheless confirms the common-sense conclusion that same-sex couples are more likely to settle in states that welcome such couples. *See, e.g.*, Gary J. Gates, Abigail M. Cook, *United States Census Snapshot 2010*, The Williams Institute (Sept. 2011) at 5, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

forfeit what may be their "most important relation in life" as the price of admission into Tennessee, *Zablocki*, 434 U.S. at 384, those laws place a significant burden on same-sex spouses' constitutional right to travel, and are subject to heightened scrutiny on that basis. *Cf. Memorial Hospital*, 415 U.S. at 259 (for purposes of the right to travel, "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements").

C. Express Discrimination Against Interstate Travelers Is Not a Prerequisite To Establishing A Burden Upon The Right To Travel And Migrate

In the proceedings below, Tennessee did not contest that its anti-recognition laws deter interstate migration by forcing same-sex spouses to choose between exercising their right to travel and migrate or maintaining their rights and obligations as legally married spouses. Instead, Tennessee's primary defense was that its anti-recognition laws are consistent with the fundamental right to travel because Tennessee refuses to *perform* marriages between individuals of the same sex, and thus is not discriminating by refusing to *recognize* valid out-of-state marriages. Defs.' Response in Opp'n to Pls.' Mot. for Prelim. Inj., Dkt. No. 35, PageID #513-14. But the right to travel may be infringed either by discrimination against interstate travelers *or* by laws (like Tennessee's anti-recognition laws) that "actually deter[]" interstate travel. *League of United Latin Am. Citizens*, 500 F.3d

at 535. As the Supreme Court has held, a state law that significantly deters and penalizes interstate travel burdens the constitutional right to travel even if it does *not* discriminate against interstate travelers. *See Memorial Hosp.*, 415 U.S. at 255-56 (county residency requirement that burdened intrastate and interstate travelers equally nonetheless "effectively penalized . . . interstate migration" and was therefore subject to heightened constitutional scrutiny).[5]

Tennessee's refusal to perform marriages for same-sex couples is distinguishable from its refusal to recognize marriages that have already been celebrated in different states. Even were Tennessee constitutionally permitted to do the former, it could not do the latter without burdening same-sex couples' right to travel through, visit, and migrate to Tennessee. Discrimination against recent immigrants provides one basis for concluding that state laws are inconsistent with

[5] Unlike the law at issue in *Memorial Hospital*, which was invalidated even though it burdened both interstate and intrastate travel, 415 U.S. at 255, Tennessee's refusal to recognize marriages of same-sex couples validly performed outside Tennessee does *not* have the same effect on intrastate travel: No individual is forced to forfeit his or her marriage rights as a condition of moving *within* Tennessee. And the fundamental legal rights and obligations of marriage that Tennessee's anti-recognition laws strip away from same-sex spouses who migrate to Tennessee are different—in fundamental significance and in the life-altering consequences associated with their loss—from the "government payments of monetary benefits" at issue in *Califano v. Gautier Torres*, 435 U.S. 1, 5 (1978). *See id.* (noting that "a person who has moved from one State to another might be entitled to invoke the law of the State from which he came as a corollary of his constitutional right to travel," but explaining that the laws of other states cannot be so invoked in the context of monetary benefits).

the right to travel, but that is not the *only* means by which that right may be infringed. *See Saenz*, 526 U.S. at 500-03.

The Supreme Court has recognized the right to travel and migrate throughout the nation without undue burden, and the Court's analysis of whether that right has been unconstitutionally infringed is consistent with its closely-related decisions applying the "dormant" component of the Commerce Clause. Like the right to travel, the Commerce Clause serves the central purpose of fusing the various states into a single united Nation marked by the free flow of individuals and commerce across state borders.[6] Indeed, the Supreme Court has at times

[6] *Compare, e.g.*, *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949) (Commerce Clause ensures that "our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy," and that "the states are not separable economic units"); *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."); *and Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995) (Commerce Clause "prevent[s] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders"); *with Crandall*, 73 U.S. at 48-49 ("For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."); *Saenz*, 526 U.S. at 501 (right to travel was "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created") (citation omitted); *Soto-Lopez*, 476 U.S. at 902 (noting "the unquestioned historic acceptance of the principle of free interstate migration, and . . . the important role that principle has played in transforming many States into a single Nation").

analyzed burdens on the movement of individuals across state borders under the Commerce Clause as well as through the lens of the constitutional right to travel.[7] And as with the right to travel, statutes may be invalidated under the Commerce Clause whether or not they expressly discriminate against interstate commerce.[8] Because the Constitution establishes the country as a single, united Nation in which goods and individuals can freely flow across state borders, a facially nondiscriminatory statute may be invalidated under the Commerce Clause if it has the *effect* of discriminating against interstate commerce,[9] or if its burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."[10]

As Justice Douglas noted, "the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Edwards*, 314 U.S. at 177 (Douglas, J., concurring). Accordingly, state-imposed burdens upon the right

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[7] *See Edwards v. Cal.*, 314 U.S. 160, 172-73 (1941); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

[8] *See, e.g., Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) ("dormant" Commerce Clause "denies the States the power unjustifiably to discriminate against *or* burden the interstate flow of articles of commerce") (emphasis added).

[9] *See, e.g., Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 351-53 (1977); *E. Kentucky Res. v. Fiscal Court of Magoffin Cnty., Ky.*, 127 F.3d 532, 540 (6th Cir. 1997).

[10] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 802-03 (6th Cir. 2005).

to interstate travel and migration are subject to at least as much constitutional scrutiny as comparable burdens upon interstate commerce—and they are subject to strict constitutional scrutiny where those burdens also involve interests as fundamental as marriage. Tennessee's contention that the significant statutory burdens upon the right to travel and migrate imposed upon same-sex spouses by its anti-recognition laws are constitutionally permissible because they do not expressly discriminate against interstate travel and migration is without merit. A law that deters and penalizes interstate migration—as a state law stripping couples of their marital status when they move to or travel through that state plainly does—burdens the fundamental right to travel in the most basic way.

II. The Challenged Laws Do Not Survive Heightened Constitutional Scrutiny

Because Tennessee's anti-recognition laws impose a significant burden on same-sex spouses' right to travel and migrate, they are permissible only if they are necessary to further a compelling state interest. *See, e.g.*, *Soto-Lopez*, 476 U.S. at 904 n.4 ("Laws which burden [the right to migrate] must be necessary to further a compelling state interest."); *Memorial Hosp.*, 415 U.S. at 254 (statute that "impinged on the constitutionally guaranteed right of interstate travel . . . was to be judged by the standard of whether it promoted a compelling state interest").

Plaintiffs-Appellees' brief explains why Tennessee's anti-recognition laws cannot survive rational basis review, let alone the heightened constitutional

scrutiny applicable to statutes that burden the right to travel. *See* Brief of Plaintiffs-Appellees, at 41-47. This brief will not reiterate Plaintiffs-Appellees' arguments, but it is worth emphasizing that Tennessee makes no effort whatsoever to defend its specific refusal to recognize marriages between members of the same-sex that were validly performed outside Tennessee. Tennessee asserts that as a *general* matter, its decision to define marriage as a relationship between different-sex individuals serves legitimate state interests in preventing marriage from becoming "divorced from its traditional procreative purpose," and promoting "family continuity and stability." Brief of Defendants-Appellants, at 25. But refusing to recognize marriages validly celebrated elsewhere undercuts rather than promotes family continuity and stability—particularly where children have been (or may be) born into that marriage. And Tennessee does not explain why its purported interest in defining marriage by reference to its "traditional procreative purpose" requires that it refuse to recognize marriages performed by *other* states in which "the intimate relationship between two people" of the same sex has been deemed "worthy of dignity in the community equal with all other marriages." *Windsor*, 133 S. Ct. at 2692.

In short, Tennessee has not offered any rational justification for its refusal to recognize marriages of same-sex couples validly performed outside Tennessee and its insistence that same-sex spouses forfeit their rights as married individuals upon

entering Tennessee, let alone demonstrated that doing so is necessary to any compelling state interest.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B), because this brief contains 4,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6th Cir. R. 32(b)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter.

Dated: June 16, 2014

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