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
Middle District of Tennessee, No. 3:13-cv-01159

BRIEF OF *AMICI CURIAE* FAMILY LAW AND CONFLICT OF LAWS PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-5297 Case Name: Tanco v. Haslam

Name of counsel: Marjory A. Gentry

Pursuant to 6th Cir. R. 26.1, Family Law and Conflict of Laws Professors
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on June 16, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Marjory A. Gentry

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), *Amici Curiae*, scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage, respectfully submit this brief in support of Appellees.[1] *Amici* support all the arguments made by Appellees to this Court on appeal. *Amici* aim to provide the court with information about the history of marriage recognition law, both across the country and in Tennessee, and its relevance to the constitutionality of the state's ban on the recognition of marriages between people of the same sex validly celebrated in other states, an issue now before the Court. A list of individual signatories may be found in Appendix A.

SUMMARY OF ARGUMENT

Amici submit this brief to address why Tennessee's refusal to give effect to marriages of same-sex couples validly celebrated in other states and countries violates the Constitution's guarantees of due process and equal protection and to provide additional historical context in support of these arguments.

Tennessee's anti-recognition laws are historically unprecedented. While marriage has been primarily regulated by the states, and states have had points of

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

stark disagreement over impediments to marriage, they have resolved those conflicts by giving effect to one another's marriages in most instances. The touchstone of interstate marriage recognition law is the "place of celebration" rule, which provides that a marriage valid where celebrated is valid everywhere. This rule was subject to narrow exceptions that were oft-recited, but rarely applied, even to marriages that were the subject of great controversy and piqued social and moral disapproval. As state marriage laws converged, marriage recognition issues arose less often, and marriages became more portable than ever. The pro-recognition approach provided stability and predictability to families, promoted marital responsibility, facilitated interstate travel, and protected private expectations. It was widely understood that a contrary rule, one that tended to deny recognition to valid marriages, would produce devastating consequences affecting everything from the legitimacy of children to protection against spousal abuse to inheritance rights.

Tennessee traditionally followed the same approach to marriage recognition, deferring in most instances to the law of the state in which the marriage was celebrated. In 1996, swept up in a national fervor opposing marriages by people of the same sex, Tennessee created by statute a single exception to the place-of-celebration rule for marriages of two men or two women. Tenn. Code Ann. § 36-3-113 (2014). The new law made clear that "[a]ny policy, law or judicial

interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee" and that heterosexual marriages "shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." *Id.* To that end, the provision also makes explicit that "[i]f another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state." *Id.* The law thus bans both the celebration and recognition of marriages by same-sex couples. The Attorney General of Tennessee concluded that this latter provision precludes recognition not only of marriages between persons of the same sex validly created in another state, but also same-sex civil unions and domestic partnerships. In 2004, the Tennessee legislature sought to reinforce the statutory bans on marriage by same-sex couples by introducing a constitutional amendment along the same lines. The amendment, approved by voters in 2006, is parallel to the statutory bans, including with respect to recognition of out-of-state marriages by same-sex couples. The amendment provides that such a marriage shall be "void and unenforceable" in Tennessee. Tenn. Const. Art. XI, § 18.

The statutory and constitutional bans on recognition of marriages by same-sex couples ("the Anti-Recognition Laws") are historically unprecedented in that they

create overlapping and categorical rules rather than allowing for individualized determinations; they shift decision-making power from courts, where it had largely resided, to the legislature; they draw no distinction between marriages contracted in a particular state to evade restrictions of the couple's home state ("evasive marriages") and those contracted by residents of another state; and, finally, they enshrine the rule of non-recognition in the state's constitution.

Under the principles elucidated in *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), Tennessee's blanket prohibition on the recognition of marriages involving same-sex couples validly celebrated elsewhere violates the Equal Protection Clause. While primarily the province of the states, marriage laws must conform to the requirements of the U.S. Constitution. As demonstrated in *Loving v. Virginia*, 388 U.S. 1 (1967), and later cases, a marriage law is not insulated from constitutional review simply because it represents state public policy. In *Windsor*, the Court invalidated the federal-law provision of the Defense of Marriage Act ("DOMA"), in which Congress adopted a non-recognition rule for marriages by same-sex couples for federal law purposes, based on due process and equal protection grounds. Given DOMA's departure from Congress's long history and tradition of deferring to state-law determinations of marital status, the Court deemed it a discrimination of "unusual character" that warranted "careful consideration" for constitutionality, and raised a strong

inference that the law reflects animus. 133 S. Ct. at 2693. Given that DOMA's purpose and effect were to impose disadvantage on same-sex married couples, it could not be justified for any legitimate purpose. In a straightforward application of these principles, Tennessee's anti-recognition laws suffer the same fate. They were adopted for no reason other than to disadvantage married same-sex couples. Tennessee offered no reason—nor could any be offered—to explain its deviation from a long tradition of respecting out-of-state marriages.

Tennessee's anti-recognition laws also run afoul of the Due Process Clause. Marriage, and the right to make personal decisions concerning marriage, is a fundamental liberty interest. Robust constitutional protection for marriage was recently reconfirmed by the Court in *Windsor*. *Id*. at 2714. Laws that infringe on an individual's right to *remain* married are inherently suspect and are subject to a heightened level of scrutiny. Tennessee's recognition bans convert legally married same-sex couples crossing into Tennessee's borders from spouses to legal strangers thereby depriving these couples of all of the rights and privileges connected with marriage. Due Process demands that same-sex couples should not be summarily stripped of their marriages absent a compelling justification by the state.

ARGUMENT

I. TENNESSEE'S ANTI-RECOGNITION LAWS ARE HISTORICALLY UNPRECEDENTED

A. Historically, Marriage Recognition Law Favored Validation of Marriages That Were Valid Where Celebrated

Marriage law has been primarily the province of the states. *See Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890) (the "whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states"); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage . . . has always been subject to the control of the legislature," which "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."); *Windsor*, 133 S. Ct. at 2680 ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States."). State statutes specifically set forth who can or cannot marry, whether prohibited marriages are void or voidable, and the procedural requirements for creating a valid marriage. *See, e.g.*, Tenn. Code Ann. §§ 36-1-103 – 36-1-113 (2014). Because states sometimes imposed different restrictions on marriage, questions arose about marriage recognition—whether a marriage would be recognized as valid in a state that would have prohibited its celebration in the first instance.

The general rule of marriage recognition is that a *marriage valid where celebrated is valid everywhere. See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated"); FLETCHER W. BATTERSHALL, THE LAW OF DOMESTIC RELATIONS IN THE STATE OF NEW YORK 7-8 (1910) (describing "the universal practice of civilized nations" that the "permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated"); WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 119, 415 (4th ed. 2013) (noting the "overwhelming tendency" in the United States to recognize the validity of marriage valid where performed); *see also In re Loughmiller's Estate*, 629 P.2d 156, 158 (Kan. 1981) (same); *In re Estate of May*, 114 N.E.2d 4, 6 (N.Y. 1953) (same). This rule, known as the "place of celebration" rule or *lex loci contractus*, is recognized in some form in every state and, indeed, is a central element of American family law.[2]

The general rule was traditionally subject to exceptions for out-of-state marriages that violated the state's "positive law" (e.g., a statute that expressly bars extraterritorial recognition of a particular type of marriage) or "natural law"

[2] The strong preference for recognition is also embodied in the Uniform Marriage and Divorce Act, which provides for no exceptions. Unif. Marriage Divorce Act § 210, 9A U.L.A. 194 (1970) (amended 1973).

(sometimes described as "public policy").[3] *See, e.g.*, JOSEPH R. LONG, LAW OF DOMESTIC RELATIONS 87-89 (1905) (describing exceptions). But even those exceptions were typically applied only after a fact- and context-specific analysis by a court considering an individual request for recognition. *See, e.g.*, *Loughmiller's Estate*, 629 P.2d at 161 (upholding evasive, first-cousin marriage because it was not an "odious" form of incest); *Inhabitants of Medway v. Needham*, 16 Mass. 157, 159 (1819) (upholding evasive, interracial marriage from Rhode Island). And despite these exceptions, courts routinely gave effect to out-of-state marriages that were declared void by state law (*see, e.g.*, *Loughran v. Loughran*, 292 U.S. 216, 222-23 (1934) (giving effect to Florida marriage under District of Columbia law despite statute declaring remarriage by adulterer "absolutely void")); were evasive (*see, e.g.*, *Medway*, 16 Mass. at 159); constituted a criminal a offense (*see, e.g.*, *Bonds v. Foster*, 36 Tex. 68, 70 (1871) (validating interracial marriage from Ohio despite Texas statute criminalizing such marriages)); or involved hotly

[3] Under traditional marriage recognition law, bigamous marriages are refused recognition under the "natural law" or "public policy" exception, regardless of whether a validation statute expressly so declares. However, because no state allows the celebration of bigamous marriages in the first instance, recognition questions arose rarely and only from non-U.S. marriages. *See, e.g.*, *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. App. 1948) (allowing two wives to inherit from decedent's estate despite "public policy" against bigamy). Likewise, closely incestuous marriages are generally thought to fall within this exception, but the near universal ban (even globally) on such marriages means that courts are rarely if ever asked to validate one. *See* P. H. Vartanian, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages*, 117 A.L.R. 186, 187 (1938) (noting absence of incestuous marriage recognition cases).

controversial unions (*see, e.g.*, *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (giving effect to interracial marriage celebrated in Utah despite miscegenation ban in California)); *State v. Ross*, 76 N.C. 242, 246 (1877) (upholding interracial marriage from South Carolina, as defense to criminal charges in North Carolina of fornication and adultery, despite conceding the marriage was "revolting to us"). And although many courts have "cited the public policy exception, many have never actually used it to invalidate a marriage." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 (1998). Even at points of stark disagreement about marriage law, states were nonetheless motivated by comity and concern for married couples to defer in most cases to the law of sister states with respect to the validity of marriage.

Moreover, as the twentieth century saw greater convergence in state marriage laws and the lifting of many traditional marriage restrictions,[4] the "public policy" exception waned and was on the verge of "becoming obsolete" before the controversy over marriage by people of the same sex reinvigorated it. *See* Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of*

[4] Among the developments that reduced the variations in state marriage laws were the lifting of miscegenation bans (even before, in many cases, the Supreme Court's ruling in *Loving*); the elimination of bans and waiting periods for remarriage following divorce; convergence on a standard age for marriage (16 with parental consent; 18 without parental consent); and the repeal of marriage bans rooted in eugenics. *See* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 442 (2005) (discussing state marriage law variations).

Obligation, 1 STAN. J. C.R. & C.L. 1, 40 (2005); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2148 (2005) (public policy exception was becoming "archaic"). Prior to the current controversy, in fact, the tendency to recognize out-of-state marriages—even evasive ones—was so strong that a leading treatise suggested "it should take *an exceptional case* for a court to refuse recognition of a valid foreign marriage of one of its domiciliaries even in the face of a local prohibition." EUGENE SCOLES ET AL., CONFLICTS OF LAWS § 13.9, at 575 (4th ed. 2004) (emphasis added).

The place of celebration rule, and the nuanced, judicial application of its exceptions, provides married couples (and their children) with stability and predictability; protects individual expectations about marital status, and its concomitant rights and obligations; facilitates interstate travel; and avoids the practical complications of having one's marital status vary by location. *See* RICHMAN ET AL., *supra*, at § 119, at 415 (noting that the general validation rule "avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state"); JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS 47 (2d ed. 1874) (general recognition rule reflects "public policy, common morality, and the comity of nations"); SCOLES ET AL., *supra*, § 13.2, at 559 (noting a strong policy of marriage is to "sustain its validity once the

relationship is assumed to have been freely created"); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES 17 (2006) ("[i]t would be ridiculous to have people's marital status blink on and off like a strobe light" as they travel or move across state lines); *cf. Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (quoting *Atherton v. Atherton*, 181 U.S. 155, 162 (1901), to describe being married in one state but not another as one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens"). Without question, interstate transportability of marriage has been a defining, and indeed essential, feature of American law. *Cf. 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").

B. Tennessee's Categorical Refusal to Recognize Marriages of Same-Sex Couples from Other States Represents a Significant Departure from the Traditional Approach

Tennessee's history is in line with the general developments described above. Prior to the enactment of House Bill 2907 in 1996,[5] which changed the rules of marriage recognition in the wake of a growing national controversy about marriages by same-sex couples, Tennessee had long followed the place of

[5] H.B. No. 2907, Pub. Ch. 1031 (Tenn. 1996) codified as Tenn. Code Ann. § 36-3-113 (2014).

celebration 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. 1888)). This rule has been applied to give effect to marriages that were prohibited by Tennessee law, but valid where celebrated. *See id.* at 140 (recognizing Florida marriage that was technically bigamous because final divorce decree from prior marriage had not yet been issued, but valid nonetheless under Florida law on the theory of "marriage by estoppel"); *Keith v. Pack*, 187 S.W.2d 618, 619 (Tenn. 1945) (recognizing Georgia marriage involving a thirteen-year-old even though Tennessee imposed a minimum age of sixteen); *Shelby County v. Williams*, 510 S.W.2d 73, 74 (Tenn. 1974) (recognizing common law marriage); *In re Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn. Ct. App. 1994) (same); *Lightsey* v. *Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966) (same).

Unlike eighteen other states, Tennessee never adopted a statute to expressly preclude recognition of evasive marriages. *See* 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS §45 (1931); Grossman, *supra*, at 464-65 (discussing marriage evasion laws). In fact, Tennessee courts have held repeatedly that evasive, prohibited marriages can be recognized as long as valid where celebrated. *See e.g.*, *Keith*, 187 S.W.2d at 618-19 (underage marriage valid even "[n]o reason is apparent why these parties went to Georgia to contract their marriage except that

the girl was not qualified under the laws of Tennessee by reason of her age to enter into such a contract"); *Pennegar*, 10 S.W. at 308 (holding that prohibited marriages from other states can be recognized even when the parties married elsewhere "for the purpose of avoiding our own laws in matters of form, ceremony, or qualification"). Nor was there any precedent for invoking the public policy exception to refuse recognition to other socially controversial marriages. Rather, Tennessee typically only denied recognition to out-of-state marriages when such marriages violate "settled public policy regarding public morals or good order in society," such as those made criminal by the penal law. *See, e.g.*, *Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (refusing to give effect to out-of-state marriage between former stepfather and stepdaughter where such marriage was deemed a felony in Tennessee and, in any event, not validly celebrated in Mississippi in the first instance). Tennessee does not criminalize a marriage or sexual relationship between people of the same-sex solely based on the gender or sexual orientation of the parties, nor could it without running afoul of the state and federal constitutions. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. App. 1996) ("an adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's

protection of the right to privacy . . . "), *abrogated on other grounds by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008).

In 1996, Tennessee created an exception to the longstanding rule of deference to marriages of sister states for marriages by same-sex couples. Tenn. Code Ann. § 36-3-113 (2014). The statute explains that the ban on marriages by same-sex couples serves Tennessee's "longstanding public policy . . . to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society." *Id.* With this change, marriages by same-sex couples became the only ones singled out for a rule of categorical non-recognition. And, to make an even stronger statement of disapproval, the bans on both the celebration and recognition of marriages by same-sex couples were enshrined into the Tennessee Constitution in a 2006 amendment designed to preclude not only judicial consideration as to the validity of a particular marriage, but also judicial consideration of the validity of the non-recognition rule itself. Tenn. Const. art. XI, § 18 ("If 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.").

Tennessee's categorical refusal to give effect to marriages between persons of the same sex from other states was historically unprecedented. The anti-same-sex-

marriage enactments in Tennessee and other states represent a stark departure from a centuries-old approach to marriage recognition. *See, e.g.*, Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 929-30 (1998) (noting that "[b]lanket non-recognition of same-sex marriage . . . would be an extraordinary rule. There is no evidence that any of the legislatures that recently acted gave any thought to how extraordinary it would be"). The departure involves three key shifts: (1) converting an individualized fact-based analysis to a categorical rule; (2) drawing no distinction between evasive marriages by residents and non-evasive marriages by non-residents who traveled through or moved to the prohibiting state; and (3) converting from judicial to legislative determination of a marriage's validity. The new rule of blanket non-recognition flies in the face of the well-reasoned approach that developed during decades of extreme controversy among states about eligibility to marry. Tolerance of disfavored marriages, in the name of comity, uniformity, and portability of marital status, was an important and widespread value, which was honored by a strong general rule of marriage recognition. *See* Grossman, *supra*, at 471-72. Tennessee has rejected that value through its enactment of a categorical rule of non-recognition for marriages between persons of the same sex. Yet, Tennessee courts continue to adhere to the place of celebration rule and its very narrow exceptions for *all other prohibited marriages*. *See, e.g.*, *Farnham*, 323 S.W.3d at 140 (technically bigamous

marriage); *Lindsley v. Lindsley*, 2012 WL 605548, *1 (Tenn. Ct. App. Feb. 27, 2012) (common law marriage); *Bowser v. Bowser*, 2003 WL 1542148, *1 (Tenn. Ct. App. Mar. 26, 2003) (common-law marriage); *Stoner v. Stoner*, 2001 WL 43211, *3 (Tenn. Ct. App. Jan. 18, 2001) ("'It is settled law in Tennessee that though a common law marriage cannot be contracted within this State, our courts do recognize a common law marriage contracted in a state where such a marriage is valid'") (quoting *Lightsey*, 407 S.W.2d at 490; *Payne v. Payne*, 1999 WL 1212435, *4 (Tenn. Ct. App. Dec. 17, 1999) (common law marriage).

II. TENNESSEE'S ANTI-RECOGNITION LAWS DEPRIVE APPELLEES OF EQUAL PROTECTION OF THE LAW

Although marriage regulation has primarily been the province of the states, marriage laws must conform to the mandates of the United States Constitution. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's miscegenation ban for failure to comply with equal protection or due process requirements of federal constitution); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *see also Holt v. Shelton*, 341 F. Supp 821, 822-23 (M.D. Tenn. 1972) (holding "it now seems settled beyond peradventure that the right to marry is a *fundamental* one . . . . Any such infringement is constitutionally impermissible unless it is shown to be *necessary* to promote a *compelling* state interest."). Most recently, in *United States v. Windsor*, the Supreme Court unequivocally affirmed that state laws regarding marriage are

"subject to constitutional guarantees" and "must respect the constitutional rights of persons." 133 S. Ct. 2675, 2691, 2692 (2013). Tennessee's refusal to recognize marriages by same-sex couples from other states, therefore, must pass constitutional muster. It does not.

A. Historically Unprecedented Non-Recognition Laws That Target Marriages of Same-Sex Couples Deprive Appellees of Equal Protection

In *Windsor*, the Supreme Court invalidated Section 3 of the federal Defense of Marriage Act ("DOMA"), which denied recognition to validly celebrated marriages by same-sex couples for purposes of federal law. The Court held that this categorical non-recognition provision was an unconstitutional violation of the due process and equal protection guarantees embodied in the Fifth Amendment. 133 S. Ct. at 2696.

The Court's ruling in *Windsor* was not based on the principle that Congress does not have the power to define marital status for purposes of applying or implementing its own laws. 133 S. Ct. at 2690. Rather, the Court based its ruling on the fact that DOMA's rejection of "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State" represented an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2692-93. For all other types of marriages, the federal government defers to state law determinations

of marital status when implementing rights and obligations as important as Social Security, income and estate taxes, and family and medical leave. With DOMA, however, Congress singled out one type of marriage for non-recognition—regardless of the particular law at issue or a particular federal policy, and regardless of the particular couple's need for, or expectation of, recognition. Never before had Congress taken such a drastic measure with respect to marital status. *Windsor*, 133 S. Ct. at 2690.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)). In *Romer*, the Supreme Court invalidated Colorado's Amendment 2, which amended the state Constitution to prohibit any special protections for gays and lesbians. The provision, the majority wrote, is not "directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 515 U.S. at 635. Rather than serving a "proper legislative end," Colorado classified homosexuals in order to "make them unequal to everyone else." *Id.* "This," the Court concluded, "Colorado cannot do." *Id.*

In DOMA, the Court saw a similar constitutional defect. Congress' sudden departure from its usual recognition of state marital status laws was, indeed, a discrimination of "an unusual character." *Windsor*, 133 S. Ct. at 2693. The unusual character of the discrimination was "strong evidence of a law having the purpose and effect of disapproval of that class." *Id.* Indeed, the text, structure, and history of the law made clear that its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.* Both the law's structure and the legislative history made clear that DOMA was enacted from a bare desire to harm a politically unpopular group, and the United States Constitution does not permit such enactments. *Id.* (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). As the Court wrote, "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696.

In recent rulings, several federal district courts have held under *Windsor* that bans on the recognition of marriages between persons of the same sex, similar to the one in Tennessee, are constitutionally defective.[6] In *Bourke v. Beshear*, No.

[6] In addition to the courts below, several federal district courts have held in *Windsor*'s wake that state laws banning the *celebration* of marriages between persons of the same-sex violate the federal constitution's Fourteenth Amendment.

3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), the court held that, even under the most deferential standard of review, Kentucky's statutory and constitutional bans on the recognition of marriages by same-sex couples from other states violated due process and equal protection guarantees in the Fourteenth Amendment. The court in *Bourke* concluded that Justice Kennedy's reasoning in *Windsor* "establishes certain principles that strongly suggest the result here." *Id.* at *6. Likewise, in *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), the court held that Ohio's constitutional and statutory ban on marriages between persons of the same sex was unconstitutional as applied to Ohio death certificates. By "refusing to recognize a particular type of legal out-of-state marriages *for the first time in its history*, Ohio is engaging in 'discrimination[] of an unusual character' without a rational basis for doing so." *Id.* at 993 (quoting *Romer*, 517 U.S. at 633). Subsequently, in *Henry v. Himes*, the court reasserted its position, holding that "even if no heightened level of scrutiny is applied to Ohio's marriage recognition bans, they still fail to pass constitutional muster." No. 1:14-CV-129, 2014 WL 1418395, *15 (S.D. Ohio Apr. 14, 2014). Similarly, in *Latta v. Otter*, the court concluded that both the non-recognition of valid out-of-state marriages

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See, e.g., *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Bostic v. Rainey*, Civ. 970 F. Supp. 2d 456 (E.D. Va. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Geiger v. Kitzhaber*, 2014 WL 2054264 (D. Or. May 19, 2014).

and the ban on the celebration of same-sex marriages within Idaho violated the U.S. Constitution. No. 1:13-cv-00482-CWD 2014 WL 1909999 (D. Idaho May 13, 2014). The same was true in *Whitewood v. Wolf*, in which the court not only held that Pennsylvania's ban on the celebration of same-sex marriages was unconstitutional, but also that "Pennsylvania's non-recognition law robs those of the Plaintiffs who are already married of their fundamental liberty interest in the legal recognition of their marriages in Pennsylvania," and is thus also unconstitutional. No. 1:13-CV-1861, 2014 WL 2058105, *9 (M.D. Pa. May 20, 2014); *see also Baskin v. Bogan*, No. 1:14-cv-00355-RLY, 2014 WL 1814064 (S.D. Ind. May 8, 2014) (granting a preliminary injunction to prevent enforcement of Indiana's refusal to recognize out-of-state marriages between same-sex couples); *Wolf v. Walker*, No. 3:14-cv-00064-bbc, 2014 U.S. Dist. LEXIS 77125 (W.D. Wis. June 6, 2014).

Tennessee's adoption of a categorical rule of non-recognition for marriages by same-sex couples suffers a similar constitutional defect. As discussed in Section I.B, *supra*, Tennessee law traditionally deemed marriages valid as long as they were validly celebrated. The legislature introduced an unusual and unforgiving exception to that rule for marriages by same-sex couples amid a national panic over the possibility that such marriages would be legalized in other states and foisted upon Tennessee through marriage recognition law. Just as the Supreme

Court concluded with respect to DOMA, the "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the . . . statute. It was its essence." *Windsor*, 133 S. Ct. at 2693. And also as with DOMA, the "avowed purpose and practical effect" of Tennessee's non-recognition law is to disadvantage one group of people, and one type of marriage. Its means and end are one in the same, for the "purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

B. Blanket Non-Recognition Laws Based On Public Policy Grounds Cannot Survive Constitutional Scrutiny

Even if the Tennessee laws were not so obviously rooted in animus, and therefore on shaky constitutional ground, there are no constitutionally permissible reasons to justify blanket non-recognition of marriages by same-sex couples. Although the traditional rules of marriage recognition (*see* Section I.A., *supra*) permitted states to refuse recognition to out-of-state marriages that violated their strong public policy (a right rarely exercised), the most common reasons for refusal are no longer valid given developments in constitutional jurisprudence. Three types of interests were commonly invoked in defense of a claimed public policy exception to marriage recognition: (1) "a desire to exclude certain sexual couplings or romantic relationships" from the state; (2) "a desire to express the moral disapproval" of the relationship, and (3) "a desire to dissuade couples in the disfavored relationship from migrating to the state in the first place." Tobias

Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2216 (2005). None of these reasons survive modern constitutional standards.

To whatever extent Tennessee's non-recognition law is founded in dislike or disapproval of gay and lesbian intimate relationships, the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), extinguishes the validity of such an interest. In that case, the Court found protection for a liberty interest in pursuing private and consensual sexual relationships, regardless of the gender of the parties. Gays and lesbians, like everyone else, have the right to make decisions about intimate relationships without interference from the state. Moreover, *Lawrence* also calls into question any interest rooted in moral disapproval. As the majority explained, moral repugnance is an insufficient basis upon which to infringe an important aspect of the right to privacy. *Id.* at 577-78; *see also* Wolff, *supra*, at 2231; Singer, *supra*, at 23-24. Finally, any intentional effort to dissuade interstate travel may raise its own constitutional problems. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 192-96 (1999) (invalidating California law that forced new residents to wait a year for a higher level of benefits); Mark Strasser, *The Privileges of National Citizenship: On* Saenz, *Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

Tennessee should not be permitted, any more than Congress is, to "identify a subset of state-sanctioned marriages and make them unequal," nor to tell "those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor*, 133 S. Ct. at 2694. Equal protection principles demand more.

III. TENNESSEE'S ANTI-RECOGNITION LAWS UNCONSTITUTIONALLY INTERFERE WITH APPELLEES' FUNDAMENTAL LIBERTY INTEREST IN THEIR MARRIAGE

A. The Status of Marriage Is a Fundamental Liberty Interest

Tennessee's refusal to recognize legal out-of-state marriages of same-sex couples directly interferes with these couples' fundamental liberty interest in remaining married once they have entered into a marriage. The existence of a fundamental liberty interest in the *status* of marriage flows from the well-established principal that the Due Process Clause protects a fundamental liberty interest in marriage. *See Windsor*, 133 S. Ct. at 2695. "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is protected by the Due Process Clause); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) ("[w]hile the outer limits of this aspect of privacy have not

been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference *are personal decisions 'relating to marriage . . . .'*") (emphasis added); *see also Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy *surrounding an existing marital relationship* into which the State may not lightly intrude.") (emphasis added).

Any constitutionally protected liberty interest of the individual to make personal decisions with respect to marital relationships is rendered meaningless, however, if States can refuse to recognize disfavored classes of marriages without a constitutionally permissible basis. Under the operation of Tennessee's anti-recognition laws, any personal choice with respect to maintaining the legal status of being married is unilaterally denied to same-sex couples. Instead, these couples have their marriages eviscerated by operation of Tennessee's anti-recognition laws. *See* Section I.B, *supra*. As a result, spouses who are legally married are converted into legal strangers when they cross into Tennessee's borders. *See* Steve Sanders, *The Constitutional Right To (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1450-51 (2012). The consequences of this conversion are far reaching: "property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil." *Id.* at 1450. "[N]ullification 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).

In refusing to recognize otherwise legal marriages between same-sex spouses, Tennessee denies these couples more than the title of marriage. Whether a couple is considered married controls myriad issues including "housing, taxes, criminal sanctions, copyright." *Windsor*, 133 S. Ct. at 2694-95. Tennessee's laws, as in all states, provide married couples with comprehensive protections and responsibilities including: the right to a share of a decedent's estate (Tenn. Code Ann. § 31-2-104); the right to hold real property as tenants by the entireties (Tenn. Code Ann. §66-1-109); the right to make medical decisions in the absence of an advance medical directive or surrogate decision (Tenn. Code Ann. § 68-11-1804); the right to adopt children as a couple (Tenn. Code Ann. § 36-1-115); the right to defer some property taxes (Tenn. Code Ann. § 7-64-201) and a plethora of rights with respect to divorce and custody matters (*see generally* Chapter 3 of Title 36 of Code of Tennessee). The majority of legally married spouses who travel to or reside in Tennessee can be assured that their personal decision to enter into a marital relationship, with the legal rights that come with that status, will be

respected by the State. In choosing to single out legally married same-sex spouses to deny them these same rights, Tennessee has interfered with these couple's fundamental liberty interest in exercising personal autonomy with respect to their marital status.

B. Tennessee's Infringement On The Fundamental Interest In Maintaining A Marital Status Is Unconstitutional

"State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. In enacting its anti-recognition laws, Tennessee has opted to select a disfavored class of people to nullify their marriages. *See* Section I.B, *supra.* Heightened scrutiny must be used in determining whether the State's action in unilaterally voiding a marriage, against the will of either spouse, comports with the requirements of due process. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (When the government "undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate."); Sanders, *supra*, at 1452-53. When a law imposes a "direct and substantial" burden on an existing marital relationship, the law cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (citation and internal quotation marks omitted); *see also Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (applying heightened constitutional scrutiny in striking down law barring use of

contraceptives by married couples). The Court should therefore apply a heightened standard of review in analyzing Tennessee's anti-recognition laws.

Regardless of the standard of review, Tennessee has not offered a constitutionally sufficient justification for the serious harms inflicted by its anti-recognition laws. Appellants contend that Tennessee's anti-recognition laws are supported by the policy interests which ties marriage to reproduction and childrearing. Appellants' Br. at 24-27. Appellants' proffered justification ignores the fact that no other couples in Tennessee other than same-sex couples have to establish their ability to "naturally" procreate in order to have their valid out-of-state marriages recognized. *See id.* Appellants' argument also disregards the reality that many couples of the same-sex choose to have children and to raise these children together. *Windsor*, 133 S. Ct. at 2694. Indeed, to the extent that Tennessee's anti-recognition laws are purportedly supported by concerns for reproduction and child-rearing, these concerns are undermined with respect to the children already being raised by legally married same-sex couples who are actually put in harm's way by the State's refusal to recognize their parent's marriage. *Id*. Appellants' rationales for non-recognition have already been considered and rejected by the Supreme Court when they were presented in support of DOMA, and there is no basis for the Court to find differently here. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of

Representatives at 28-49, 133 S. Ct. 2675 (2013) (No. 12-307); *Windsor*, 133 S. Ct. at 2696.

Appellants further concede that the purpose of Tennessee's anti-recognition laws is to limit "the institution of marriage to the purpose for which it was created" and that Tennessee, in enacting these laws was "embracing [marriage's] traditional definition." Appellants Br. at 27. Discriminatory legislation justified on the grounds of history, tradition, and moral disapproval, cannot survive constitutional scrutiny. *See Windsor*, 133 S. Ct. at 2695; *Lawrence*, 539 U.S. at 571; *Romer*, 517 U.S. at 634-35. Because Tennessee cannot offer a constitutionally sufficient justification for the serious harms inflicted by the anti-recognition laws, these laws unconstitutionally deprive married same-sex couples of their liberty interests in their existing marriages. Such an unjustified deprivation of fundamental liberties cannot be tolerated.

CONCLUSION

For the foregoing reasons, this Court should hold that Tennesse's refusal to give effect to valid marriages by same-sex couples violates basic principles of due process and equal protection. Same-sex couples should not be summarily stripped

of a marriage, "the most important relation in life" (*Maynard v. Hill*, 125 U.S. 190, 205 (1888)), simply by setting foot in Tennessee.

Date: June 16, 2014

Respectfully submitted

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APPENDIX A

Amici Curiae are scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. Their institutional affiliations are listed for identification purposes only.

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with this Court's length limitation because it contains 6,927 words, excluding exempted parts of the brief. This brief also complies with this Court's typeface and typestyle requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: June 16, 2014

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: June 16, 2014

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