IN THE CIRCUIT COURT FOR BRADLEY COUNTY, TENNESSEE
AT CLEVELAND

Guinn Green and Howard Thompson,	)	
Individually and as Bradley County, Tennessee	)	
Commissioner,	)	
	)	
Plaintiffs,	)	
v.	)	**Case No. V-16-073**
	)	
Donna Simpson, Clerk of Bradley County, TN	)	**(Judge Pemberton)**
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Come now Plaintiffs, Guinn Green and Howard Thompson, and submit this Memorandum of Law in Opposition to Defendant's main Motion to Dismiss[1].

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, by virtue of the fact that only a male and female can apply for a marriage license and 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 Plaintiffs do not know if the licenses that authorize them to solemnize marriages are legally valid, subjecting them to certain liabilities if not, and as citizens they have had or are

[1] Defendant has filed a separate motion to dismiss on the grounds of prior suit pending and a separate motion to dismiss Plaintiff Thompson in his capacity as a county commissioner. Memoranda specific to those motions are being filed separately. For purposes herein, Defendant's Memorandum refers to only the main motion to dismiss.

having certain rights 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 Memorandum in Support of Motion to Dismiss appears to argue that the complaint should be dismissed on two general grounds, namely, that Plaintiffs (i) have "fail[ed] to allege the existence of a justiciable case or controversy" (Defendant's Memorandum in Support of Motion to Dismiss, 9-24, hereinafter "Def.'s Mem.") and (ii) "are not entitled to injunctive relief (Def.'s Mem. 25-27).

The first general argument is grounded on the assertion that:

1. Plaintiffs lack of standing (Def.'s Mem. 15-21),
2. Plaintiffs' "claims are not ripe" (Def.'s Mem. 21- 24), and
3. Defendant is "not a real and adverse party in interest, (Def.'s Mem. 24-25).

The second general argument – that injunctive relief is inappropriate – seems to rest on two main arguments. The first argument is that injunctive relief is not appropriate "unless [a plaintiff] has suffered from some special and peculiar damage outside that which is common to all citizens." (Def.'s Mem. 26) The second aspect of this argument rests on the proposition that there is no act of Defendant to be enjoined because Defendant is following the law. But this latter proposition rests on the assertion that "a court may elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." (Def.'s Mem. 29). Of course, whether the doctrine of elision applies and how it applies is the substantive issue raised by the complaint and is to be decided at trial or on motions for summary judgment.

However, relative to the second general argument, it should be said at the outset that even if injunctive relief is not an appropriate remedy for the claims asserted by Plaintiffs, that is not grounds for dismissal of a declaratory judgment action nor is it 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). Consequently, this alleged ground for dismissal, by itself, is without merit and, as such, deserves no further comment. Defendant's argument that elision makes injunctive relief inappropriate begs the very question raised by the complaint, but will be addressed in Section II, D, b herein, beginning on page 21.

Lastly, Defendant asserts in Paragraph 8 of her Motion and on page 34 of her Memorandum that the case should be dismissed on the grounds that the complaint asserts a "political controversy," and that the complaint is asking the court to "improperly usurp the province of (sic) legislature." While this issue will be addressed more extensively in Section III (page 31), the argument misses the whole point of the lawsuit. How a Supreme Court decision applies to a statute is not a political controversy, but a legal question. It is appropriate that the application of the holding in *Obergefell* to T.C.A §36-3-104(a) be adjudicated because *Tanco v. Haslam*, the Tennessee case consolidated with the *Obergefell* case from Ohio, only dealt with the marriage license laws of Tennessee *as they pertained to individuals who, at the time of their marriage, were residents of another state, married in that state, and then moved to Tennessee*. **The marriage license law at issue in the present case was not at issue in *Tanco***. This is, therefore, a legal issue, not a political one.

II. Plaintiffs Have Established Standing

A. Introduction and Legal Standard.

In analyzing the Plaintiffs claims in the two different capacities in which they assert them – persons authorized by the state to solemnize a marriage and citizens - 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. Plaintiffs, as persons authorized by the state to solemnize marriages, have standing.

a. *Plaintiffs, as state-authorized marriage officiants, have alleged a "distinct and palpable" injury*.

1. Plaintiffs' injuries, as authorized marriage officiants, are not contingent, theoretical, or hypothetical.

Regarding standing, Defendant says, "The Complaint offers no basis for the standing of the Plaintiffs beyond their status a resident (sic), taxpayers and voter (sic)." (Def.'s Mem. 17, middle first full paragraph) This assertion is patently false. Paragraphs 2 through 5 of the Complaint carefully lay out allegations related to Plaintiffs' status as persons "authorized under TENN. CODE ANN. § 36-3-301(a)(1) to 'solemnize the rite of matrimony' in any county of the state."

For that reason alone, Defendant's arguments should be dismissed; an argument that Plaintiffs, *as citizens,* don't have standing as such is not even germane to the capacity in which Defendants primarily seeks to dismiss Plaintiff's claims, namely, as persons authorized by the state to officiate/solemnize a marriage. Of course, a person who is only a "resident, taxpayers (sic) and voter" is not subject to injury for not timely returning a solemnized marriage license to Defendant's office or for solemnizing a marriage between people without a valid marriage license.[2] A state-authorized marriage officiant, however, may be subject to criminal penalties and monetary judgments.

Nevertheless, Defendant does argue, "Plaintiffs have not alleged that they have suffered or will suffer any direct injury as a result of Defendant issuing marriage licenses." Def.'s Mem. 17 (first full paragraph)[3]

[2] Defendant's assertion herein rebutted reflects the fact that Defendant's Memorandum jumbles together arguments involving injuries to Plaintiffs arising from potential non-compliance with the marriage license law and with arguments involving the constitutional injuries Plaintiffs have asserted as "resident (sic), taxpayers and voter (sic)" if licenses are being issued pursuant to a law that is invalid.

[3] Plaintiffs assume this argument is directed to Plaintiffs' claims as persons authorized by the state to validate a marriage and not to their claims as citizens, but it is hard to tell for the reasons stated in the preceding footnote.

But this argument assumes that *Obergefell* did not invalidate T.C.A § 36-3-104(a) and that licenses are therefore still being validly issued. In other words, this argument rests on a particular assumption regarding how *Obergefell* should be applied to that statute, which assumption is what the complaint puts at issue. The merits of that assumption should be decided on motions for summary judgment or at trial. To decide how *Obergefell* should be applied to Tennessee marriage license law under the guise of deciding whether Plaintiffs have standing is to put the proverbial cart before the horse. But, in any event, Plaintiffs, as state-authorized marriage officiants, have alleged an injury sufficient to establish standing.

As to the requirement that a Plaintiff assert an "injury," 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, Plaintiff Green and Thompson have alleged that they have "officiated or solemnized marriages in Tennessee in the past" and "would be willing" to do so in the future. Complaint, ¶ 6 and 7, respectively. Plaintiff Green, in fact, "has officiated or solemnized two marriages in Bradley County since June 26, 2015." Complaint, ¶ 6.

Legally, Plaintiff Green may now[4] 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."[5] And certainly Plaintiff Thompson is subject to those same consequences if he solemnizes a marriage in the months to come.

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

[5] 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 § 36-31-104(a) is addressed more fully in Exhibit 1 attached hereto entitled, "The History of 36-3-103(a)". Without a license, parties were "not capable" of marrying in Tennessee.

This possibility exists if, as Plaintiffs allege, the *Obergefell* holding quoted above invalidated laws like T.C.A. § 36-3-104(a) because the words "male" and "female" in that statute cannot be properly elided.[6] This, of course, points out what has previously been said, namely, that Defendant's motion in this regard rests on a particular assumption regarding the merits of the substantive legal issues raised by the Complaint.

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 Plaintiffs, as state-authorized marriage officiants, have a real interest*.

Defendant asserts that the dispute must be "between parties with real and adverse interests." (Def.'s Mem. 24) Plaintiff Green in the present case has a real interest inasmuch as he has solemnized marriages that may not be valid under Tennessee law and Plaintiffs Green and Thompson are both reasonably likely, based on past experience, to be asked to solemnize marriages in the future that may not be valid.

However, Defendant argues that Plaintiffs have no real interest because they are "not required to perform civil marriage ceremonies." (Def.'s Mem. 19) 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). 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)

[6] That this court might not apply the rule that an unconstitutional law is void *ab initio* (see Footnotes 15 and 16) and that 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.* Plaintiffs, as potential marriage officiants, believe the law is no longer valid and Plaintiffs as citizens believe there is no statute prescribing the issuance of marriage licenses, particularly as 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. But that is the very controversy between the parties that Defendant says doesn't exist.

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. § 49-6-1004(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*, Plaintiffs, as legally authorized marriage officiants, 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*[7] 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 Plaintiffs, by virtue of having been legally authorized to officiate/solemnize marriages, have "a real interest, officially, in determining whether or not the legislation is valid before" purporting to marrying individuals 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 *Oldham* is controlling because Plaintiffs are "not *required* to perform civil marriage ceremonies" under the statute is inapposite and misses the point. (Def.'s Mem. 17, first full paragraph, emphasis added).

Furthermore, to require 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).

Because the questions raised by the Plaintiffs, as state-authorized marriage officiants, are "real and not theoretical," they 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.

b. The injury to Plaintiffs, as state-authorized marriage officiants, is "fairly traceable" to the conduct of the adverse party.

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

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" Plaintiffs to "solemnize" a marriage. If the Defendant's authority is being improperly and unconstitutionally exercised by the issuance of marriage licenses,[8] then 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 Plaintiffs, as marriage officiants, 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 the license has been unconstitutionally issued. 195 S.W.3d at 620.

c. Plaintiffs' injuries, as state-authorized marriage officiants, 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 Plaintiffs are experiencing under the marriage licensing laws and the relationship they have, at law, with those whose marriages they purport to solemnize. *Brown & Williamson Tobacco Corp.,* 18 S.W.3d at 193.

Presumably Defendant believes that 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. 19) 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.

[8] See discussion of cases cited in Footnote 16 relative to the validity of licenses if T.C.A. § 36-3-104(a) is constitutionally invalid.

C. Plaintiffs, as state-authorized marriage officiants, have *jus tertii* standing[9]

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.

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,

[9] This is an alternative ground for standing by Plaintiffs, as state-authorized marriage officiants, and its applicability does not have to be addressed if they have standing to prosecute their own claims.

> 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 Plaintiffs can establish no set of facts by which they could demonstrate that they are "intimately involved" in the marriages they solemnize, particularly as to Plaintiff Green who is an ordained minister and pastor of a local church. *Id.* And "aside from" the couple that desires to marry, Plaintiffs are "uniquely qualified" to litigate the validity of the marriage laws which would validate the couple's marriage. *Id.* Plaintiffs, in their capacity as state-authorized marriage officiants, 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 Plaintiffs, as state-authorized marriage officiants, 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 Plaintiffs standing on this ground should be denied.

D. Plaintiffs, as citizens, have standing.

Defendant appears to assert that Plaintiffs cannot have standing because they are "residents, taxpayers and voters" misses the mark and would lead one to believe that a resident, taxpayer and voter could never have standing. (Def.'s Mem. 17). Defendant also appears to assert that Plaintiffs' cannot have standing to assert violations of their rights under the state constitution because "Defendant did not violate the constitutional rights of Plaintiffs or other Bradley County Citizens." (Def.'s Mem. 28)

a. Plaintiffs have standing to assert violations of their constitutional rights.

As to the first of these two arguments, Defendant confuses facts *about* the Plaintiffs (voters/taxpayers) with the nature of their claims. Plaintiffs have not brought this action simply because of their interest as voters in the constitutionality of a statute. 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.[10] Nor have Plaintiffs brought this action because they don't like the *Obergefell* decision or don't like same-sex marriage, which is what distinguishes the present situation from that in *Durham v. Haslam*, M2014-2404-COA-R3-CV (Ct. App. E.D.TN filed April 1, 2016) (holding the "deprivation of [plaintiffs] alleged right to vote directly in a contested election for appellate judges" is not an injury because "*no such right can be found in the Tennessee Constitution*.")(emphasis added)[11]

[10] 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.

Rather Plaintiffs are suing for a violation of their state constitutional rights. In *Durham* no constitutional rights were violated because there was no constitutional right at issue. But if Defendant is arguing that a citizen does not have standing to ask for a declaration as to whether his or her constitutional rights are being violated, when that violation does not depend on some future, contingent, or theoretical act by a government official,[12] then citizens' rights can only be vindicated after they have been violated. This is not the law and frustrates the very purpose of the Declaratory Judgment Act.

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."

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, not the citizen, had a constitutional right to observe. Similarly, as demonstrated below, 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 and licenses continue to be issued.

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

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[11] Essentially the plaintiff in *Durham* didn't like that Amendment 3 to the state constitution regarding the election of judges was ratified by the people in November 2014 and took away any chance they had to vote directly on Supreme Court Justices. As stated, Plaintiffs claims have nothing to do with whether they "like" Obergefell or same-sex marriage.

[12] That the Defendant has continued to issue marriage licenses post-*Obergefell* is essentially conceded by statements made on pages 27, 28 and 34 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 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 abdicate 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* that follows in the text that follows on this page.

specific state constitutional rights belonging directly to 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 that application of the statute 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.[13] This, too, is not the law. *This is what distinguishes the taxpayer standing cases Defendant relies on from cases alleging violation of a constitutional right.*

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

    a) Plaintiffs have standing because their right to vote was violated.

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 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).[14] 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

[13] For example, assume the legislature repealed the laws that set up the election process for the Governor. That law would affect the right to vote of every Tennessean. So, if 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.

[14] 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. 25 and following).

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.

Plaintiffs herein 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, ¶ 8.

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,

> 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*, Plaintiffs in the present case allege that the Defendant is without authority to issue marriage licenses (or to continue 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[15] are *ultra vires*.[16] And if void

[15] 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, and has therefore been void since the *Obergefell* decision. See footnote 16 as to whether void *ab initio* doctrine should apply in the present case.

[16] As to whether the Defendant's actions have been void since the *Obergefell* decision or only void prospectively, if the law is held invalid, is of no great moment to Plaintiffs, except to the extent Plaintiff Green might be subject to criminal sanctions if the law is void *ab initio*. As to whether an act is void *ab*

because *ultra vires*, then those actions are in violation of the following provision of the Tennessee Constitution, Article VII, Section 1.[17] (Defendant's actions would then also 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 Plaintiffs' right to indirectly vote on the duties of the Defendant have been violated.[18] 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*.[19] In that case, Plaintiffs, as citizens, will be

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initio, the Tennessee Supreme Court, applying the 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 or void post decision, 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 would become *ultra vires* and void *ab initio* and the presumption of constitutionality and validity of a statute.

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

[18] 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, it is not. It also does not change the fact that courts cannot and the *Obergefell* Court did not amend the state's marriage statute.

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, 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.

b) 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 when 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" that duty, then the Plaintiffs are being denied their "right . . . to instruct their representatives" regarding the duties that should be prescribed to the County Clerks, 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)[20]. 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

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[19] Arguably this honorable Court could escape the conclusion that the doctrine of elision requires if the *Obergefell* decision were *ultra vires* (see Footnote 17) 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 be invalid, avoiding, at least in part, the implications of the void *ab initio* doctrine if it is applied.

[20] The case is attached as Exhibit 4 and can be found at this link: http://cases.justia.com/tennessee/court-of-appeals/PotterRalphOPN.pdf?ts=1396144363

State of Tennessee." *Id.* at *5. In denying the plaintiff's claim, the court said, "Tennessee courts have recognized that Article I, § 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 about the difference between the nature of the right accorded Plaintiffs 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*. *Id*.

This conclusion is buttressed by the fact that the 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," Plaintiffs are being denied their "right 'to "instruct" representatives [and] to "apply" to their officials." And as a consequence of that denial, 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. 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.[21]

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 Plaintiffs 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 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.

c) 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

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[21] 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. Defendant concedes that a mandamus action might be appropriate (Def.'s Mem. 28, first sentence), but the point here is that in either type of case the same constitutional issue can be raised.

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. 25). Yet, if the marriage license law was invalidated by *Obergefell,* Plaintiffs had no notice whatsoever "about the nature and scope" of the new statute Defendant appears to be administering. And certainly Plaintiffs had no notice that the statute had been changed 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[22], now that the issue of the constitutional invalidity of the law has been raised, 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 Plaintiffs' rights to know what laws are going to be prescribed for the Clerks to be violated.

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

[22] See Footnotes 15 and 16 for a discussion as to the merits of this assumption.

Tennessee Constitution.

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

With respect to the injuries to 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 applied only prospectively) the direct result of Defendant issuing licenses in the absence of any new marriage license law being prescribed by the General Assembly.

3. 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 Plaintiffs' rights can be remedied by enjoining the Defendant from continuing to issue marriage licenses.

Defendant's argument that injunctive relief is not an appropriate remedy, *see* (Def.'s Mem. 25-27), rests on the assertion that Plaintiffs have not suffered any injury and the assertion that Defendant has "performed her duties as prescribed by law." (Def.'s Mem. 28) But the former argument was just refuted by the preceding arguments and the latter argument continues to beg the question being asked, namely, is the marriage license law still valid after *Obergefell*? Any argument by Defendant that Plaintiffs' injuries, if proved, cannot be remedied by injunctive relief under this prong of the standing test are specious.

b. The doctrine of elision does not prevent a violation of Plaintiffs' constitutional rights.[23]

As previously stated, Defendant argues that Plaintiffs do not have standing because their constitutional right were not violated. (Def.'s Mem. 28) Again, this assertion begs the substantive question presented by the Complaint. But because Defendant has raised the question, Plaintiffs feel obligated to respond at least

[23] It should be noted at the outset of this argument that the Alabama Supreme Court said last Spring 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. …" A copy of that opinion is attached for the court's convenience as Exhibit 2. This authority, though not controlling, is certainly persuasive authority for the proposition Plaintiffs advance regarding the effect of *Obergefell*.

in part. Defendant's argument hinges on an incorrect application of the doctrine of elision (Def.'s Mem. 29-31) and borders on the notion that this "unfavored" doctrine is some kind of talisman to save statutes that contain unconstitutional language in them. *See Maury County v. Porter*, 195 Tenn. 116, 118, 257 S.W.2d 16, 17)(1953)(holding "[t]he doctrine of elision is not favored . . . *")*

1. Introduction to Plaintiffs' Argument in Response.

In analyzing Defendant's elision argument, made to prop up the validity of 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 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 annexation statutes 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.")

2. *The Legislature's Intent Was for Marriage to be Only Between a Man and a Woman*.

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,[24] 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). (A copy of the pertinent sections of the Code of 1858 are attached as Exhibit 1B to Exhibit 1 attached hereto) 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 as defined at the common law. *See Obergefell*, 135 S.Ct. at 2594 ("The respondents [states] say . . . it would demean a timeless institution if the concept and lawful status of marriage were extended to two person of the same sex. Marriage, *in their view*, is ***by its nature*** *a gender-differentiated union* of man and woman." (emphasis added)).

Ignoring the fact that the marriage licensing scheme as a whole has always contemplated a male and a female, Defendant points to the fact that the T.C.A. § 36-1-104(a) did not reference a "male and female" until 1995. (See Def.'s Mem. 2) That has no bearing on what the intent was in 1995 because the fact is the law, since 1995, does require a male and female.

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[24] 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).

But consider the implications of what Defendant is arguing. Defendant must mean that prior to 1995 the General Assembly was either okay with same-sex marriage or was at least indifferent to such marriages. This argument is vitiated by two facts.

First, even if the legislature in 1995 did not really care that the words "male and female" were in the statute and were indifferent to whether any two people, regardless of their sex, could marry[25], the legislature made it "clear" in 1996 that T.C.A. § 36-3-104(a) was to be construed so as to limit licenses to applications by a male and female. To argue that T.C.A. § 36-3-104(a) should not be construed in light of the most recent action by the Tennessee General Assembly is unfathomable.

Second, House Joint Resolution 529, adopted by the General Assembly when the state Senate, on April 19, 2016, by a vote of 26 to 2, concurred in that Resolution, previously approved in the House by a vote of 73 to 18, contains the following recital: "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). For convenience of the court, a copy of the Resolution, as adopted, is attached hereto as Exhibit 3.

To avoid such legislative facts, 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. 31) (emphasis added). 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.

Defendant's argument quoted above would have this court *add the word* "either" to the statute and *substitute the word* "or" for the word "and" that is in the statute. This argument is a failed attempt to find some way to avoid the clear import of the holding in *Obergefell* that statutes restricting marriage to a man and a woman are invalid. "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).

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[25] Plaintiffs submit that the evidence will show that the original bill did not include the words "male and female," but that they were added as part of an amendment that rewrote the bill.

The legislative intent behind T.C.A. §§ 36-3-103[26] and -104(a) was and always has been 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 state-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 continuing constitutional validity of T.C.A. § 36-3-104(a).

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

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

The Tennessee Supreme Court has described the doctrine of elision 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)). Contrary to what Defendant appears to argue (Def.'s Mem. 28, 29), because legislative intent is determinative, the existence of a general severability statute 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 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)*;*

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[26] Defendant argues that she is "authorized to issue marriage licenses under § 103." *That* statute does not authorize the issuance of licenses; rather it authorizes the solemnization of a marriage *if a license has been issued*. T.C.A. § 36-3-104(a) authorizes the issuance of the license. Defendants bases this tortured reading of the statutes on the proposition that the invalidity of T.C.A.§ 36-3-104(a) does "not affect the validity" of any marriage under 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. 32). 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. Furthermore, compliance with T.C.A. §36-3-103, which *requires* a license *before* a marriage will be legal, is not excepted from the statute that excepts certain procedural irregularities. *See* T.C.A. § 36-3-306; *see also* Exhibit 1 for the proposition that it is the requirement of a license that abrogates common law marriage. This argument is without merit.

But the inclusion of a severability clause within a particular legislative enactment is not itself determinative either. 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 the legislative intent in 1995 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/separability and for good reason.

If the words "male and female" are elided from the statute in disregard of the legislature's clearly intended definition of marriage, 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 elisions is this: "If, in the absence of the words 'male and female,' the statute could have been given a judicial meaning that allowed or reflected an legislative 'intent' to allow two people of the same sex to marry, would the legislature have enacted the statute that way?" 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[27] 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.[28]

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, as previously noted, 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 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(1a) in 1995 if the "contracting parties" could be anything other than one man and one woman, particularly given the fact they envisioned a day *when some court might try to misconstrue the statute to imply some other intention*.

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[27] 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. The entire work can be found at http://www.glapn.org/sodomylaws/sensibilities/introduction.htm.

[28] 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.

To hold otherwise would ascribe a foreign intention to the legislature back in 1995, an intention even the present General Assembly does not appear to have.[29]

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.*

Given the foregoing, if this court holds that the law enacted in 1995 is now to be read to authorize the issuance of marriage license the legislature did not authorize, effectively replacing a statute that the doctrine of elision cannot save with one crafted by this court, then this court will have obliterated 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*, 122 Tenn. at 492, 126 S.W. at 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))

In addition, 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

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[29] 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)

the legislature's intent in other statutes.[30]

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 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.[31] 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.*

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 (Def.'s Mem. 33). In *Roy,* 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,

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[30] 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; however, if that type of legislative intent is unconstitutional, then maybe this statute, too, is unconstitutional. If so, will a future court supply a new legislative intention to that statute, too?

[31] Defendant even mentions that the legislature may want to "eliminate statutory marriage ... and … revert to a common law marriage system." (Def.'s Mem. 34). Of course, Plaintiffs argue that the *Obergefell* Court has already "eliminated" our marriage license law by holding it "invalid."

> 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 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 the 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), attached hereto as Exhibit 2 for the court's convenience.

4. 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.[32] 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

[32] 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).

Constitutional Limitations 167-68 (8th ed. 1927) (footnotes omitted)).

Id. at 892 (emphasis added) (internal quotations omitted);[33] *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 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),[34]

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

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[33] 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.

[34] This is in accord with the U.S. Supreme Court's decisions regarding self-executing and non-self-executing 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.

that the courts "are without authority" to make the legislature give efficacy to it "by affirmative decree." *Id*.

The United States Supreme Court has ruled, and it put the ball in the hands of the judicial branch to decide how that 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.[35] This court should not presume to decide how they will or should respond.

Defendant's argument that the doctrine of elision allows her to continue issuing licenses and that Plaintiffs have therefore not stated a claim for how the marriage license law should be applied post-*Obergefell* and have not stated a claim for violation of their constitutional rights not only begs the question and goes to the merits of Plaintiffs' claims instead of the issues of justiciability or standing, but in any event the argument is wrong as a matter of law.

III. Not to Adjudicate Plaintiffs' Claims Is An Abdication of the Judicial Function, not Respect for the Legislative Function.

While Plaintiffs initially noted that it is not a usurpation of the legislature's function or the injection of the court into a political controversy for the judicial branch to decide how a Supreme Court decision applies to a state law, this point is made even more forcefully by HJR 529.

That Resolution essentially recognizes that the holding in *Obergefell* appears to invalidate T.C.A. § 36-3-104(a) and that the doctrine of elision cannot "save" that statute from invalidity. The Resolution further asserts that if "*Obergefell* ordered the state to issue marriage licenses notwithstanding its holding that state marriage license laws that 'exclude same-sex couples from civil marriage' are 'invalid'," then such constitutes a "constitutional overreach" by the Court because it "purports to allow federal courts to order or direct a state legislative body to affirmatively amend or replace a state statute."

This Resolution answers Defendant's assertion that "[i]t is within the province of Tennessee's legislature to eliminate statutory marriage in Tennessee and to revert to a common law marriage system, if the

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[35] 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.

legislature sees fit." (Def.'s Mem. 34) *In other words, 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 valid or invalid so that it will know what action it would need to take.*

If the court holds the law invalid, then the legislature may decide common law marriage should prevail and do nothing. If the court holds that the law is still valid, then it may decide to repeal the law in favor of common law marriage. But this explains why this lawsuit does not involve a political question and is not asking the court to usurp the legislature's role. The legislature is waiting on the judicial system in Tennessee to do its job, and then it will know what "job" it must do. The legislature is properly deferring to the judicial branch (and to this lawsuit) to determine how *Obergefell* applies to T.C.A. § 36-3-104(a).

IV. Plaintiffs' Claims Are Ripe for Adjudication.[36]

Defendant argues that Plaintiffs' claims should be dismissed because they are not "ripe" for adjudication. This assertion rests on the claim that Plaintiffs "'**may** be asked to officiate marriages in the future'." (Def.'s Mem. 23).

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 Green, 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"

[36] This argument seems to be limited to the claims Plaintiffs make as those authorized by the state to solemnize a marriage and not to the claims as citizens relative to the violation of their state constitutional rights.

criminal sanctions and/or a suit for damages in connection with the marriages already solemnized if the licenses involved were invalidly issued.

And with respect to Plaintiff Thompson, he is subject to these same sanctions if he performs a marriage.[37] But even if the first prong of the *West* test does not apply to Plaintiff Thompson, the second prong of the test certainly does.[38] 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[39]. This is exactly the kind of choice from which a plaintiff was to be protected by the "hardship" test.

The claims of 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**.**[40]

V. Defendant Has a Real Interest Sufficient to Establish Justiciability.

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[37] 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 Thompson is subject to risking criminal and civil penalties if he solemnizes a marriage for which no valid license has been issued.

[38] 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.

[39] 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 Plaintiffs, as marriage officiants, to the kind of choice just articulated.

[40] 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 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 (Def.'s Mem. 24,25), 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 to 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 twenty percent 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 Bradley 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.

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 Plaintiffs, as state-authorize marriage officiants, 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. 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 Plaintiffs, as state-authorized marriage officiants, 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 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 these claims.

As to Plaintiffs' claims as citizens, 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 the statute-making body under our constitution, 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, which Defendant acknowledges, 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 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.

[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 under the U.S. Constitution.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and all attachments hereto have been served via U.S. mail, postage pre-paid, upon counsel of record for Defendant, James F. Logan, Jr., P.O. Box 191, Cleveland, TN 37364-0191, and upon Herbert H. Slattery, III, c/o Alexander S. Rieger, P.O. Box 20207, Nashville, TN 37202 on this the _____ day of April, 2016.

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David E. Fowler