IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

George Grant, Lyndon Allen,	)	
Tim McCorkle, Larry Tomczak, and	)	
Deborah Deaver	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 44859**
	)	**(Judge Woodruff)**
Elaine Anderson, Clerk of Williamson County	)	
And	)	
Herbert H. Slatery, III, Attorney General and	)	
Reporter for the State of Tennessee,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

Come now Plaintiffs, George Grant, Larry Tomczak, Lyndon Allen, Tim McCorkle, and Deborah Deaver, and submit this Memorandum of Law in Opposition to Defendant's Motion to Dismiss.

To appreciate Defendant's arguments, it is necessary to understand that the issue raised by the complaint involves the application of one of the holdings in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) to T.C.A. § 36-3-104(a). The relevant holding in *Obergefell* is as follows: "state laws . . . are . . . held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id*. at 2591. T.C.A. § 36-3-104(a) provides, in pertinent part: "No county clerk or deputy clerk shall issue a marriage license *until* the applicants make an application in writing, stating the names, ages, addresses and social security numbers of both the proposed *male and female* contracting parties and the names and addresses of the parents, guardian or next of kin of both parties." (emphasis added).

Plaintiffs' argue that, because only a male and female can apply for a marriage license and because there must be one of each of the two sexes (the law uses the conjunction "and," not the disjunctive "or"), then T.C.A. §36-3-104(a) is "invalid" because it "exclude[s] same-sex couples from civil marriage." *Id*. If that is true, then Minister Plaintiffs do not know if the licenses that authorize them to solemnize marriages are legally valid, subjecting them to certain liabilities if not, and Citizen Plaintiffs have had or are having certain rights or of theirs under the state constitution violated by the issuance of marriage licenses under a statute that is no longer (or should no longer be) constitutionally valid.

I. Introduction and Summary of Defendant's Arguments.

Defendant appears to have moved to dismiss the complaint on several grounds. The first four primary grounds are:

1. Lack of a justiciable case or controversy,
2. Failure to state a claim upon which relief can be granted,
3. Lack of subject matter jurisdiction,[1] and
4. Lack of a standing to ask for an injunction.

Defendant's Memorandum of Law 6, 7 (hereinafter cited as "Def.'s Mem.") However, at the top of page 9, Defendant provides more specificity regarding these grounds:

> Plaintiffs have failed to present a justiciable case or controversy for the following reasons: (1) Plaintiffs cannot establish standing of the Citizens Plaintiffs or the Minister Plaintiffs; (2) Minister Plaintiffs' claims are not ripe for adjudication; and (3) Defendant Elaine Anderson does not have a real and adverse interest sufficient to establish a legal controversy.

In Section II of her Memorandum, Defendant also appears to assert that Plaintiffs lack standing to assert a claim for injunctive relief, presumably as distinguished from standing to bring a declaratory judgment action. That injunctive relief may not be an appropriate remedy for the claims asserted is not grounds for dismissal of a declaratory judgment action nor is it

[1] The argument regarding subject matter jurisdiction is actually cloaked in arguments regarding justiciability and will be treated as such. Surely Defendant does not mean to argue that the court does not have jurisdiction to declare the constitutionality of T.C.A. § 36-3-103 and -104(a). The cases refuting that line of argument are almost too numerous to cite. *But see Mayhew v. Wilder*, 46 S.W.3d 760,773 (Tenn. Ct. App. 2001)("The courts may, of course, hold an act of the Legislature unconstitutional, ...").

determinative of whether a case or controversy exists such that a court cannot declare what the rights and duties of the various parties are under the law. *See Buena Vista Special School District v. Board of Board of Election Commissioners*, 173 Tenn. 198, 201, 116 S.W.2d 1008, 1009 (1938) ("We think . . . an injunction [against an election authorized by a statute that was being challenged constitutionally] was not properly issued herein. The case, *however*, is one that seems properly to justify relief under the declaratory judgments statute." (emphasis added)). This argument by Defendant really appears to be based on Defendant's view of the merits of Plaintiffs' substantive arguments, which, of course, puts the proverbial cart before the horse. Consequently, this alleged ground for dismissal, by itself, is without merit and, as such, deserves no further comment.[2]

Defendant also asserts in Section III of her Memorandum that the complaint should be dismissed because Defendant has not "violate[d] the constitutional rights of Plaintiffs." (Def.'s Mem. 20)., apparently arguing that Plaintiffs have failed to state a claim upon which relief can be granted. As will be discussed, this argument begs the underlying substantive question presented by the complaint, namely, how does the holding in *Obergefell* apply to Tennessee marriage license laws.

Lastly, in Section IV of her Memorandum, Defendant asserts that the complaint should be dismissed because it asks the Court to violate the separation of powers doctrine by having this court intermeddle in legislative matters. (Def.'s Mem. 25-27) (Complaint "asks this Court to Improperly Usurp the Province of Legislature"). This argument will be addressed in the context of Section II D below (page 8) in which elision and the separation of powers is discussed.

II. Plaintiffs Have Asserted A Claim Upon Which Relief Can Be Granted.

A. Summary of Defendant's Argument.

Defendant's argument that Plaintiffs have no valid claim for relief because she has not "violated the constitutional right of Plaintiffs," begs the question presented by the complaint.

[2] Plaintiffs will discuss the propriety of injunctive relief in other parts of this Memorandum, but in connection with the issue of standing, not for the purpose of refuting the Defendant's apparent assertion that a declaratory judgment action is inappropriate unless injunctive relief is appropriate.

But in any event the argument hinges on the Defendant's failure to read the marriage statutes *in pari materia* and on an incorrect application of the doctrine of elision. (Def.'s Mem. 20-25).

Defendant argues that T.C.A. § 36-3-104(a) was "enacted by the Tennessee legislature in 1937 without any clause limiting its applicability to opposite sex couples." (Def.'s Mem. 23). While that is true, Defendant appears to draw from this fact the *assumption* that the sole "purpose of §104 is to establish procedures pertaining to the completion of applications of marriage licenses." (Def.'s Mem. 23).

Defendant then proceeds to argue that the "purpose of §104 was not to define marriage in Tennessee and that the language of §104 was, in fact, insufficient to do so" and that's why the legislature enacted T.C.A. §36-1-113[3], to "establish[ ] that marriage between one man and one woman was the only legally recognized marital contract in Tennessee." (Def.'s Mem. 23 n.9). As demonstrated below, these arguments are without merit.

B. Introduction to Plaintiffs' Argument in Response.

In analyzing Defendant's argument trying to prop up the validity T.C.A. § 36-3-104(a) in view of *Obergefell's* holding, the court should keep in mind its function:

> In construing statutes, our duty is *to effectuate the legislative intent* (citations omitted). Legislative intent is to be ascertained primarily from the nature and ordinary meaning of the language used, *without a forced or subtle construction that would* limit or *extend the meaning of the language*. (citations omitted) … The *language* employed *must be considered in the context of the entire statute, and the component parts of a statute should be construed, if possible, consistently and reasonably*. (citations omitted) Furthermore *we are to assume that the legislature used each word in the statute*

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[3] T.C.A. § 36-1-113 provides, in pertinent part: "(a) Tennessee' marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage. (b)The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state."

> *purposely*, and that the *use of these words is intended to convey a meaning and serve a purpose*. *Browder*, 975 S.W.2d at 311. Where the language of the statue is clear and plain and fully expresses the legislature's intent, resort to auxiliary rules of construction is unnecessary, and we need only enforce the statute. *Id.*

State v. Goodman, 90 S.W.3d 557, 563-64 (Tenn. 2002) (emphasis added);

In addition, because T.C.A. § 36-3-103 and -104(a) are part of an entire regulatory scheme regarding marriage, they must be construed in *para materia* with the other statutes that are part of that scheme. *See Town of Mount Carmel v. Kingsport*, 217 Tenn. 298, 305, 397 S.W.2d 379, (1965) (Regarding a case involving annexation, the Court said statutes forming a system or scheme of legislation should be construed so as to make that scheme consistent in all its parts, and uniform in its operation. *Davis v. Beeler,* (1947), 185 Tenn. 638, 207 S.W.2d 343" and "enactments on the same subject matter, must be read *in pari materia*" and specific sections should be "considered as if a part of a single law.")

C. <u>The Legislature's Intent Was for Marriage to be Only Between a Man and a Woman</u>.

Applying the foregoing standard to T.C.A. § 36-3-103 and T.C.A. § 36-3-104, it is clear that the legislative intent behind the statutory scheme for marriage, of which those laws are a part, **always** contemplated that marriage was between a man and a woman and that the marriage license was a license for a man and a woman to marry.

Looking at the marriage license "system or scheme" of which T.C.A. § 36-3-103 and § 36-3-104(a) are a part, even a cursory and partial review of just a few statutes reflects that the law *has always* contemplated that the parties to a marriage were a man and woman, a husband and wife.

For example, in the first official codification of all of Tennessee's laws, the Code of 1858,[4] Section 2436 therein provides that "marriage cannot be contracted with a lineal ancestor or descendant . . . of *husband or wife*, as the case may be, nor the *husband or wife* of a parent, or lineal descendant." (emphasis added). *See* copies of the pertinent sections of the Code of

[4] This review is not a wasted exercise. The Tennessee Supreme Court has said, ***in a marriage case***, "that 'where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, *they shall be taken and construed together as one system and as explanatory of each other*; . . . .'" *Smith v. Bank*, 115 Tenn. 12, 20, 89 S.W. 392, 393 (1905) (emphasis added).

1858 attached as Exhibit 1B to "The History of T.C.A. §36-3-103(a) included in the Appendix of Authorities filed herewith) This reference to husband and wife continues today in T.C.A. § 36-1-101.

Even the divorce laws in the Code of 1858 contemplated that the marriage was between a man and a woman. Section 2448(1) thereof provided that a cause of divorce could be:

- "[r]efusal, on the part of a wife, to remove with her husband to this State, without a reasonable cause, and wilfully (sic) absenting herself from him for two years," and
- 'That the woman was pregnant at the time of the marriage, by another person, without the knowledge of the husband,"

While the language regarding the first stated ground for divorce now refers to either spouse refusing to move and to absent himself or herself from the other, the second stated ground for divorce continues as is. *See* T.C.A. § 36-4-101(a)(9).

The bottom line is that Tennessee's marriage license laws were never understood or interpreted to imply that marriage was anything other than as between a man and a woman. In fact, the State of Tennessee said as much in arguing *Obergefell*, which the Court noted as follows, "The respondents [States] say . . . it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, *in their view*, *is* ***by its nature*** *a gender-differentiated union of man and woman*." 135 S. Ct. at 2594. Thus, this court should treat that understanding of marriage by our state legislature from time immemorial as a "part of the enactment" that now forms Tennessee's marriage license laws. *See Smith v. Bank*, 115 Tenn. 12, 30, 89 S.W. 392, 396 (1905)(Stating that it is the universal rule of construction that *where a statute* has received a judicial interpretation and *is* afterwards *re-enacted*, whether alone or in a compilation or a codification of the laws of the state, *the judicial construction which had theretofore been placed upon it, forms a part of the enactment*. (emphasis added))

Furthermore, the possibility that any state might interpret marriage as anything other than a male and female didn't even arise until *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and clarification granted in part, 74 Haw. at 645, 852 P.2d at 74 (1993)

(stating that a prohibition on same-sex marriage might violate state constitution's equal protection provision unless government satisfied "strict scrutiny" standard).[5]

In fact, the *Baehr* case explains why the legislature enacted T.C.A. § 36-3-113. Plaintiffs submit that the evidence will show that the concern that prompted the enactment of this statute was exactly that which was described by the *Obergefell* Court,

> In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, *some States were concerned by its implications* ***and reaffirmed*** *in their laws that marriage is defined as a union between opposite-sex partners.* So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. §7.

135 S. Ct. at 2596-97. Tennessee was one of those states that "reaffirmed" male-female marriage, first by legislative enactment of T.C.A. § 36-3-113 and later by constitutional amendment.

Furthermore, Defendant's argument necessarily implies that the General Assemblies prior to the enactment of T.C.A. § 36-3-113 in 1996 must have intended for same-sex couples to get a marriage license under T.C.A. § 36-1-104(a) or, at the very least, the previous General Assemblies were indifferent to whether same-sex couples could marry. In the words of *Goodman*, if ever there were an argument that gave to a statute "*a forced or subtle construction that would . . . extend the meaning of the language"* of a statute and rejected the assumption that "*the legislature used each word in the statute purposely*, and that the use of these words [was] *intended to convey a meaning and serve a purpose,"* this is it. 90 S.W.3d at 563-64.

Of course, whatever the legislature may have intended prior to 1995 or intended in 1995 with the adoption of T.C.A. § 36-1-104(a), that intent was settled with the adoption of T.C.A. §

[5] While the issue of same-sex marriage had been raised prior to 1993, it was in *Baker v. Nelson*, 409 U.S. 810 (1972), overruled in *Obergefell*, 135 S. Ct. 2584 (2015), wherein the Court said that same-sex marriage was not a federal question. That meant that same-sex marriage was only a state law question until *Obergefell*. The evidence will show that T.C.A. § 36-3-113 was enacted to bolster the state's argument that it would not have to recognize a same-sex marriage legalized by another state.

36-3-113. To argue that T.C.A. § 36-3-104(a) should not be construed in light of the most recent legislative action by the Tennessee General Assembly is unfathomable.

In a failed attempt to avoid the clear intent of the legislature over the years, Defendant argues that the statute "could be read as stating that two parties must supply the required information … and those two parties may be *either* male *or* female." (Def.'s Mem. 23 n.8) (emphasis added). This, too, is a "force" reading of the state and would have this court *add the word* "either" to the statute and also *substitute the word* "or" for the word "and" that is in the statute. To this Plaintiffs can only say what the Tennessee Supreme Court has said, "If the words of a statute plainly mean one thing, they cannot be given another meaning by judicial construction." *Henry v. White*, 194 Tenn. 192, 198, 250 S.W.2d 70, 72 (1952).

The legislative intent behind T.C.A. §§ 36-3-103[6] and -104(a) was that only a man and a woman could apply for a marriage license and that their marriage could not be solemnized "before" they had received that license and given it to a authorized marriage officiant. The only question is whether the doctrine of elision can be applied to "save" T.C.A. § 36-3-104(a). If not, then the complaint has stated a claim relative to the constitutionality of T.C.A. § 36-3-104(a).

D. The Doctrine of Elision Cannot "Save" T.C.A. § 36-3-104(a) From Unconstitutionality.[7]

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[6] Defendant appears to argue that the invalidity of T.C.A.§ 36-3-104(a) has "no impact" on T.C.A. § 36-3-103 because T.C.A. § 36-3-103 "is not reliant upon and contains no reference to §104." (Def.'s Mem. 24). This argument ignores the plain language of T.C.A. § 36-3-103, which indicates that the parties "*shall* present . . . *a license*" to one of the persons described in Part 3 of Chapter 3 of Title 36. It is hard to imagine what "license" is being referred to in T.C.A. § 36-3-103 unless it is the one referred to in T.C.A. § 36-3-104. A cross-reference was not needed. This argument is without merit.

[7] It should be noted at the outset of this argument that the Alabama Supreme Court has said that the doctrine of elision cannot save its man-woman marriage statute from invalidity if civil marriage is redefined by federal courts: "[T]he contemplated change in the definition (or "application" if one insists, although this clearly misapprehends the true nature of what is occurring) of the term "marriage" so as to make it mean (or apply to) something antithetical to that which was intended by the legislature and to the organic purpose of Title 30, Chapter 1, would appear to require nothing short of striking down that entire statutory scheme.19" *Ex parte State ex rel. Ala. Policy Inst*., 2015 Ala. LEXIS 33, 89 (Ala. Mar. 3, 2015). Footnote 19 reads, in part, "Few courts that have have (sic) ordered the issuance of marriage licenses to same-sex couples appear to have contemplated this issue. …" This authority, though not controlling, is certainly persuasive authority for the proposition Plaintiffs advance regarding

a. Summation of Defendant's Argument and Introduction to General Legal Principles.

Defendant's argument that the doctrine of elision can be applied to "save" § T.C.A. 36-3-104(a) from being held unconstitutional appears to proceed on two grounds.

The first is that "eliding 'male and female' from § 104 is the *obvious solution to any concerns* regarding constitutionality as a result of Obergefell." (Def.'s Mem. 24) (emphasis added). But the doctrine of elision is not some kind of judicial "solution" to problems created by a decision holding certain language in a statute unconstitutional.

The second argument rests on the assertion that the sole purpose of the T.C.A. § 36-3-104 was "to establish procedures pertaining to the completion of applications for marriage licenses." (Def.'s 23). That this was not the sole purpose of the statute has previously been proved. And furthermore it begs the question of who was authorized under those "procedures" to "complete" an application. So, the question now is how the doctrine of elision applies to T.C.A. § 36-3-104(a).

The Tennessee Supreme Court has described the doctrine as follows: "The doctrine of elision allows a court, under appropriate circumstances *when consistent with the expressed legislative intent*, to elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." *State v. Crank*, 468 S.W.3d 15, 28 (Tenn. 2015) (emphasis added) (citing *State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994)). Because legislative intent is what is determinative, the fact that there is a general severability statute, as argued by Defendant, is not determinative:

> *This legislative endorsement of elision "does not automatically make it applicable to every situation*; however, when a conclusion can be reached that the legislature *would have enacted* the act in question with the unconstitutional portion omitted, *then* elision of the unconstitutional portion is appropriate." *In re Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999); *see also Tester*, 879 S.W.2d at 830 ("The rule of elision applies if it is

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the effect of *Obergefell.*

> made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted . . . ." (quoting *Gibson Cnty. Special Sch. Dist. v. Palmer*, 691 S.W.2d 544, 551 (Tenn. 1985))).

Id. at 29 (emphasis added).

But the inclusion of a severability clause within a particular legislative enactment itself is also not determinative. In *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 22 (Tenn. 2000), the Court refused to elide a "physician-only counseling requirement" from an informed consent statute codified *as part of a series of statutes* codified under Tenn. Pub. Acts, ch. 591 "[e]ven though the General Assembly included a severability clause *when the statutes were recodified in 1989*.")(emphasis added).

So, it doesn't matter that there is a general severability statute or even a severability provision specific to a particular Public Act, the issue is still what was legislative intent and whether the legislature "would have enacted" T.C.A. § 36-3-104(a) *in 1995* if it had allowed two individuals of the same sex to marry. *See Maury County*, 195 Tenn. at 118, 257 S.W.2d at 17)(holding "[t]he doctrine of elision *is not favored* and for us to apply this doctrine it must appear to us that the *Legislature would have enacted* the Statute without the objectionable features."(emphasis added)).

b. *The words male and female cannot be elided from T.C.A. § 36-3-104(a).*

While the words "male and female" could be elided from T.C.A. § 36-3-104(a) and the statute's sentence structure would still make sense grammatically, that is not the test for the application of the doctrine of elision and for good reason in this particular situation.

If the words "male and female" are elided from the statute, then there is no language in the statute limiting the number of "contracting parties" to just two individuals. Any such limitation would have to be an "implied intent" of the General Assembly; however, if a new interpretation of the doctrine of elision is now to be applied so as to allow courts to disregard the intent of the General Assembly, *then consistency in the application of this new doctrine of elision must allow future litigants to argue that the intent of the General Assembly in regard to the* ***number*** *of the "contracting parties" can also be disregarded*. Anything else would be a mere act of judicial will and polygamous marriages will naturally have to follow. For this reason alone, Defendant's argument should be rejected.

So the question under the doctrine of elision is still this: "If, in the absence of the words 'male and female,' the statute could have been given a judicial meaning that allowed two people of the same sex to marry, would the legislature have enacted the statute that way in 1995?" Two legal facts make it clear that the answer is "no."

First, the State of Tennessee has had a law prohibiting and criminalizing various types of sexual relations between two people of the same sex from statehood[8] until 1996 when the Homosexual Practices Act, T.C.A § 39-13-510, was declared constitutionally unenforceable by the Tennessee Court of Appeals in the case of *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996). The statutes in question were enacted prior to 1996.[9]

To believe, as Defendant apparently does, that the legislature "would have enacted" the license law if two people of the same sex could apply for the license would be to attribute to the legislature an intention to legalize a relationship which, if consummated, would have been a criminal act. This would essentially attribute to the Tennessee legislature some form of corporate schizophrenia or complete irrationality.

Second, the legislature enacted T.C.A. § 36-3-113 to make it clear to all that "the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman *shall be the only legally recognized marital contract in this state* in order to provide the unique and exclusive rights and privileges to marriage." (emphasis added).

But if that language is not clear enough as to the legislature's intent that Tennessee's "system and scheme" of marriage law was intended to apply only to one man and one woman, the legislature even envisioned a day like today in which some court, though surely not one in

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[8] This is so because upon Tennessee's organization as a territory in 1790, it received the laws of North Carolina, which recognized the English law criminalizing sodomy. *See generally,* George Painter, *The Sensibilities of Our Forefathers, The History of Sodomy Laws in the United States*, 1991-2001, a copy of section related to Tennessee being included in the Appendix of Authorities. The entire work can be found at http://www.glapn.org/sodomylaws/sensibilities/introduction.htm.

[9] Even if T.C.A. § 36-3-104(a) had been enacted after the sodomy statute had been declared unconstitutional by the Court of Appeals, that would be irrelevant in terms of legislative intent. The criminalization of sodomy and the redefinition of marriage are two different issues as demonstrated by the fact that the legislature enacted T.C.A. § 36-3-113 about four months after the *Campbell* decision.

Tennessee, might try to interpret Tennessee's marriage license law and the legislative intent behind it to mean same-sex marriage was permitted. Subsection (c) of T.C.A. § 36-3-113 states: "Any 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."

It is impossible to argue credibly that the legislature would have enacted T.C.A. § 36-3-104(a) if the "contracting parties" could be anything other than one man and one woman (or allowed it to remain un-amended if it did mean something other than one man and one woman). To hold otherwise would ascribe a foreign intention to the legislature back in 1995, an intention even the present General Assembly does not think its predecessors had.[10]

In this regard, the words *Smith v. Bank*, in which our marriage laws were construed, come to mind:

> To say otherwise would be not only to prostrate the well-directed labors of the legislature on the subject for the last one hundred years, but on our part the expression of a gratuitous and improper assumption that the legislature did not intend what they have so repeatedly and expressly declared.

115 Tenn. at 29-30, 89 S.W. at 396 (1905). To hold that T.C.A. § 36-3-104(a) can ***now*** be read after *Obergefell* to reflect a legislative intention that the "contracting parties" be other than a "male and female" would be to "prostrate the well-directed labors of the legislature" over the centuries and into the 1990s, and to assume that "the legislature did not intend what they have so repeatedly and expressly declared." *Id.*

In the face of the foregoing, Defendant seems to argue that, given the Supreme Court's *Obergefell* ruling, the legislature would have intended for Tennessee to still have a marriage licensing law, and that it would have enacted a licensing law that allowed for same-sex

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[10] The just-concluded 109th General Assembly overwhelmingly adopted House Joint Resolution (HJR) 529, a recital therein stating, "given the history of the marriage laws of Tennessee, this General Assembly, *some members of which voted for Tennessee Code Annotated, Section 36-3-104(a)*, believes that Tennessee Code Annotated, Section 36-3-104(a), would never have been enacted had the words "male and female" been deleted so as to allow two people of the same sex to marry." (emphasis added) A copy of the Resolution, as adopted, is included in the Appendix of Authorities.

marriages rather than have no marriage license law. (see e.g. Def.'s Mem. 23) That argument fails for a number of reasons.

First, it fails because that is not the Tennessee Supreme Court's articulated test – what the legislature would have intended *now* given the state of affairs *now* rather than in 1995. The test is what it would have intended *then*.

Second, such a test would allow the judicial branch to obliterate the clear constitutional distinction between the powers accorded the legislative and judicial branches of government under the state Constitution by allowing a court to substitute some new intention for a statute for that which the legislature clearly intended. *See Richardson v. Young*, 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909) ("It is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct, ... *The most responsible duty devolving upon this court is to see that this injunction of the constitution shall be faithfully observed*."(emphasis added))

Third, the substitution of a new intent would then have ripple effects throughout the Tennessee Code relative to statutes involving marital status. The court will be creating for itself the nightmare of trying to figure out how a new judicially super-imposed intention defining marriage is to be applied consistent with the legislature's intent in other statutes.[11]

And the two preceding arguments point out the fact that if this court allows licenses to be issued when the law authorizing the issuance of licenses had been held invalid, then it is presuming to know what the legislature would do or want to do in the face of the ruling in *Obergefell*. This the courts cannot do. *See Dockery v. Dockery,* 559 S.W.2d 952, 955 (Tenn. Ct. App. 1977) ("In Tennessee especially are the Courts restricted in their functions to a decision of controversies; that they act post factum only, *and can never be called upon to prescribe in advance what lawmaking bodies shall do* or in what way

[11] For example, T.C.A. § 68-3-306 provides that**, "**A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife." Did the legislature intend this statute to apply where the marriage was between two women and the child would not have a mother and father? Based on the arguments the state made in *Obergefell* in support of its constitutional amendment regarding marriage, the legislative policy was to connect a child to a mother and father, but if that type of legislative intent is now unconstitutional, then maybe this statute, too, is unconstitutional. If so, will a future court supply a new legislative intention to that statute, too?

parties in the future shall conduct their transactions in general. *Whenever they do so, they lay themselves liable to the imputation of impertinence . . . .*") (emphasis added).

For all we know, the legislature is content to allow the state to operate on the basis of common law marriage, which would arguably be permitted if the marriage license law is invalid.[12] In fact, HJR 529 *is essentially a statement by the legislature that it is awaiting action by the judicial branch to learn whether Tennessee's marriage license laws are still valid so that it will know what action it needs to take.* Contrary to Defendant's assertion that Plaintiffs are asking this court to usurp the legislature's function, Defendants are actually asking the judiciary to abdicate its function by not deciding how *Obergefell* applies to laws not before the Supreme Court in the *Tanco* case.

It is the legal posture in which the state and Plaintiffs find themselves that distinguishes the present situation from the one in *Roy v. Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956), cited by Defendant, wherein the plaintiffs sought to avoid the implications of *Brown v. Board of Education*, 347 U.S. 483 (1954).

After the *Brown* Court ruled that the judicially created "separate but equal doctrine" no longer had a place in its constitutional jurisprudence, the plaintiffs in *Roy* claimed that "funds of a State appropriated for Segregated Schools cannot be used or expended for racially-mixed schools." *Roy*, 201 Tenn. at 145, 297 S.W.2d at 74. In rejecting this claim, the Tennessee Supreme Court said,

> The foregoing *contention rests solely upon the hypothesis that the laws of this State forbidding racially mixed schools are in full force and effect*, and it was error for the Chancellor to refuse to enjoin certain county officials from disbursing State funds for maintaining public schools in Anderson County, and especially Clinton High School. The plain *fallacy of this insistence is that the Segregation Statutes referred to are not now in full force and effect*.

Id., at 145-46, 297 S.W.2d at 74. (emphasis added).

But that is not the kind of argument made by Plaintiffs. Plaintiffs are not asking this Court to uphold some "discriminatory" marriage license scheme after the same was held invalid

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[12] Defendant even mentions that the legislature may want to "eliminate statutory marriage ... and revert to a common law marriage system." (Def.'s Mem. 26). Of course, Plaintiffs argue that the *Obergefell* Court has already "eliminated" our marriage license law by holding it "invalid."

by *Obergefell*. The exact opposite is true.

Unlike *Roy*, the issue here is not whether this court will continue to uphold a license scheme that *Obergefell* ruled invalid, but whether, *because of Obergefell*, a valid license scheme remains at all and, if not, then Plaintiffs are asking, "Who, in conformity with Tenn. Const. art. VII, § 1, 'prescribed it'"? As the Alabama Supreme Court said in its marriage decision last spring, the judicial branch "prescribing" legislative duties for the Defendant would be "contrary to well established state and federal principles of judicial review." *Ex parte State ex rel. Ala. Policy Inst*., 2015 Ala. LEXIS 33, 89 n. 19 (Ala. Mar. 3, 2015).

E. The "Right to Marry" Is Not a Self-Executing Right.

In making this argument, Plaintiffs are cognizant of the fact that the *Obergefell* Court also held that "same-sex couples may exercise the fundamental right to marry." 135 S. Ct. at 2591.[13] But the "right to marry" is not a self-executing right.

What constitutes a self-executing constitutional right was discussed in *Parks v. Alexander,* 608 S.W.2d 881 (1980), *cert. denied*, 1981 U.S. LEXIS 1852 (U.S. 1981):

> A constitutional provision may be said to be self-executing *if it supplies a sufficient rule by means of which the right given may be enjoyed and protected*, or the duty imposed may be enforced; and *it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Washington County Election Commission v. City of Johnson City*, 209 Tenn. 131, 137, 350 S.W.2d 601, 603 (1961) (quoting 1 Cooley's Constitutional Limitations 167-68 (8th ed. 1927) (footnotes omitted)).

Id. at 892 (emphasis added) (internal quotations omitted);[14] *see also Washington County Election Commission v. City of Johnson City*, 209 Tenn. 131, 137, 350 S.W.2d 601, 603 (1961)("It is said that the test of whether a constitutional provision is self-executing is

[13] It is this aspect of the holding that Plaintiffs could assert is *ultra vires.* The power to find rights according to the spirit of the Constitution or to make it in keeping with the times is not a power given under the Constitution to the judiciary nor one necessarily implied power from some power given under the Constitution, as required by *Martin v. Hunter's Lessee*. 14 U.S. 304 (1816).

[14] The non-self-executing nature of the "right" to statutory marriage is demonstrated by this: if the legislature repealed the marriage licensing laws, what could the courts do? Nothing.

whether it supplies, without aid of legislation, a sufficient rule by which the right given may be enjoyed and protected, or the duty imposed may be enforced.").

Consequently, even if one assumes that the *Obergefell* Court had the constitutional power to "declare" a "right" to a civil, statutory marriage, that right is not self-executing. Statutory marriage can, by definition, only be effectuated by a statute and the legislature has enacted no statute in place of the one the *Obergefell* Court declared invalid, and it has certainly not enacted any amendment to T.C.A. § 36-3-104(a) by which any two persons, regardless of sex, can be granted a marriage license. And recently adopted HJR 529 would indicate that the legislature has no intention of amending the statute.

That this Court can do nothing about any supposed "right to marry" is driven home by *Biggs v. Beeler*, 180 Tenn. 198, 173 S.W.2d 144, (1943). The Court said,

> A wide distinction exists between a mandatory non-self-executing provision of a constitution and one that is directory or permissive only. The Legislature is left free to execute and act on the latter, or not, at is pleasure . . . but *a mandatory non-self-executing constitutional provision* delegates to the legislature the execution of a power coupled with a command *which, it is true, the Legislature may disregard and the Courts are without authority to enforce performance of it by affirmative decree*.

Id. at 205, 173 S.W.2d at 147 (emphasis added),[15]

So even if the holding in *Obergefell* regarding the "right to marry" is considered mandatory, it is not self-executing and the Tennessee Supreme Court knows that "the Legislature may disregard" it and that the courts "are without authority" to make the legislature give efficacy to it "by affirmative decree." *Id*.

Perhaps this explains why Justice Scalia, in his dissent in *Obergefell,* said, "With each

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[15] This is in accord with the U.S. Supreme Court's decisions regarding the self-executing or non-self-executing nature of federal treaties. *See Medellín v. Texas*, 552 U.S. 491 (2008) ("The point of a non-self-executing treaty is that it "addresses itself to the political, not the judicial department; and the legislature must execute *the contract* before it can become a rule for the Court." *Foster*, *supra*, at 314 (emphasis added); *Whitney*, 124 U. S., at 195.") (emphasis added). Even as a treaty can be in the nature of a contract and consequently require legislation to give it efficacy, marriage is a civil contract and statutory marriage, by definition, requires legislative action to address the conditions under which it can be contracted. A right to "civil marriage" is not self-executing.

decision of ours that takes from the People a question properly left to them—*with each decision that is unabashedly based not on law, but on the "reasoned judgment*" of a bare majority of this Court—*we move one step closer to being reminded of our impotence.*" 135 S. Ct. at 2631 (Scalia, J., dissenting).

The United States Supreme Court ruled, and it put the proverbial ball in the hands of the judicial branch to decide how its ruling applies to existing state laws that were not before the Court. Once this process is complete, state legislatures will have to decide how to respond.[16] This court should not presume to decide how the legislature will or should respond.

In conclusion, Plaintiffs have submitted a constitutional theory, based on sound principles of judicial construction articulated by Tennessee's Supreme Court, upon which this court could find that T.C.A. § 36-3-104(a) was rendered unconstitutional and invalid on the basis of the holding in *Obergefell*. If the law is invalid, then Minister Plaintiffs have stated a valid claim that the licenses *by which they are authorized* to solemnize marriages are invalid and ineffective, and Citizens Plaintiffs have stated a valid claim that, by the issuance of those licenses (or the continued issuance of those licenses if the law is adjudicated invalid only prospectively), Defendant has violated or will be violating prospectively their right to vote indirectly on the marriage laws Tennessee should have after *Obergefell*, their "right . . . to instruct" their representatives relative to those laws, and their right to have notice of what laws may be imposed on them. *State, ex rel Potter v. Harris*, No. E2007-00806-COA-R3-CV, 2008 Tenn. App. LEXIS 458 (Tenn. Ct. App. Aug. 4, 2008) (hereinafter "*Potter*"). Their standing to assert those claims is discussed in the following Section.

III. Plaintiffs Have Established Standing

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[16] It must be noted that the issue of common law marriage was not before the Court in *Obergefell,* because none of the states involved recognize common law marriage. Thus, anything the Court might have said to imply that the common law marriage must "evolve" to allow same-sex marriage would be pure *dicta*. Furthermore, the U.S. Supreme Court has recognized that there is a distinction between common law marriage and statutory marriage and that the two can exist simultaneously. *See generally Meister v. Moore*, 96 U.S. 76 (1877). This makes it even more imperative that this court not "*prescribe in advance what lawmaking bodies shall do." Dockery,* 559 S.W.2d at 955.

A. Introduction and Legal Standard.

In analyzing the claims of the two types of Plaintiffs, it must be remembered that the primary purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to *rights, status, and other legal relations . . . .*" *State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d 186, 193 (Tenn. 2000) (quoting T.C.A. § 29–14–113) (emphasis added). The act is "to be liberally construed and administered." *Id.*

The proper focus of a determination of standing is a party's right to bring a cause of action, and the likelihood of success on the merits does not factor into such an inquiry. *See ACLU of Tenn. v. Darnell,* 195 S.W.3d 612, 620 (Tenn. 2006); *Petty v. Daimler/Chrysler Corp.,* 91 S.W.3d 765, 767–68 (Tenn. Ct. App. 2002). To establish standing, a plaintiff must satisfy "three 'indispensable' elements." *Darnell,* 195 S.W.3d at 620 (quoting *Petty,* 91 S.W.3d at 767).

First, a party "must show a distinct and palpable injury; conjectural or hypothetical injuries are not sufficient.). Standing also may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens. *Mayhew*, 46 S.W.3d at 767." *Id.* (internal citations omitted).

Second, a party must demonstrate "a causal connection between the claimed injury and the challenged conduct." *Id.* While the causation element is not onerous, it does require a showing that the injury to a plaintiff is "fairly traceable" to the conduct of the adverse party. *Id.*

The third and final element is "a showing that the alleged injury is capable of being redressed by a favorable decision of the court." *Id.; see also City of Chattanooga v. Davis,* 54 S.W.3d 248, 280 (Tenn. 2001) (noting that the third standing element requires an injury that "is apt to be redressed by a remedy that the court is prepared to give" (quoting *Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.,* 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992)).

B. Minister Plaintiffs Have Standing.

a. *Minister Plaintiffs have alleged a "distinct and palpable" injury.*

1. Minister Plaintiffs' Injuries are not contingent, theoretical, or hypothetical.

As an aspect of the "injury" requirement, it is well-settled that if the alleged controversy "depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable." *State v. Brown & Williamson Tobacco Corp*, 18 S.W.3d 186 (Tenn. 2000). But "a plaintiff in a declaratory judgment action *need not show a present injury*." *Colonial Pipeline v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008) (emphasis added). In fact, "declaratory judgment actions have gained popularity as a proactive means of preventing injury to the legal interests and rights of a litigant. One commentator has observed that the declaratory judgment action recognizes that "[c]ourts should operate as preventive clinics as well as hospitals for the injured." Henry R. Gibson, *Gibson's Suits in Chancery,* § 545 (6th ed.1982)." *Id*. at 836-37 (emphasis added).

Applying the foregoing in the context of the standard to be applied in evaluating a motion to dismiss, Minister Plaintiffs have alleged that they have "officiated or solemnized marriages in Tennessee in the past and, as ministers, may be asked to officiate marriages in the future, which they would be willing to do consistent with their ministerial beliefs and responsibilities." (Complaint, ¶ 5) In fact, as reflected in the Amended Complaint, Plaintiff Grant has solemnized two marriage ceremonies in Williamson County since *Obergefell*, one on July 11, 2015 and the other on July 25, 2015, both under the authority of licenses issued by Defendant. (Complaint, ¶ 5)

Legally, the Plaintiff Grant may now[17] be subject to the possibility of criminal sanctions and a monetary judgment under T.C.A. § 36-3-305 if the parties he "join[ed] together in matrimony [were] not capable thereof"[18] because *Obergefell* ruled that laws like T.C.A. § 36-

[17] The limitation period for prosecution of a misdemeanor of the nature herein involved is twelve months. *See* T.C.A § 40-2-102.

[18] The relationship between T.C.A. § 36-3-105 and the necessity of the Plaintiff being presented with a valid marriage license in accordance with T.C.A. § 36-3-103(a) and § 36-3-104(a) is addressed more fully in "The History of 36-3-103(a)" included in the Appendix of Authorities. It will demonstrate that, without a license, parties were not "capable" of being married, in the words of T.C.A. § 36-3-305.

3-104(a) are invalid.[19] And certainly Plaintiff Allen is subject to those same consequences if he solemnizes a marriage in the months to come.

The potential for criminal prosecution alone is sufficient to show a distinct and palpable injury. *See West v. Schofield*, 468 S.W.3d 482, 492 (Tenn. 2015) ("The prototypical case of hardship comes from the claimant who faces a choice between immediately complying with a burdensome law or 'risk[ing] serious criminal and civil penalties.' (citations omitted)"; *see also Waters v. Farr*, 291 S.W.3d 873 (Tenn. 2009) (allowing a defendant subject to potential criminal penalties under a statute to prosecute declaratory judgment action).

2. *The Minister Plaintiffs Have a Real Interest*.

Plaintiff Grant in the present case has a real interest inasmuch as he has solemnized marriages that may not be valid under Tennessee law and Plaintiffs Grants and Allen are both reasonably likely, based on past experience, to be asked to solemnize marriages in the future.

However, Defendant argues that Minister Plaintiffs have no real interest because they are "not required to perform civil marriage ceremonies." (Def.'s 12). That they are not required by law to perform any particular marriage, however, is not determinative.

In making this argument, Defendant relies predominately on the decision in *Oldham v. American Civil Liberties Union*, 910 S.W.2d 431 (Tenn. Ct. App. 1995). Minister Plaintiffs agree that the case is instructive because **it actually helps establish their standing** when read in conjunction with the Tennessee Supreme Court's decision in *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949)

In *Oldham* a school principal brought a Declaratory Judgment Action against the American Civil Liberties Union based upon a letter he had received threatening a lawsuit if the school he served allowed prayers at their graduation ceremonies in reliance on T.C.A. § 49-6-

[19] That this court might not apply the rule that an unconstitutional law is void *ab initio* (see Footnotes 30 and 31) and that Minister Plaintiffs may have no liability for what has already been done does not mean that there is no case or controversy. The controversy is over whether the law is still valid after *Obergefell.* Minister Plaintiffs believe the law is no longer valid and Citizen Plaintiffs believe there is no longer any statute prescribing the issuance of marriage licenses, particularly to same-sex couples. Defendant apparently believes the law is still valid and believes she is under a duty to issue marriage licenses to same-sex couples. That is the controversy.

1004(c). That statute provided, in pertinent part, "[N]onsectarian and nonproselytizing voluntary benedictions, invocations or prayers, which are initiated and given by a student volunteer or student volunteers may be permitted on public school property during school-related noncompulsory student assemblies, school-related student sporting events, and school-related commencement ceremonies." *Oldham*, 910 S.W.2d at 432. The Court of Appeals agreed that the principal had no standing because there was no lawsuit by the ACLU to put the statute in question and because:

> [T]he controverted statute does not require that the plaintiff do anything, or that he refrain from doing anything. He may have an "interest" in the constitutionality of Tenn. Code Ann. § 49-6-1004(c), in the form of an absorption or involvement in the questions it presents, *but he has not been vested with any rights or saddled with any obligations arising from the statute*.

Id. at 435 (emphasis added).

Unlike the plaintiff principal in *Oldham*, Minister Plaintiffs are not just "interested" in whether the marriage licensing laws are of any continuing legal validity; rather, they are interested because they have been "vested with . . . rights" – the right/power to validate a marriage by solemnization – and have been "saddled with . . . obligations" – returning a license properly solemnized to the County Clerk and not solemnizing a marriage between those "not capable" thereof, both under pain of criminal prosecution for the breach thereof. *Id.*

The present case is more like *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949). In *Cummings*, the Tennessee Secretary of State asked the court for a declaration that an act of the Legislature, which ordered him to hold a special election, was constitutional. The Attorney General had issued an opinion that the statute was unconstitutional.

In deciding that the case presented a justiciable question, the Tennessee Supreme Court noted that the statute in question required the Secretary of State to spend large sums of money to hold the special election, and it described his interest thusly:

> If . . . it develops that the Attorney General was correct in his opinion in holding that the law was invalid and unconstitutional, the Secretary of State would have spent public funds under the authority of a law which was illegal and without effect. This

> expenditure would have been made in the face of the declared official opinion of his official legal advisor. . . . It would therefore clearly appear that the *Secretary of State has a real interest, officially, in determining whether or not the legislation is valid before spending these public funds.*

Id. at 157-58, 223 S.W.2d at 915-16 (emphasis added). The *Oldham* court rightly characterized *Cummings* as a case in which "the plaintiff is a public official who feels that a ruling *will relieve him from an uncertainty about his duties*." 910 S.W.2d at 435 (emphasis added).

While the Plaintiffs are not public officials like in *Cummings*, they have been cloaked with certain powers under state law to validate marriages *in the only way marriages can be entered into in Tennessee*[20] and, in the words of *Oldham*, "a ruling will relieve [them] from an uncertainty about [their] duties." *Id.* Like the public officials in *Cummings*, the Minister Plaintiffs have "a real interest, officially, in determining whether or not the legislation is valid before" purporting to marrying individuals they are authorized to marry and potentially subjecting themselves to criminal sanctions and monetary judgments. 189 Tenn. at 158, 223 S.W.2d at 916.

Consequently, Defendant's assertion that the statutes at issue "do not impose obligations on Minister Plaintiffs" because they are "not required to perform civil marriage ceremonies" is inapposite and misses the point. (Def.'s Mem. 12).

Furthermore, to require Minister Plaintiffs (and any other category of individuals authorized by law to solemnize marriages) to wait to raise the constitutionality of the marriage license law and their rights and duties under that law until they have been prosecuted or sued for damages would frustrate an additional purpose of the declaratory judgment statute. As the Tennessee Supreme Court said in *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008), the statute's "purpose is to settle important questions of law *before* the controversy has reached a more critical stage." (emphasis added).

[20] Tennessee has never had common law marriage. *See Smith v. Bank*, 115 Tenn. 12, 89 S.W. 392 (1905).

Because the questions raised by the Minister Plaintiffs are "real and not theoretical," the Plaintiffs have "a real interest" in being "relieve[d] … from an uncertainty" regarding the "rights" that have been "vested" in them and the "obligations" with which they have been "saddled" under the marriage licensing statutes. Minister Plaintiffs should not be required to wait until they are prosecuted or sued to have a declaration of their rights.

b. The injury to a Minister Plaintiffs is "fairly traceable" to the conduct of the adverse party.

T.C.A. § 36-3-103(a) provides, in pertinent part, **"*Before*** being joined in marriage, the parties ***shall*** *present to the minister* or officer *a license* under the hand of a county clerk in this state, directed to such minister or officer, ***authorizing*** *the solemnization* of a marriage between the parties." (emphasis added).

It is the license issued by Defendant that "authorizes" Minister Plaintiffs to "solemnize" a marriage. If the Defendant's authority is being improperly and unconstitutionally exercised by the issuance of marriage licenses,[21] then Minister Plaintiffs are not lawfully authorized to solemnize a marriage and therefore are subject to the criminal sanctions and monetary judgments (i.e. "injuries") referenced above and pled in the complaint.

Thus, the injuries to which the Minister Plaintiffs are subject are certainly "fairly traceable" to the conduct of the Defendant, within the meaning of the *Darnell* case, because they are not subject to any injury if the Defendant is constitutionally exercising her prescribed duties but they are subject to injury if they unwitting rely on a license authorizing them to solemnize a marriage that is invalid because it has been unconstitutionally issued. 195 S.W.3d at 620.

c. Minister Plaintiffs' injuries are capable of being redressed by a favorable decision of the court.

It is hard to imagine how a declaration that the marriage license law is constitutionally valid or invalid could not provide "relief from uncertainty and insecurity with respect to *rights, status, and other legal relations*" that Minister Plaintiffs are experiencing under the marriage licensing laws and the relationship they have, at law, with those whose marriages they

[21] See discussion of cases cited in Footnote 29 relative to the validity of licenses if T.C.A. § 36-3-104(a) is constitutionally invalid.

purport to solemnize. *Brown & Williamson Tobacco Corp.,* 18 S.W.3d at 193. In fact, Defendant does not appear to have addressed this aspect of standing, other than in her assertion that injunctive relief is not appropriate under a declaratory judgment statute, which assertion was summarily addressed herein on page 2.

Presumably Defendant believes that Minister Plaintiffs have no injury to redress because "a license issued to an opposite sex couple certainly is not contrary to the provision of Tenn. Code Ann. § 36-3-104." (Def's Mem. 12) But this assertion misses the whole point of the lawsuit, namely, that the marriage license law may be constitutionally invalid *as to all persons* as a result of the U.S. Supreme Court's holding in *Obergefell* and a proper application of the doctrine of elision.

C. Minister Plaintiffs Have *Jus Tertii* Standing[22]

Jus tertii is a Latin term which means "right of a third party." The doctrine of *jus tertii* sometimes allows one person to enforce the constitutional rights of another. The seminal case in this regard is *Singleton v. Wulff*, 428 U.S. 106 (1976). In *Singleton* two physicians brought an action for injunctive relief and a declaration regarding the unconstitutionality of a Missouri statute that did not provide Medicaid benefits for abortions that were not "medically indicated." Part of the argument was that the restriction on funding to abortions "medically indicated" was an "unconstitutional interference with the decision to terminate pregnancy" of indigent women. *Id*. at 108.

In deciding whether the physician plaintiffs could assert the rights and injuries of the indigent women whose rights to an abortion were allegedly being interfered with, the Court said:

> "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. at 255. *See also Flast v. Cohen,* 392 U.S. at 99 n.20; *McGowan v. Maryland,* 366 U. S. 420, 429 (1961).
>
> Like any general rule, however, this one should not be applied where its underlying justifications are absent."

Id. at 114.

[22] This is an alternative ground for standing by Minister Plaintiffs and its applicability does not have to be addressed if they have standing to prosecute their own claims.

In *Singleton*, the U.S. Supreme Court said courts should look primarily to "two factual elements" to determine whether *jus tertii* standing should apply in a particular case:

> The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Id. at 114-15.

In regard to this first factual element, the *Singleton* Court said, relative to abortion,

> A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. *See Roe v. Wade,* 410 U.S. at 153-156. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.

Id. at 117.

Similarly, a couple "cannot . . . secure" a legally recognized marriage without someone to solemnize it. *Id.* And on a motion to dismiss, this court cannot assume that Minister Plaintiffs can establish no set of facts by which they could demonstrate that they are "intimately involved" in the marriages they solemnize. *Id.* And "aside from" the couple that desires to marry, Minister Plaintiffs are "uniquely qualified" to litigate the validity of the marriage laws which would validate the couple's marriage. *Id.* Minister Plaintiffs have satisfied this factor relative to *jus tertii* standing.

The second factual element that the *Singleton* Court said should be examined was articulated as follows:

> The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. *If there is some genuine obstacle to such assertion*, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes, by default, the right's best available proponent. Thus, in *NAACP v. Alabama,* 357 U. S. 449 (1958), the Court held that the National Association for the Advancement of Colored People, in resisting a court order that it divulge the names of it members, could assert the First and Fourteenth Amendments rights of those members to remain anonymous. The Court reasoned that *"[t]o require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion" Id.* at 357 U. S. 459.

Id. at 116 (emphasis added).

In regard to this "factual element" and abortion, the *Singleton* Court said,

> As to the woman's assertion of her own rights, there are several obstacles. For one thing, she may be chilled from such assertion *by a desire to protect the very privacy of her decision from the publicity of a court suit*. A second obstacle is the *imminent mootness*, at least in the technical sense, of any individual woman's claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost, assuming, as it seems fair to assume, that, unless the impecunious woman can establish Medicaid eligibility, she must forgo abortion. It is true that these obstacles are not insurmountable.

Id. at 117.

Similarly, couples desiring to marry may desire to protect the privacy of their decision from all the publicity that will come about from a suit such as the present one. In addition, by the time a decision to marry is made, there may not be sufficient time between that decision and the marriage for the issue to be finally resolved in the courts. And like the situation in the NAACP case, a couple that brings a suit to determine whether their marriage is legally valid might find that they have "nullified" their own marriage. Yet they need to know sooner rather than later whether their marriage is lawful because so many other rights depend on the validity of their marriage such as benefits under the tax laws. This factor relative to *jus tertii* standing has also been satisfied.

Since Minister Plaintiffs have satisfied both of the factors necessary to establish *jus tertii* standing on behalf of residents who desire to enter into a lawful marriage, Defendant's motion to deny Minister Plaintiffs standing on this ground should be denied.

D. Citizen Plaintiffs[23] Have Standing.

Defendant asserts that Citizen Plaintiffs' "grounds for standing" are based on the fact "that they are taxpayers of Williamson County and Tennessee voters" and asserts that "[s]uch is not sufficient to confer standing." (Def.'s Mem. 9). However, this assertion confuses facts about Citizen Plaintiffs with the nature of their claims. Citizen Plaintiffs have not brought this action simply because of their interest as voters in the constitutionality of a statute. Citizen Plaintiffs have also not brought this action as taxpayers because of a concern that their tax burden might be increased because of Defendant's actions.[24]

Rather Citizen Plaintiffs are suing for a violation of their state constitutional rights. If a citizen does not have standing to ask for a declaration as to whether a government official is violating his or her constitutional rights when that violation does not depend on some future, contingent, or theoretical act,[25] then citizens' rights can only be vindicated after they have been violated. This is not the law.

For example, in *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001), the court held that certain newspapers, excluded from budget meetings of the General Assembly, had standing to assert a violation of Article 9, Section 19 of the Tennessee Constitution which provides, in pertinent part, "That the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof."

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[23] For purpose of this argument, "Citizen Plaintiffs" also includes the Minister Plaintiffs.

[24] This is not to say that Defendant's actions might not, in fact, increase the Plaintiffs' tax burden because of costs to taxpayers related to tax laws and government employee family benefits.

[25] That the Defendant has continued to issue marriage licenses post-*Obergefell* is essentially conceded by statements made on pages 18 and 25 of her Memorandum. But the kind of hypothetical case courts should avoid would be demonstrated by one brought *before* the Supreme Court's ruling in *Obergefell*, based on a concern that the Supreme Court *might rule* as it did and that the Defendant *might* continue to issue marriage licenses. Then Citizen Plaintiffs would concede that they had no standing. But the United States Supreme Court has ruled on the constitutionality of certain marriage license laws like those at issue and the Clerk is issuing marriage licenses. This court should not abdicated its responsibility to determine if the actions of the Defendant in issuing or continuing to issue marriage license is an "infringement of their rights." See discussion of *Parks v. Alexander* in the text on the next page.

This was a "distinct" injury relative to plaintiff newspapers, unlike that of the citizen who sued for a violation of that Section of the Constitution. The plaintiff newspapers were the intended beneficiaries of Section 19, and they alleged that their rights had been violated because they had been excluded from a meeting that, arguably, they, unlike the citizen, had a constitutional right to observe. Similarly, as demonstrated below, Citizen Plaintiffs are the beneficiaries of certain rights under the Tennessee Constitution that have been or will be violated if the marriage license law is invalid.

Also instructive is *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980). In *Parks* the court said, "Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that *the enforcement of the law would be an infringement on his rights*." *Id.* at 885 (emphasis added). As will be shown, the issuance of marriage licenses (or the continued issuance of marriage licenses), particularly to same-sex couples, is an "infringement" of specific state constitutional rights belonging directly to Citizen Plaintiffs, which rights the courts have recognized.

Thus, this type of injury is different from the injuries alleged in the taxpayer standing types of cases where the allegation is simply that a statute is unconstitutional and its operation or application is increasing the citizen's tax burden, which is the same as to all citizens. Consider what the standing argument advanced by Defendant essentially means: When a constitutional right extends to all people (like a right to vote), then no citizen has standing to assert a violation of that right because his right and corresponding injury is common to all people and not distinct to him or her. This type of standing argument would seem to mean that constitutional rights common to all citizens could not be vindicated in a court of law.[26] This is what distinguishes the taxpayer standing cases Defendant relies on from cases alleging violation of a constitutional right.

a. *Citizen Plaintiffs have alleged a "distinct and palpable" injury*.

1. *Citizen Plaintiffs have standing because their right to vote was violated*.

[26] For example, assume the legislature repealed the laws that set up the election process for the Governor and enacted a statute whereby the Governor was appointed by the legislature. That law would affect the right to vote of every Tennessean. So, if Citizen Plaintiffs understand Defendant's standing argument correctly, no one would have standing because no Tennessean's injury would be unique to him or her and everyone's injury would be common to all.

Citizen Plaintiffs have alleged that their **right to vote** has been violated by the issuance of marriage licenses when no currently valid statute has been "prescribed by the General Assembly" authorizing the issuance of licenses after *Obergefell*. Of this right, the Tennessee Supreme Court has said: "[T]he right to vote is essential to the continued existence of democratic institutions. That the right to vote is individual and fundamental is . . . recognized in the Tennessee Constitution. . . . . " *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 901 (Tenn. 1987). The standing of Citizen Plaintiffs relative to an injury to their right to vote is controlled by the Tennessee Supreme Court's decision in *Walker v. Dunn*, 498 S.W.2d 102 (1972).[27] Citizen Plaintiffs submit the evidence will show that that allegations in the present complaint almost exactly mirror the allegations made by the citizen plaintiffs in *Walker*.

In *Walker,* the General Assembly met in special session to ratify a proposed amendment to the United States Constitution. The *Walker* plaintiffs claimed that this action violated Article II, section 32 of the Tennessee Constitution and wholly deprived them of their right to vote for the General Assembly that would be charged with ratifying the amendment. The Court described the plaintiffs' allegations as sufficient to establish a "real interest in the suit." *Id.* at 105. Standing in *Walker* was not predicated upon the fact the plaintiffs were voters, but because, **as voters**, they had alleged a distinct, concrete injury in fact— a denial of their right to vote.

Citizen Plaintiffs submit that the evidence will show that their status is no different than that of the plaintiffs in *Walker* and that the *Walker* plaintiffs were considered appropriate representatives of a class of person who also "wished to preserve the blessings of liberty to themselves and their posterity by requiring their governmental representatives to adhere to the requirements of the Tennessee Constitution." Complaint, ¶ 7

In dismissing the government's argument that "the plaintiffs have not alleged special injury or
real interest in the issues in the suit beyond that of members of the public generally," the Court said,

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[27] The following analysis of the *Walker* case serves the dual purpose of rebutting Defendant's argument that Plaintiffs are not entitled to injunctive relief. *See* (Def.'s Mem. 18).

> The complainants assert injury *based on the defendants' deprivation of complainants' right "indirectly" to vote* on the ratification through their vote for their legislators; further, that the General Assembly's action denies to them liberty without due process of law, and the equal protection of the law in violation of Article 1, 8, of the Tennessee Constitution, and the Fourteenth Amendment of the United States Constitution. *We are of opinion that these averments are sufficient to satisfy the requirement of special injury or real interest in the suit.*

Walker, 498 S.W.2d at 104-05 (emphasis added).

As in *Walker*, all the Plaintiffs in the present case allege that Defendant is without authority to issue marriage licenses (or at least to continuing issuing licenses) under T.C.A. § 36-3-104(a) after *Obergefell* because *Obergefell* held that "State laws are invalid" if they "exclude same-sex couples from civil marriage," which Tennessee license law does. 135 S. Ct. at 2591. If the law is invalid, which is the issue to be decided, and the Defendant has issued marriage licenses, which Defendant does not deny and impliedly admits in her Memorandum, then the Defendant's actions in issuing marriage licenses[28] are *ultra vires*.[29] And if void because *ultra vires*, then those actions are in violation of the following provision of the Tennessee Constitution, Article VII, Section 1.[30] (Defendant's actions would then also

[28] There are exceptions to the general rule that a law is to be presumed constitutional until ruled unconstitutional. *See Spec v. State*, 66 Tenn. 46, 53 (1872)("[E]very act of the Legislature, *which is not palpably unconstitutional on its face*, is binding as a law until its constitutionality is judicially determined . . . or *until some proceeding is instituted* to enforce the act or *to declare some right under the act affecting life, liberty or property*." (emphasis added)). Certainly an argument can be made that it is "palpably" clear that T.C.A. § 36-3-104(a), "on its face," excludes two people of the same sex from applying for a marriage license.

[29] As to whether the Defendant's actions have been void since the *Obergefell* decision or only void prospectively is of no great moment to Plaintiffs, except to the extent Plaintiff Grant might be subject to criminal sanctions if the law is void *ab initio*. As to whether an act is void *ab initio*, the Tennessee Supreme Court, applying that doctrine to a zoning ordinance, said, "Tennessee cases have long recognized the doctrine of void ab initio" and even though it acknowledged in an earlier case, *Cumberland Capital Corp v. Patty*, 556 S.W.2d 516, 539 (Tenn. 1997), that "the 'presumption of validity' may often be 'the better, more equitable and more realistic rule,'" it "recognized that the void *ab initio* doctrine 'continues to have at least limited validity in Tennessee.'" *Edwards v. Allen*, 216 S.W.3d 278, 290 (Tenn. 2007). Whether the actions of the Clerk should be considered void *ab initio* since the date of the *Obergefell* decision or void since this lawsuit was filed, is a legal issue to be decided on the merits. *See* analysis of *Spec v. State* in the preceding footnote as to the time at which the Defendant's actions might become *ultra vires* and void *ab initio* and the presumption of constitutionality and validity of a statute,

[30] Plaintiffs concede that the Defendant's actions might not violate the Tennessee Constitution if

violate Article I, Sections 5, 8, 23, and Article II, Section 17, as discussed in subparts 2 and 3 of this Subsection)

Section 1 of Article VII of the Tennessee Constitution says,

> The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a sheriff, a trustee, a register, *a county clerk* and an assessor of property. Their qualifications and *duties shall be prescribed by the General Assembly*. (emphasis added).

It is clear that no law "prescribed by the General Assembly" has ever authorized the issuance of a license to a same-sex couple. If Defendant has issued a license to two parties of the same-sex in the absence of a statute prescribing that authority, then Citizen Plaintiffs' right to indirectly vote on the duties of the Defendant in that regard have been violated.[31] And if the Tennessee Supreme Court's doctrine of elision is faithfully applied to the case at bar so as to render T.C.A. § 36-3-104(a) invalid, then there is no law "prescribed by the General Assembly" for the issuance of a marriage license *to anyone*.[32] In that case, Citizen Plaintiffs

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the *Obergefell* decision is itself *ultra vires* and void *ab initio* as having exceeded the scope of the "powers which [were] granted to it by the Constitution," which powers "must be such as are expressly given, or given by necessary implication." *See Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816), in which the State of Virginia argued that it could "decline" an earlier mandate by the U.S. Supreme Court because the "proceedings thereon in the Supreme Court were *coram non judice* [literally "not before a judge"] in relation to" the state court. While the Court held that the case was reviewable, it was only because the power to review was necessarily implied from explicit powers given the court unlike the power exercised in *Obergefell* to redefine marriage.

[31] Defendant could only justify the issuance of a license two parties of the same sex based on the assumption that the Supreme Court's *Obergefell* decision lawfully authorized and, indeed, required her to do so. No doubt Defendant's assumption was made in good faith, but that does not change the legal conclusions to be drawn from *Obergefell's* holdings, namely, that Tennessee license law is invalid and that any "right to marry" given to same-sex couples by the Supreme Court is somehow self-executing which, as demonstrated above, it is not. It also does not change the fact that courts cannot and the *Obergefell* Court did not amend Tennessee's statutes.

[32] Arguably this honorable Court could escape the conclusion that the doctrine of elision requires if the *Obergefell* decision were *ultra vires* (*see* Footnotes 13 and 30) or if the "to the extent" language in *Obergefell* is interpreted to mean that Tennessee's marriage license law is valid "as far as it goes," meaning, relative to its language regarding opposite sex couples, but the statutory language just doesn't go far enough to include language relative to same-sex couples. In other words, the Court could say that a County Clerk can still issue licenses to opposite sex couples but cannot issue them to couples of the same sex *until the General Assembly "prescribes" a law authorizing the County Clerk to issue licenses based upon applications by couples other than a "male and female."* The latter possibility would mean that all marriages between a man and a woman post-*Obergefell* would be valid and only those not in conformity with the statute would

will be deprived of their right to vote indirectly on whatever authority Defendant would then purportedly be operating under relative to the on-going issuance of marriage licenses.

The denial of the right to vote, even "indirectly," is sufficient to establish standing in Tennessee under *Walker* and this interpretation of *Walker* was re-affirmed by the Tennessee Supreme Court in *American Civil Liberty Union v. Darnell*, 195 S.W.3d 612, 624 ("[S]tanding in *Walker* was predicated upon a distinct, concrete injury in fact— denial of the right to vote. Standing was not predicated upon the *Walker* plaintiffs' status as voters."). Thus, Citizen Plaintiffs have, in the words of *Walker*, alleged an injury "sufficient to satisfy the requirement of special injury or real interest." 498 S.W.2d at 105.

But Plaintiffs also have standing to assert the denial of other rights guaranteed to them under the state Constitution.

2. *Citizen Plaintiffs have standing because their right under the Tennessee Constitution to Due Process and "to instruct" their representatives has been violated.*

If Defendant is allowed to issue marriage licenses the United States Supreme Court has held that laws like T.C.A. § 36-3-104(a) are invalid, or, with respect to same-sex couples, when there is no law by the General Assembly "prescribing" a duty to issue such licenses, then the Plaintiffs are being denied their "right . . . to instruct their representatives" regarding the duties that should be prescribed to the County Clerks of this state and of their County, in violation of Article 1, Section 23 of the state Constitution.

That section of the state constitution was discussed in *Potter v. Harris*, 2008 Tenn. App. LEXIS 458 (Tenn. Ct. App. Aug. 4, 2008)[33]. In *Potter*, the plaintiffs filed a petition for writ of *mandamus* alleging that the Carter County Election Commission had "arbitrarily, capriciously, and illegally rejected valid voter signatures" relative to a referendum and that "its actions constituted a violation of constitutional rights of due process and equal protection guaranteed by the constitutions of the United States and the State of Tennessee." *Id.* at *5. In denying the plaintiff's claim, the court said, "Tennessee courts have recognized that Article I,

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be invalid, avoiding, at least in part, the implications of the void *ab initio* doctrine if it is applied.

[33] The case is attached as part of the Appendix of Authorities and can be found at this link: http://cases.justia.com/tennessee/court-of-appeals/PotterRalphOPN.pdf?ts=1396144363

§ 23 of the state constitution serves to protect the citizen's rights 'to "*instruct"* representatives [and] to "*apply*" to officials.' *Vincent*, [1996 Tenn. App. LEXIS 230, [WL] at *2"], and the U.S. Supreme Court has construed the Petition Clause of the federal constitution as a guaranty 'that people "may communicate their will" through direct petitions to the legislature and government officials. *McDonald v. Smith,* 472 U.S. 479, 482 (1976) (quoting 1 Annals of Cong. 738 (1789))'."

The critical point in *Potter* relative to the case at bar is what the Court said in dismissing the plaintiffs' constitutional claim about the difference between the nature of the right accorded Tennesseans under Article 1, Section 23 and the type of "right to petition" associated with a voter referendum. The Court said, "[W]e do not agree that the right to petition for a referendum implicates *the constitutional rights* to vote or to *freely engage in political speech.*" *Potter*, 2008 Tenn. App. LEXIS at *25 (emphasis added). In other words, participation in referendum process, which circumvents the normal legislative process, is not the same as voting for public officials *or petitioning, by means of political speech, one's representatives*.

This conclusion is buttressed by the fact the that *Potter* Court quoted with approval what the U.S. Supreme Court said about the right to petition in *McDonald*,

> The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The *right to petition* is cut from the same cloth as the other guarantees of that Amendment, and *is an assurance of a particular freedom of expression*. In *United States v. Cruikshank,* 92 U. S. 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.* at 92 U. S. 552. And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. 1 Annals of Cong. 738 (1789).

472 U.S. at 482 (emphasis added). In other words, *McDonald* equates the "right to petition" with the "freedom of expression," which is same constitutional concept as the "political speech" the *Potter* Court equated with the "right to petition" in the state Constitution.

When the Defendant in the case at bar issues marriage licenses that have not been "prescribed

by the General Assembly," Citizen Plaintiffs are denied their "right 'to "instruct" representatives [and] to "apply" to their officials.'" And as a consequence of that denial, the Plaintiffs and other citizens are also being denied their "liberties" and "privileges" in violation of the "law of the land" contrary to Article I, Section 8 of the Tennessee Constitution. Furthermore, Plaintiffs and other citizens are being denied their right to have the legislative power exercised only by the legislative branch in violation of Article II, Section 1 of the Tennessee Constitution.

That this court may find that *Obergefell* did not result in Tennessee's marriage license laws being unconstitutionally invalidated, may find that the doctrine of elision applies to "save" those laws, or may find that the U.S. Supreme Court can disregard the doctrine of federalism and separation of powers to judicially amend those laws, does not mean that the Plaintiffs do not have standing to assert the claims they have made and the arguments in support thereof.[34]

Standing to bring suit to prevent an alleged unlawful act by public officers has been recognized by the Tennessee Supreme Court. In *State v. Wilson County*, 212 Tenn. 619, 623, 371 S.W.2d 434, 436 (Tenn. 1963) "three . . . citizens and taxpayers of the school district" brought suit to "enjoin and restrain the further and future unlawful acts of" the defendants who allegedly wrongfully "diverted general county funds to elementary school use." While the action appears to have been in the nature of *mandamus*, the Court said,

> A taxpayer of a county may maintain an action *to prevent the commission of an unlawful act by public officers*, the effect of which would be to divert a public fund from the purpose for which it was intended, by law and thus increased his burden of taxation. *In such cases the taxpayers have such a special interest in the subject matter* as will authorize them to maintain an injunction.

Id. at 628-29, 361 S.W.2d at 439. Even though all taxpayers were likewise injured, the three who brought suit had standing to enjoin an alleged unlawful act because of the injury they sustained.

Similarly, if *Obergefell* invalidated Tennessee's marriage license laws, then Citizen Plaintiffs

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[34] Plaintiffs would note that judicial economy should militate in favor of having this constitutional issue resolved in the present case rather than require Plaintiffs to file a separate mandamus action or perhaps a more procedurally appropriately ouster proceeding for violation of an official's duties under the law. In either type of case, the same constitutional issue can be raised.

should have standing "to prevent the commission of an unlawful act" by the Clerk, albeit such may have been innocent and unintentional until the constitutional issues in the Complaint were brought forth.

Defendant's argument that Citizen Plaintiffs have not suffered an injury to their rights under Tennessee Constitution, Article 1, Sections 8 and 23, sufficient to justify standing is without merit.

3. Citizen Plaintiffs have standing because their right under Article II, Section 17 of the Tennessee Constitution to know the nature and purpose of the laws "prescribed by the General Assembly" has been violated.

Article II, Section 17 of the Tennessee Constitution states, in pertinent part: "No bill shall become law which embraces more than one subject, that subject to be expressed in the title." The case relevant to the case at bar is *Tennessee Municipal League v. Thompson*, 958 S.W.2d 333, 338 (Tenn. 1997).

In *Thompson* various cities, including the Tennessee Municipal League, brought a declaratory judgment action to determine the constitutionality of a statute making certain changes to the laws governing municipal annexation. *See Id.* at 335. The plaintiffs argued that the scope of the caption of the bill that became the law was more narrow than the law itself. *Id.* Put another way, they asserted that the law was unconstitutional, in violation of Article II, Section 17, because the law went beyond the scope of the bill's caption.

Standing was not an issue in that case, but its relevance to the case at bar is found in its statement concerning the purpose of the constitutional provision here at issue:

> *The purpose* of Article II, § 17, *is* to prevent "surprise and fraud" and *to inform* legislators and *the public about the nature and scope of proposed legislation*. The constitutional purpose is effectively thwarted when a restrictive caption is employed and then legislation is adopted which is broader than the caption. In this case, although we are convinced the General Assembly's action was in good faith, the restrictive caption failed to adequately inform the members of the General Assembly and *the citizens of this state about the nature and scope of the legislation* that eventually passed.

Id. at 338 (emphasis added).

While *Thompson* may seem irrelevant because no statute enacted by the General Assembly is at issue, that is exactly the point. Only the legislature can *constitutionally* "prescribe the

duties" of the Defendant and, in fact, Defendant asserts that her function is "purely ministerial." (Def.'s Mem. 18). Yet, if the marriage license law was invalidated by *Obergefell,* then Citizen Plaintiffs had no notice whatsoever "about the nature and scope" of what appears to be a new statute that the Defendant is administering. And certainly Citizen Plaintiffs had no notice that the statute had been changed or amended by somebody (the Supreme Court?) to allow licenses to be issued to same-sex couples.

While Defendant asserts that she is entitled to presume the law is constitutional until it is declared unconstitutional[35], now that the issue of the constitutional invalidity of the law has been raised, for this court to allow Defendant to continue to administer a law that may not exist and to issue licenses to couples of the same sex when such has not be "prescribed by the General Assembly" would allow Citizen Plaintiffs' rights to know what laws are going to be prescribed for the Clerks to be violated.

Citizen Plaintiffs have asserted a distinct injury to their constitutional rights under Article II, Section 17 of the Tennessee Constitution.

b. The injury to Citizen Plaintiffs is "fairly traceable" to the conduct of the adverse party.

With respect to the injuries to Citizen Plaintiffs' right to vote, right to apply to and instruct their representatives, and right to have notice of the laws that will govern the Defendant's duties, it can hardly be gainsaid that their injuries are (or will be if *Obergefell* is only applied prospectively) the direct result of Defendant issuing licenses in the absence of any new marriage license law being prescribed by the General Assembly.

c. Citizen Plaintiffs' injuries are capable of being redressed by a favorable decision of the court

This prong of the standing test is also easily met. If this court finds that the marriage license law at issue is invalid after *Obergefell* and finds that the General Assembly has not enacted any new law prescribing the Defendants duties since *Obergefell*, then the violation of Citizen Plaintiffs' rights can be remedied by enjoining the Defendant from continuing to issue marriage licenses.

[35] See Footnote 28 for a discussion as to the merits of this assumption.

Defendant's argument that injunctive relief is not an appropriate remedy, *See* (Def.'s Mem. 18-20), rests on the assertion that the marriage license law is still valid after *Obergefell*. This argument begs the question being asked, namely, is the marriage license law still valid after *Obergefell*? But in any event, any argument by Defendant that Plaintiffs' injuries, if proved, cannot be remedied by injunctive relief under this prong of the standing test are specious.

IV. Minister Plaintiffs' Claims Are Ripe for Adjudication.

Defendant argues that Minister Plaintiffs' claims should be dismissed because they are not "ripe" for adjudication. This assertion rests on the claim that Minister Plaintiffs "'**may** be asked to officiate marriages in the future' which they would be willing to do if the request was consistent with their beliefs and responsibilities." (Def.'s Mem. 16).

The Tennessee Supreme Court has applied a two-pronged test to the question of ripeness. The test requires this court to "evaluat[e] '[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.'" *West v. Schofield*, 468 S.W.3d 482, 491 (Tenn. 2015).

In *West*, certain death row inmates asked the court to determine "the constitutionality of a 2014 statute [acronym was CPEA] that designated electrocution as an alternative method of execution and the constitutionality of electrocution as a means of execution." *Id.* at 484.

In addressing the issue of "fitness," the *West* Court said, "No allegation of the amended complaint, or any other portion of the record on appeal, demonstrates that the Inmates are presently subject to execution by electrocution. Moreover, the plain language of the CPEA establishes that none of the Inmates will ever become subject to execution by electrocution unless one of two statutory contingencies actually occurs," which contingencies the plaintiffs never alleged to have occurred. *Id.*

With respect to Plaintiff Grant, Defendant's argument overlooks the fact that he has already performed two marriages since *Obergefell*. Certainly, the controversy is ripe as to him as he is "presently subject to" criminal sanctions and/or a suit for damages in connection with the marriages already solemnized if the licenses authorizing him to solemnize the marriages were invalidly issued.

And with respect to Plaintiff Allen, he is subject to these same sanctions if he performs a marriage.[36] But even if the first prong of the *West* test does not apply to Plaintiff Allen, the second prong of the test certainly does.[37] To dismiss his claim because he is not currently committed to officiate a wedding is to do one of three things: (i) judicially force him to never officiate another marriage, (ii) risk his being subject to criminal sanctions or monetary damages if he does perform an invalid marriage, or (iii) file a lawsuit once he has agreed to marry a couple, which may become moot before the case could be finally adjudicated, allowing the present issues to evade review[38]. This is exactly the kind of choice from which a plaintiff was to be protected by the "hardship" test.

The claims of Minister Plaintiffs will never be more ripe than they now are unless this court is going to force them to sue once the next marriage request comes along and then have to argue around the mootness defense Defendant would undoubtedly assert at that time. This is not just an impermissible choice under the second prong of the ripeness test, it is a Hobson's choice**.**[39]

V. Defendant Has a Real Interest Sufficient to Establish Justiciability.[40]

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[36] In discussing the hardship test, the *West* Court said, "The prototypical case of hardship comes from the claimant who faces a choice between immediately complying with a burdensome law or 'risk[ing] serious criminal and civil penalties.' *Warshak*, 532 F.3d at 526 (quoting *Abbott Labs*., 387 U.S. at 153). This prototypical hardship is not present in this litigation. The CPEA does not force the Inmates to make any choice." *West*, 468 S.W.3d at 492. However, unlike the *West* plaintiffs, Plaintiff Allen is subject to risking criminal and civil penalties if he solemnizes a marriage without valid statutory authority.

[37] It should be noted that the *West* Court examined both prongs of its test, even though it determined the case was not ripe under the first prong. This necessarily implied that if either prong had been satisfied, then the case could have been considered ripe. "Fitness" and "hardship" might be said to be opposite sides of the same coin.

[38] While distinct from the doctrine of ripeness, it is not inappropriate to consider the possibility that dismissal of the present lawsuit for ripeness might result in a later lawsuit being dismissed for mootness. Though such a case might not be dismissed under well-recognized exceptions to the mootness doctrine, *See Walker v. Dunn*, 498 S.W.2d 102 (Tenn.1972), dismissal in the present case subjects Minister Plaintiffs to the kind of choice just articulated.

[39] The *West* Court also noted that "a readily available alternative means exists for ameliorating the Inmates' notice concerns." *Id*. at 494. There is no alternative means by which Minister plaintiffs concerns can be ameliorated.

In the words of *Oldham v. American Civil Liberties Union*, 910 S.W.2d 431, 433-34 (Tenn. Ct. App. 1995), "there must be someone having a real interest in the question who may oppose the declaration sought." Defendant denies this element of justiciability, but it is met in the present case in two ways.

A. The County Clerk is Subject to Ouster.

First, if the Defendant County Clerk is issuing marriage licenses contrary or beyond the powers "prescribed by the General Assembly", then she may be subject to ouster.

T.C.A. § 8-47-101 provides as follows:

> Every person holding any office of trust or profit, under and by virtue of any of the laws of the state, either state, county, or municipal, except such officers as are by the constitution removable only and exclusively by methods other than those provided in this chapter, *who shall knowingly or willfully commit misconduct in office, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state*, . . . shall forfeit such office and shall be ousted from such office in the manner hereinafter provided.

T.C.A. § 8-47-110 provides that **"***upon the relation of ten (10) or more citizens* and freeholders *of the* state, *county*, or city, as the case may be," a "petition or complaint . . . in the name of the state . . . may be filed upon the relation of the attorney general and reporter, or the district attorney general for the state, or the county attorney in the case of county officers . . . ."

The present case involves half of the number of citizens necessary to bring an ouster proceeding against Defendant. However, they have chosen to raise the constitutional issues created by *Obergefell* by means of a declaratory judgment action rather seek to involve more Williamson Countians in a more adversarial ouster proceeding. Surely the prospect that Defendant may be subject to ouster if she is issuing marriage licenses without authority to do so is an interest sufficient to create justiciability.

B. The County Clerk is Subject to Criminal Sanctions.

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[40] This section of the Plaintiffs' Memorandum is responsive to the argument found in Section C of Def.'s Mem,, beginning on page 17 thereof, and corresponds to Defendant's argument No. 3 found on page 9 of Def.'s Mem.

In addition to the threat of ouster, Defendant, having now been made a party to this action, must be cognizant of the provisions of T.C.A. § 36-3-111, which provides: "Any county clerk or deputy clerk who issues a marriage license without compliance with the last sentence in §§ 36-3-103(c)(1), ***36-3-104*** -- 36-3-107, 36-3-109, 36-3-110, or 36-3-113, and not in good faith, commits a Class C misdemeanor." (emphasis added).

While no criminal charge may, in fact, ever be brought against the Defendant, if such a charge is brought, it could be a jury question as to whether the issuance of licenses, particularly to couples of the same sex, would be in good faith *going forward* in the absence of any new statute having been "prescribed by the General Assembly" to replace the one ruled invalid in *Obergefell*.

The possibility of criminal prosecution should ensure that Defendant has "a real interest in the question" at issue in the present case such as to create justiciability.

Finally, it should be noted that the present case is analogous to *Powers v. Vinsant*, 165 Tenn. 390 (1932). In that case the State Board of Dental Examiners filed a declaratory judgment action against the Dental Department of the University of Tennessee. *Id.* at 391. Pursuant to a statute, students were practicing dental operations under the supervision of their instructors. *Id.* at 392. The Board thought this was the unauthorized practice of dentistry inasmuch as fees were being collected for the students' services. *Id.* The Court said,

> We think this is a proper case for a declaratory judgment. The Board of Dental Examiners is interested to see that unauthorized persons do not practice dentistry in this State. Those in charge of the Dental School are interested to see that the students obtain practical instruct in dental work.

Id. Similarly, the Minister Plaintiffs are interested in making sure that they are actually authorized to solemnize a marriage, lest they be subject to various sanctions, and Defendant is interested in making sure that she is actually authorized to issue the licenses, lest she be subject to various sanctions.

VI. Conclusion.

When the United States Supreme Court held that "state laws . . . are . . . held invalid to the

extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," it created a question as to what those who execute, operate under, and have rights, duties, and obligations pursuant to those marriage laws should do. *Obergefell*, 135 S. Ct. at 2591. While Plaintiffs believe the constitutional analysis leading to the *Obergefell* holding was wrong, it cannot be ignored now that it has been made. What does it mean?

As to Minister Plaintiffs, the question is whether the law, specifically, T.C.A. § 36-3-104(a) is still constitutionally valid and, if not, then does any license issued pursuant to that statute still authorize them under T.C.A. § 36-3-103 to solemnize a marriage? If the license is invalid, then they may not be under the threat of criminal sanctions for failing to return a solemnized license to the Defendant as required by T.C.A. § 36-3-303, but they may be in violation of T.C.A. §36-3-305 for purporting to marry individuals who, for lack of a valid license, are not capable of marrying. Declaratory judgment actions were specifically authorized as a means by which individuals like the Minister Plaintiffs should be able to know and ascertain their duties and liabilities under the law. Defendant's motion to dismiss should be denied as to them.

As to Citizen Plaintiffs, they have certain rights under the Tennessee Constitution, as outlined above. If the above-quoted holding in *Obergefell* means that T.C.A. § 36-3-104(a) is constitutionally invalid, then they have a right to have the legislative and judicial branches operate in accord with that constitution, which means that new laws cannot be imposed by the judiciary about which they had no notice, no opportunity to instruct their representatives, and no opportunity to vote indirectly on those laws by means of their votes for those who, by constitution, are to "prescribe the duties" of Defendant. Declaratory judgment actions were specifically authorized as a means by which citizens could determine if their constitutional rights have been or are being violated. Defendant's motion to dismiss should be denied as to them.

If neither category of Plaintiffs have standing to assert the claims made herein, it would appear that, as a practical matter, the application of *Obergefell's* holdings to Tennessee's marriage laws will not be subject to adjudication unless a County Clerk either reaches his or own conclusion as to the issues herein raised and stops issuing at least same-sex marriage licenses or brings his or her own Declaratory Judgment Action. Given the fact that a decision

by a County Clerk to stop issuing marriage licenses would subject that Clerk to a mandamus lawsuit by parties wanting to marry and given the fact that same-sex couples are no doubt content with the current practice among Tennessee Clerks to issue same-sex licenses, such a decision is likely never to be made. That means the application of *Obergefell* to laws not challenged in *Tanco v. Haslam* will remain unresolved.

But if that does happen and if a statute is presumed valid until it is adjudicated invalid (which is Defendant's contention), then that means the current statute that clearly restricts the issuance of marriage licenses to "male and female" applicants is the only marriage license law that's been prescribed by the General Assembly.[41] But that then leaves the validity of all same-sex marriage licenses forever in legal limbo and *subjects Defendant to an ouster proceeding for issuing licenses to such couples* without any statutory authority to do so. The legal issues raised by *Obergefell* are real, justiciable, and must be addressed; Plaintiffs have standing to ask this Court to do so.

Therefore, for all of the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied.

Respectfully submitted,

David E. Fowler (BPR 014063)
Constitutional Government Defense Fund
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and all attachments hereto, including the Appendix of Authorities, have been served via hand-delivery upon counsel of record for Defendant, Lisa M. Carson, 306 Public Square, Franklin, TN 37064,

[41] Of course, to justify the issuance of same-sex licenses, Defendant can argue that *Obergefell* re-wrote T.C.A. § 36-3-104(a) or judicially enacted a new statute to replace the one it ruled invalid, but that argument runs afoul of the separation of powers in Article II, Sections 1 and 2 of the state Constitution and the principles of federalism and separation of powers in the U.S. Constitution.

and by U.S. mail, postage prepaid, on Herbert H. Slattery, III, c/o Alexander S. Rieger, P.O. Box 20207, Nashville, TN 37202 , on this the _____ day of April, 2016.

_____
David E. Fowler