**IN THE SUPREME COURT FOR THE STATE OF TENNESSEE**

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| **George Grant, Lyndon Allen, Tim McCorkle, Larry Tomczak, and Deborah Deaver** | ) | |
| Plaintiffs, | ) | **TENN. SUPREME COURT CASE NO. _____** |
| v. | ) | |
| **Elaine Anderson, Clerk of Williamson County, TN** | ) | **TENNESSEE COURT OF APPEALS CASE NO. M2016-01867-COA-R3-CV** |
| And | ) | |
| **Herbert H. Slatery, III, Attorney General And Reporter for the State of Tennessee** | ) | **21st JUDICIAL DISTRICT (CHANCERY) WILLIAMSON COUNTY, CASE NO. 44859)** |
| Defendants. | ) | |

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**APPLICATION FOR PERMISSION TO APPEAL OF PLAINTIFFS-APPELLANTS PURSUANT TO RULE 11 OF THE TENNESSEE RULES OF APPELLATE PROCEDURE**

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## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants ("Plaintiffs"), in their respective capacities as ministers ("Minister Plaintiffs") and citizens ("Citizen Plaintiffs[1]) seek discretionary review under Tenn. R. App. P. 11(a) of the judgment of the Court of Appeals filed May 22, 2018, holding that their respective claims were properly dismissed pursuant to Tenn. R. Civ. P. 12.02(6) for lack of standing. On June 1, 2018, Plaintiffs filed a petition for rehearing in the Court of Appeals pursuant to Tenn. R. App. P. 39, which petition was summarily denied by the Court of Appeals by Order filed June 13, 2018. Accordingly, this Application is filed within the time prescribed by Tenn. R. App. P 11(b). A copy of the May 22, 2018, opinion of the Court of Appeals is attached to this Application as **Exhibit 1** to the Appendix. A copy of the June 13, 2018, Order denying a rehearing by the Court of Appeals is attached to this Application as **Exhibit 2** to the Appendix.

[1] The appellation "Citizen Plaintiffs" is for convenience only and is not intended to mean and should not be understood to mean that they are asserting some kind of "citizen standing" or standing merely by virtue of their citizenship. It is simply intended to merely distinguish the claims of these plaintiffs from those who are ministers. As hereinafter explained, Citizen Plaintiffs are asserting violations of specific rights under the Tennessee Constitution.

## Questions Presented for Review

1. The Court of Appeals denied Plaintiffs' right to Due Process by failing to provide them a meaningful opportunity to be heard on the disputed questions of law raised by their causes of action, namely, how the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) should be interpreted and applied to the marriage licensing statute, T.C.A. § 36-3-104(a)(1), by resolving those disputed questions at that stage of the proceeding in which the only issue before the Court and briefed by the parties was the justiciability of Plaintiffs' claims regarding those disputed questions.

2. The Court of Appeals erred in dismissing, for lack of standing, Minister Plaintiffs' complaint for declaratory relief to resolve their uncertainty regarding the effect of *Obergefell* on their rights, duties, liabilities as those who are authorized by law to solemnize statutorily defined marriages on behalf of the state pursuant to T.C.A. §§ 36-3-103 and 104(a)(1) by actually resolving the various disputed questions of law created by *Obergefell* and giving rise to those uncertainties, effectively using Defendant's Motion under Tenn. R. Civ. P. 12.02(6) to judge the strength of Minister Plaintiffs' claims rather than the legal sufficiency of their complaint.

3. The Court of Appeals erred by disregarding Citizen Plaintiffs' right to standing under *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972), confusing standing based on a plaintiff's mere status as a voter with Citizen Plaintiffs' claim under *Walker* that their "right 'indirectly' to vote" for members of the General Assembly is being violated by Defendant's on-going *ultra vires* act of authorizing herself to perform certain duties that can only be prescribed to her by the legislators for whom Citizen Plaintiffs have a right to vote.

4. Permission to appeal should be granted to settle an important legal issue of first impression created by the Court of Appeals' error in applying elision, which is a remedial tool to be applied

only after disputed legal questions are resolved, to determine standing, in this case holding there was no standing in regard to disputed legal questions created by *Obergefell* and raised by the Plaintiffs, because elision would apply to resolve those questions.

5. Permission to appeal should be granted to settle an important legal issue of first impression created by the Court of Appeals' erroneous holding that the "particularized injury" requirement engrafted onto T.C.A. § 29-14-103 also applied to the cause of action for declaratory relief granted by newly-enacted T.C.A. § 1-3-121, even though T.C.A. § 1-3-121 states that the cause of action for declaratory relief provided for therein is "notwithstanding any law to the contrary," thus attributing no intent, meaning or purpose to those words in violation of the principles of statutory construction set forth in *Browder v. Morris*, 975 S.W.2d 308 (Tenn. 1998).

6. Permission to appeal should be granted because this Court needs to settle the important issue of law created by the Court of Appeals' erroneous holding that Plaintiffs lacked standing by drawing conclusions about legislative intent for elision purposes from various actions by the General Assembly taken after submission of the case on oral argument and not in the record and about which the parties were not allowed to submit proof or be heard.

Standard of Review: All of the Questions Presented are questions of law, "[t]herefore, the standard of review is de novo without any presumption of correctness given to the legal conclusions of the trial court." *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006)

## STATEMENT OF THE CASE

A. Summary of Proceedings Below.

Plaintiffs filed a Complaint against Defendant Anderson on January 21, 2016 for declaratory and injunctive relief. T.R. Vol. I, pp. 1-8. All their claims flow out of the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).

Plaintiffs George Grant and Lyndon Allen, denominated the Minister Plaintiffs, asserted a claim for declaratory relief relative to uncertainties regarding their rights, duties, liabilities, and legal relations as those authorized to solemnize marriages on behalf of the state of Tennessee under Tenn. Code Ann. §§ 36-3-103, 36-3-104, and 36-3-301 and subject to criminal and civil sanctions for any violations thereof under T.C.A. § 36-3-305.[2] T.R. Vol. I, pp. 6-7, ¶¶ 38-42, Prayer for Relief, ¶¶ 1-3. They are uncertain if the licenses being issued by Defendant that would authorize them to solemnize a marriage for legal purposes are valid after Obergefell held that statutes similar to Tennessee's were held "invalid." *Id.* at 2605.

All the Plaintiffs, including the Minister Plaintiffs and collectively denominated Citizen Plaintiffs, asserted a claim that Defendant Anderson should be enjoined from violating their state constitutional right to vote.[3] T.R. Vol. 1, p. 7, ¶ 43, Prayer for Relief, p 8, ¶ 5. Their voting rights claim, read in the light most favorable to them as required by *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999), was grounded in the allegation that Defendant's actions in issuing licenses for certain statutorily defined marriages ("Government-Licensed Marriages") were *ultra vires*. First, they claimed that *Obergefell* invalidated Tenn. Code Ann. §§ 36-3-103, 36-3-104, 36-3-113

[2] "Any such minister or officer who knowingly joins together in matrimony two (2) persons not capable thereof commits a Class C misdemeanor and shall also forfeit and pay the sum of five hundred dollars ($500), to be recovered by action of debt, for the use of the person suing." T.C.A. § 36-3-305.

[3] Citizen Plaintiffs' also alleged that Defendant's actions violated their state constitutional right to instruct their representatives and to have notice of any new laws the Legislature would "prescribe[ ]" for Defendant pursuant to Article VII, Section 1 of the Tennessee Constitution." T.R. Vol. I, p. 7, ¶¶ 44, 45. For the purposes of this Petition, Citizen Plaintiffs will focus solely on the violation of their right to vote.

(hereinafter sometimes referred to collectively as the "In-state Licensing Statutes") and therefore Defendant's issuance of any marriage license was *ultra vires* absent any new statutory authorization to do so. T.R. Vol. 1, p. 7, ¶ 43, Prayer for Relief, p 8, ¶ 5. However, subsumed within and under that claim is the claim that if *Obergefell* itself did not invalidate the In-state Licensing Statutes, then Defendant's issuance of licenses for Government-Licensed Marriages to same-sex couples contrary to the express language in those statutes is *ultra vires*. However, Citizen Plaintiffs alleged that the *ultra vires* act of Defendant under either scenario rendered meaningless "their right to indirectly vote," which allegation tracks the principle of standing articulated by this Court in *Walker v. Dunn*, 498 S.W.2d 102 (1972) as interpreted by *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006) (collectively referred to as "*Walker*" unless the context requires otherwise).

Consequently, Citizen Plaintiffs prayed that the Trial Court would enjoin Defendant from issuing any licenses for Government-Licensed Marriages if *Obergefell* invalidated the In-state Licensing Statutes and, if those statutes were not invalidated, prayed that the court would provide "such other and further relief as the Court deem[ed] just and proper," i.e., enjoin Defendant's *ultra vires* issuance of licenses to same-sex couples until such time as their issuance was authorized by some legislative act or judicial determination. T.R. Vol. 1, p. 8, ¶¶ 5, 6.

On February 22, 2016, Defendant Anderson filed a Motion to Dismiss. T.R. Vol. I, pp. 9-11. On March 18, 2016, by agreement, Plaintiffs filed an Amended Complaint to add Tennessee Attorney General and Reporter Herbert H. Slatery, III, as a Defendant. T.R. Vol. II, pp. 221-229.

On March 30, 2016, Defendant Anderson moved to dismiss the Amended Complaint on the grounds that the court lacked subject matter jurisdiction and because Plaintiffs lacked standing, their claims were not ripe, and the Amended Complaint failed to state a claim upon which relief

could be granted. T.R. Vol. II, pp. 235-237. Defendant Slatery did not file a similar motion. On April 29, 2016, Plaintiffs filed their Memorandum in Opposition to the Motion to Dismiss the Amended Complaint. T.R. Vol. III, pp. 385-427. On May 12, 2016, Defendant Anderson filed a Reply to Plaintiffs' Memorandum. T.R. Vol. VI, pp. 772-841.

On June 14, 2016, the Trial Court, *forbidding oral argument*, entered its Memorandum and Order granting Defendant's Motion to Dismiss the Amended Complaint. for lack of standing. T.R. Vol. VI, pp. 842-873. Alternatively, the Trial Court held that the Plaintiffs' claims were not ripe and the Defendant did not have an adverse interest.

On July 11, 2016, Plaintiffs filed a Motion under Tenn. R. Civ. P. 59 and specifically asked for oral argument thereon. T.R. Vol. VI, pp. 874-876. The Motion was denied without benefit of oral argument on August 18, 2016. T.R. Vol. VII, pp. 944-945.

On August 31, 2016, Plaintiffs filed a Notice of Appeal. T.R. Vo. VII, p. 946. On May 22, 2018, the Court of Appeals affirmed the dismissal, but only on the issue of standing, the other grounds of dismissal presented to the Trial Court not being reached.[4]

Plaintiffs filed a Motion for Rehearing on June 1, 2018, which was summarily denied on June 13, 2018.

B. Nature of the Case

The claims of both categories of Plaintiffs flow from the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). The only legal issue in *Tanco v. Haslam,* consolidated under the style *Obergefell*, was the constitutionality of the provision in Tennessee's Constitution that precluded the recognition in Tennessee of same-sex marriages solemnized under the laws of another state. *DeBoer v. Snyde*r, 772 F.3d 388, 399 (6th Cir. 2014)

[4] The Court of Appeals expressly declined to address those other reasons in light of its holding in regard to standing. Opinion, 14.

(noting that the *Tanco* case only "challenges the State's same-sex-marriage recognition ban"). *No court of competent jurisdiction has adjudicated the effect that the holdings in Obergefell would have on Tennessee's In-state Licensing Statutes or on the remaining provisions of Article XI, section 18 of Tennessee's constitution*[5] *regarding the relationships that can give rise to a "marital contract" under Tennessee law (the "Marriage Amendment").*

T.C.A. § 36-3-104(a)(1), which was not as issue in *Tanco,* authorizes Defendant to issue a license for a Government-Licensed Marriage upon submission of an application containing certain information about the "male and female contracting parties." The provision expressly requiring that the applicants for a Government-Licensed Marriage be a "male and female" was part of Public Chapter 241 of the Public Acts of 1995 of the Tennessee General Assembly. T.R. Vol. II, p. 225, ¶ 30 (hereafter references to allegations are to those in the Amended Complaint).

The next year, the very same General Assembly emphatically affirmed the requirement that the parties to a Government-Licensed Marriage be a biological male and female with the enactment of T.C.A. § 36-3-113.[6] T.R. Vol. II, p. 226, ¶ 32. There, however, the Legislature

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[5] That constitutional provision found in Article XI, section 18, contains three sentences, but the third sentence was expressly ruled unconstitutional in *Obergefell*, it being the only provision in the Constitution expressly dealing with the non-recognition of marriages legalized in another state and challenged in *Tanco*. For that reason, only the first two sentences in that constitutional provision are referred to herein as the "Marriage Amendment" and must be considered in the present case in determining whether the Plaintiffs have standing. The first two sentences of the Amendment are as follows: "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee." As explained *infra* 27-28, these provisions are not necessarily in conflict with *Obergefell.*

[6] That statute states:

(a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.

(b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state.

(c) 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.

used the words "one man and one woman" to describe the relationship that it intended to recognize under the In-state Licensing Statutes as a marriage. Therefore, the words "male and female contracting parties" in T.C.A. § 36-3-104 (a)(1) must be interpreted in light of and be consistent with the "one man and one woman" requirement in T.C.A. § 36-3-113.

The constitutionality and on-going validity of the In-state Licensing Statutes depend on two specific holdings in *Obergefell*. The first was: "State laws challenged by petitioners in these cases are now held invalid to the extent[7] they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605 (2015). The second was that "same-sex couples may exercise the fundamental right to marry in all States," and, accordingly, the Court held "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Obergefell,* 135 S. Ct. at 2608. The right-to-marry language in *Obergefell must be limited to Government-Licensed Marriages* because none of the states whose laws were addressed in *Obergefell* recognize common law marriage, the right to which is not conferred by any positive act of civil government.

Since the In-state Licensing Statutes and the provisions of the Marriage Amendment bearing on their construction were not at issue in *Obergefell* and since *Obergefell's* effect on those statutes and the Marriage Amendment have never been adjudicated in any court of competent jurisdiction, the appropriate question at the procedural stage at which Plaintiffs' claims were dismissed was not how *Obergefell*, in light of the Marriage Amendment, should be interpreted and applied to the In-State Licensing Statutes, but

(A) Whether the Minister Plaintiffs were persons subject to the In-state Licensing Statutes

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(d) If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.

[7] The "extent" language and its meaning is at the heart of claims brought by the Plaintiffs.

and whether there was an actual case or controversy between them and Defendant involving bona fide uncertainties regarding the validity of the licenses being issued to them by Defendant after *Obergefell* and the effect on them if those licenses were not valid, and

(B) Whether the Citizen Plaintiffs had standing under *Walker*, *infra* p. 5, to assert that the *ultra vires* administration of T.C.A. § 36-3-104(a)(1) by Defendant violated their "right 'indirectly' to vote" for legislative candidates who would not alter Defendant's duties until such time as a court of competent jurisdiction interpreted and applied *Obergefell* in a way that upheld the authority she was purporting to exercise. T.R. Vol. II, pp. 226-227, ¶¶ 37, 38, and 45.

If the allegations in the complaint, "construed in favor of the plaintiff[s]," *Doe,* 2 S.W.3d at 922, could be read to make out a legal theory by which *Obergefell*, in light of the Marriage Amendment, could be interpreted and applied in a manner that left Tennessee without an In-State Licensing statutory scheme, then a real and bona fide controversy exists as to the validity of the licenses that would be issued by Defendant to the Minister Plaintiffs. The bona fides of that controversy and resulting uncertainty as to Minister Plaintiffs' rights and liabilities is heightened by the fact that they are subject to various sanctions under T.C.A. § 36-3-305 if they purport to solemnize the rite of matrimony for legal purposes in the absence of a valid license authorizing them to do so. The existence of those sanctions accords them standing under *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996), *perm. app. denied* (Tenn.1996), which held that homosexuals had standing to challenge the state's sodomy statute even though its application to the private conduct of the plaintiffs on which they challenged the statute made an actual prosecution virtually impossible—their actions would be private. Even as the Plaintiffs in *Campbell* had standing simply because they fell within the scope of the sodomy law's sanctions, Minister Plaintiffs have standing because they fall within scope of the sanctions under T.C.A. §

36-3-305.

Those allegations would also provide standing for Citizen Plaintiffs to present a claim under *Walker* for a denial of their "right 'indirectly' to vote" for legislative candidates who will not amend the "male and female" requirement in existing law until the effect of *Obergefell* and the Marriage Amendment on the In-state Licensing Statutes is adjudicated.

However, Citizen Plaintiffs' standing is not wholly dependent on a legal theory under which the In-state Licensing Statutes are invalid. Defendant, as a ministerial officer, is required to administer T.C.A. § 36-3-104(a)(1) on the presumption that it is constitutional *as enacted*[8] until its constitutionality is adjudicated by a court of competent jurisdiction or the statute is amended. Consequently, Defendant has been and is now acting in an *ultra vires* manner by issuing licenses for Government Licensed Marriages to same-sex couples that the Legislature has never authorized her to do.

If Defendant contends, as she has done, that *Obergefell* authorized her to issue licenses to same-sex couples or that elision allows her to issue such licenses, then Defendant's actions in that regard are still *ultra vires,* because she is violating the constitutional separation of powers by exercising a power given only to the judicial branch either by (A) interpreting *Obergefell* to

[8] Not only is this "required" according to the state's Attorney General, Opinion No. 84-157, but its wisdom is easily demonstrated. If Defendant and other County Clerks have the authority to determine the effect of *Obergefell* on the In-state Licensing Statutes and answer the questions *Obergefell* left open, then one County Clerk might decide, as Defendant did, that either *Obergefell* itself requires the issuance of licenses to any two people who apply or that the state's doctrine of elision applies so as to require the issuance of licenses to any two people who apply. A second, by that same power, might decide that the effect of *Obergefell* was to invalidate those statutes, decide that elision cannot be applied, and stop issuing marriage licenses altogether. But a third, applying the limitation on ministerial officers laid down by this Court in *City of Memphis v. Shelby County Election Commission*, *infra* p. 11, might decide to follow T.C.A. § 36-3-104(a)(1) as enacted until enjoined from doing so by a court or prescribed different duties by the General Assembly. *That no County Clerk has taken any option other than the first one is not relevant, because the legal principle that would justify Defendant's actions in the case at bar would not only justify the actions by the second Clerk but require the reversal of City of Memphis*. The best course of action for County Clerks, under existing precedent, would have been to bring a declaratory judgment action either against the Department of Health to determine the validity of any new marriage license or certificate forms issued to them or against whatever official instructed or ordered them to act contrary to the statutory duties prescribed to them by the General Assembly and the proscriptions of the Marriage Amendment.

require the issuance of license for Government Licensed Marriage regardless of the biological sex of the parties or (B) deciding that the judiciary's remedial power of elision can be applied to "save" the statutes from invalidity under *Obergefell*. *See City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 53, 538 (Tenn. 2004) (holding that election commissioners *functioning in their capacity as ministerial officers* have no authority to "usurp[ ] the power of the judiciary to determine the substantive constitutionality of duly enacted laws," and there is "no Tennessee authority" for the proposition that "executive or legislative branch officials," on whom ministerial officers might rely for legal advice, "are permitted to determine the substantive constitutionality of duly enacted, presumptively valid ordinances.")

Consequently, with respect to the Citizen Plaintiffs, there is no legal theory upon which Defendant's actions can be supported and not be *ultra vires*, and *Walker/Darnell* provides standing when, as here, *ultra vires* actions indirectly violates a citizen's right to vote.[9]

C. Disposition in the Court of Appeals

1. *Court of Appeals' Interpretation of Obergefell*

The Court of Appeals held that the Trial Court had subject matter jurisdiction (Opinion, 6), but affirmed the Trial Court's dismissal of all causes of action based on standing. To deny standing to Plaintiffs, the Court of Appeals, under the pretext of examining "the nature and source of the claim asserted" (Opinion, 7), actually interpreted *Obergefell's* holding. *See* Opinion, p. 8 (stating that "plaintiffs would have us read the words 'to the extent they exclude' out of the *Obergefell"*). Having disregarded the word "invalid" that immediately preceded the language it quoted from *Obergefell*, effectively reading that word out of its opinion, the Court of Appeals concluded the "extent" language in *Obergefell* did not invalidate T.C.A. § 36-3-

[9] Electing legislators who will not amend the licensing requirement in T.C.A. § 36-3-104(a)(1) regarding "male and female contracting parties" and the "one man and one woman" requirement in T.C.A. § 36-3-113 is important to Citizen Plaintiffs for reasons hereafter set forth with particularity, pp. 37-40.

104(a)(1) for two reasons.

First, the Court of Appeals relied on the fact that three of the four dissenting Justices in *Obergefell* assumed that the majority's opinion required states to issue licenses for Government-Licensed Marriages to same-sex couples. Opinion, 8-9. However, dissenting opinions are not the law and the Court of Appeals failed to give any consideration to the strong language in Justice Scalia's dissenting opinion by which he rightly noted that the Constitution renders federal courts "impotent" to make states enact statutes legalizing a *wholly new type* of legal relationship and call it a "marriage."[10] *Obergefell*, 135 S. Ct. 2631 (Scalia, J. dissenting) ("'The Judiciary . . . must ultimately depend upon the aid of the executive arm' *and the States*, 'even for the *efficacy* of its judgments.' (citation omitted) With each decision of ours that takes from the People a question properly left to them . . . we move one step closer to being reminded of our *impotence*.'" (emphasis added)).

Second, the Court of Appeals relied on the Supreme Court's decision in *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) for the proposition that the "Supreme Court generally favors limited *remedies* 'when confronting a constitutional flaw in a statute.'" 546 U.S. at 328 (emphasis added). However, that statement is only true and applicable as far as it goes, because the U.S. Supreme Court has held that the severability of unconstitutional language in a state statute "is of course a matter of *state* law." *Leavitt v. Jane* L, 518 U.S. 137, 139, 116 S. Ct. 2068, 2069 (1996) (emphasis added); *See also Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S. Ct. 323, 325 (1924) (Stating that "[t]he task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. *Its decision as to the severability of a provision is conclusive upon this Court*." (emphasis

[10] Why the legal relationship recognized in *Obergefell* is "wholly new" is explained under "Law and Argument, 3. A. *infra* p. 21-25.

added)).

Thus, *Ayotte* only means that *if* a federal court *chooses* to address *remedial* issues arising from its determination that a portion of a state statute is unconstitutional, then its *remedial* powers are limited to discerning and applying the doctrine of elision or severability *that the state would apply* as required by *Leavitt* and *Dorchy*. However, *Obergefell* didn't even discuss elision or severability, let alone purport to announce a *new* federal doctrine of elision or severability. Thus, under existing precedent, *Obergefell* left state courts to decide if any unconstitutional language in a state's licensing statute can be severed or elided so as to preserve the statute's validity going forward.

Therefore, it is not surprising that the Court of Appeals turned to elision/severability as an alternative basis for holding that Plaintiffs did not have standing to assert claims regarding *Obergefell.* Though there is no authority for the proposition that the judicial remedy of elision can be applied to questions of standing, the Court of Appeals held *Obergefell* would not result in the invalidity of T.C.A. § 36-3-104(a)(1) anyway, because the general elision statute, T.C.A. § 1-3-110, made "clear" the "legislative intent" that the "invalidity of one portion of a statute should not affect the remaining portions of the statute." Opinion, 10.

However, in its cursory elision analysis, the Court of Appeals ignored this Court's decision in *State v. Crank*, 468 S.W.3d 15 (Tenn. 2015) in which it stated that "legislative endorsement of elision does not automatically make it applicable to every situation," because elision cannot be used "to completely re-write or make-over a statute." 468 S.W.3d at 29. Consequently, the Court made no mention of the bearing that T.C.A. § 36-3-113 might have on the intent of the Legislature in regard to T.C.A. § 36-3-104(a)(1), which is particularly troublesome given that the same General Assembly enacted both statutes. Lastly, the Court gave

no consideration to the limitation the people put on state government through the Marriage Amendment and the state's judicial branch in particular.

2. *The Court of Appeals' Application of Its Interpretation of Obergefell*

Under Part IV B of its opinion, the Court of Appeals examined each category of Plaintiffs' claims in light of its resolution of the disputed legal questions involving *Obergefell* raised by the Plaintiffs' various claims.

*a. Court of Appeals' Evaluation of Minister Plaintiffs' Claims.*

Based on its use of a Rule 12.02(6) motion to adjudicate meaning and effect of *Obergefell's* on T.C.A. §36-3-104(a)(1), the Court of Appeals concluded that the concern of the Minister Plaintiffs about the sanctions under T.C.A. § 36-3-305 "stems from a hypothetical scenario: that there are 'no valid marriage license[s] by which Minister Plaintiffs are authorized to solemnize th[e] marriage[s]'" Opinion, 11. The concern was "hypothetical," of course, only because the Court of Appeals had decided how *Obergefell* should be interpreted and bolstered its conclusion with its cursory elision analysis.

However, it is not hypothetical that *Obergefell* held that statutes for Government-Licensed Marriages were "invalid" if same-sex couples could not get a license under those statutes. It is not hypothetical that the effect of that decision on Tennessee's In-state Licensing Statutes and the relationship between *Obergefell* and the Marriage Amendment relative to those statutes have never been adjudicated. And it is not hypothetical that *Obergefell* may have invalidated the In-state Licensing Statutes, because both this Court and Defendant Slatery have opined that statutes may not be entitled to a presumption of constitutionality if they are "palpably unconstitutional." *Spec v. State,* 66 Tenn. 46 at 53 (Tenn. 1872) (stating that "every 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)); Attorney General Opinion 84-157 (stating that *Spec v. State* is one of the "limited exceptions to [the] legal presumption of constitutionality principle" laid out in *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516 (Tenn. 1977)).

b. *Court of Appeals' Evaluation of Citizen Plaintiffs' Claims*

As to the Citizen Plaintiffs, the Court of Appeals said, "Even if, in carrying out her responsibilities, the county clerk had rewritten the marriage license laws or prescribed duties to herself not existing in the marriage license statutes, the Citizen Plaintiffs did not allege how such actions would invade or infringe upon their voting rights." Opinion, 11. This erroneous conclusion is explained under Question 3 below, *infra* p. 33.

Lastly, the Court of Appeals also erroneously opined that T.C.A. § 1-3-121 did not grant standing for Citizen Plaintiffs' cause of action. That statute, which was enacted after the present case was taken under advisement by the Court of Appeals but effective upon becoming law, provides, "Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a government action." Opinion, 13. Disregarding the "notwithstanding" language in the new statute, the Court held that it did "not relax the particularized injury requirement for standing" under the Declaratory Judgment Act and, in so holding, made the new statute a vain and meaningless act of the Legislature.

## STATEMENT OF FACTS

All Plaintiffs are residents of Williamson County, Tennessee, are taxpayers and are registered voters in Tennessee. T.R. Vo. II, 222, ¶¶ 2, 3, and 6.

Minister Plaintiffs also alleged that they serve as ministers of churches located in Tennessee. T.R. Vol. II, 222, ¶¶ 2, 3. As such, they have the "care of souls" and are "ordained or otherwise designated [as ministers] in conformity with the customs of a church" and the customs of their respective churches "provide for such ordination or designation by a considered, deliberate, and responsible act," all as required by T.C.A. § 36-3-301(a)(1) and (2). T.R. Vol. II, p. 222, ¶ 4. Plaintiff Grant has officiated at or solemnized two marriages in Williamson County, Tennessee since *Obergefell.* T.R. Vol. II, 222, ¶ 5. Both Minister Plaintiffs have officiated or solemnized marriages in Tennessee before *Obergefell*, and expect to be asked to officiate at marriages in the future, which they would do "if consistent with their ministerial beliefs and duties." T.R. Vol. II, 222, ¶ 5.

Defendant Elaine Anderson is the duly elected County Clerk of Williamson County and Herbert H. Slatery, III, is the duly appointed Attorney General and Reporter for the State of Tennessee. T.R. Vol. I, 223, ¶¶ 9 and 10. Defendant is alleged to be issuing licenses for Government-Licensed Marriages "after and in light of the decision in *Obergefell*" contrary to the duties prescribed to her by the General Assembly. T.R. Vol. 1, p. 227, ¶¶ 43-45.

## LAW AND ARGUMENT

This introduction to the Questions Presented is provided not only to frame the gravity of the errors of law committed by the Court of Appeals, but to highlight the need to secure settlement of important questions of constitutional law and questions of great public interest post-*Obergefell*. Plaintiffs' claims are not a Quixotic tilting at windmills. *Obergefell* and the Plaintiffs' claims related thereto raise critical questions not about marriage *per se,* but about the validity of the In-state Licensing Statutes and the seismic repercussions of *Obergefell* for the separation of powers and the balance of powers under our federal system of "dual sovereignty."

*Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399(1991) (emphasis added). A great shift in the understanding of these great constitutional principles will come if states continue to assume that *Obergefell* stands for the proposition that the federal judiciary has the power under Article III of the U.S. Constitution to require states to issue licenses for a wholly new type of legal relationship that has never before been licensed by those states and that its legislature refuses to authorize by new or amended statutes. *See Missouri v. Jenkins*, 515 U.S. 70, 131, 115 S. Ct. 2038, 2070 (1995) (Thomas, J., concurring) (Stating in connection with the Court's rejection of a federal district court's "structural injunction" against a state as beyond its equitable and remedial powers, that "[t]wo clear restraints on the use of the equity power—federalism and the separation of powers—derive from the very form of our Government. Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States."); *New York v. United States,* 505 U.S. 144, 181, 112 S.Ct. 2408, 2431 (1992) (quoting *Coleman v. Thompson,* 501 U.S. 722, 759, 111 S. Ct. 2546, (1991) (Blackmun, J., dissenting)) ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'"); *See also*, John Yoo, *Who Measures the Chancellor's Foot—The Inherent Remedial Authority of the Federal Courts*, 84 Cal. L. Rev. 1121, 1150 (July, 1996) ("The text and structure of the Constitution, as well as the continuing significance of the states in the national political system, suggest that the burden of proof rests upon the *supporters of broad remedial powers* to demonstrate that the framers understood Article III to vest the federal courts with this authority." (emphasis added))

A. Interpreting *Obergefell's* First Holding.

To weigh the merits of this application, it is imperative that this Court understand that *Obergefell's* holding that statutes creating Government-Licensed Marriages are "invalid to the extent" they exclude same-sex couples from getting a license under a state's statutory scheme for such licenses must mean that the holding itself did one of four things:

(1) invalidated T.C.A. § 36-3-104(a)(1) without the statute having been adjudicated invalid by any court of competent jurisdiction, presumably consistent with *Spec, supra* 14. (*See* Plaintiffs' Memorandum in Opposition to Motion to Dismiss Amended Complaint, T.R. Vol. III, p. 30 note 28, and Plaintiffs' Brief on Appeal, p. 11), in which case there has been no operative licensing statute in place since June 26, 2015.

(2) elided any language in a state's statutes creating and defining a relationship called marriage, including those of states whose statutes were not then before the Court, that would have made those statutes unconstitutional by (i) implicitly creating a new federal common law doctrine of elision, and then, in a departure from existing precedent, (ii) making the application of this new, unarticulated federal doctrine of elision binding on those states so as to authorize licenses for a new type of Government-Licensed Marriage under those statutes, all contrary to the well-established doctrines of *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), wherein the Court held that in "applying" federal common law in disregard of a state's common law "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." 304 U.S. at 80, 58 S. Ct. at 823.

(3) interpreted any sex-restrictive language in a state's statutes creating and defining a relationship called marriage, including those of states whose statutes not then before the Court, in a way that authorized licenses for a new type of Government-Licensed Marriage under those

statutes and then, in a departure from existing precedent, made that interpretation of state law binding on that state, or

(4) left the effect of the "invalid to the extent" language up to state courts if a state's statutes were never amended by that state's Legislature and a lawsuit was brought by either (i) same-sex couples, because the statutes for Government-Licensed Marriages continued to be administered as enacted, or (ii) those involved in various aspects of administering the In-state Licensing Statutes to have any post-*Obergefell* uncertainties regarding their responsibilities and liabilities thereunder declared.

Perhaps the U.S. Supreme Court (including the dissenting Justices) didn't anticipate lawsuits such as those described in (3)(ii) and assumed that states, to avoid the complicated constitutional questions raised by *Obergefell*, would take a proverbial cue from *Obergefell's* "to the extent" language and simply begin "administering" existing statutes without regard to any biological, sex-restrictive language in them. But unless such a case arises and is decided on the merits, then Defendant (and other state officials) must be assuming that *Obergefell sub silentio* announced a new federal court doctrine relative to state statutes, namely, that federal courts can either (A) elide or interpret language in state statutes and make their decision in that regard binding on states or (B) require states to issue licenses that no state statute has ever authorized and without regard to whether the state ever authorizes them.

With respect to possibility (A), such a doctrine would be new with respect to elision given *Leavitt* and *Dorchy*, *supra* p. 12. And with respect to the interpretation of state statutes, it would be contrary to the U.S. Supreme Court's long history of respecting a state's power to interpret its own statutes. *See Moore v. Sims*, 442 U.S. 425, 427-28, 99 S. Ct. 2371, 2379 (1979) (stating the Supreme Court's "sensitivity to the primacy of the State in the interpretation of its

own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework" and its recognition of the fact that a "constitutional determination" by a federal court "predicated on a reading of [a state] statute . . . is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless."). The only other alternative is to attribute to Defendant (and executive branch officials) a right to exercise the judiciary's power to interpret and apply *Obergefell* in light of its own interpretation of the Marriage Amendment.

With respect to possibility (B), this would be an unprecedented expansion of judicial power under Article III of the U.S. Constitution.

Surely such a radical break from prior precedents would not be done by the U.S. Supreme Court *sub silentio.* And surely a *ministerial* officer such as Defendant cannot be allowed *to assume* the power to interpret *Obergefell* and the Marriage Amendment as it would be a radical break from this Court's precedent in *City of Memphis*, *supra* p. 10 and recently affirmed in *McFarland v. Pemberton*, 530 S.W.3d 76, note 21 (Tenn. 2017).

2. Interpreting *Obergefell's* Second Holding

The problem with *Obergefell's* second holding that same-sex couples have a "right to marry in all states," *Obergefell*, 135 S. Ct. at 2604, is that there is no language in *Obergefell* explaining how that right *must* be exercised and, more specifically, whether that new federal right (federal courts cannot create new rights in *state* Constitutions) could be exercised under federal laws that presumably Congress could now enact[11] or can *only be exercised* under state

[11] Two law professors have defended the notion that *Obergefell* could be interpreted as having usurped the state's authority over marriage. See Robert L. McFarland and Adam J. MacLeod, *Did The Supreme Court Take Tennessee Courts Out of the Marriage Business?* Public Discourse (September 24th, 2015) (stating the reasons that Tennessee Chancellor Jeff Atherton may have been correct in believing that "the Supreme Court of the United States has

laws that would either have to be enacted or amended. Clearly, two people of the same sex will never meet the requirements for a Government-Licensed Marriage under state statutes that define that kind of marriage in terms of the complementariness of the two biological sexes. Given that Congress had not acted, the question, then, is how, on the basis of *Obergefell*, do same-sex couples get a license for a government-licensed relationship called "marriage" under *state* statutes that expressly limit licenses to a "male and female" and to "one man and one woman"?

There is no language in *Obergefell* to imply that the right to this new type of "marital" relationship is self-executing;[12] indeed rights dependent on government-issued licenses are, by definition, not self-executing. That should be particularly so where the 10th Amendment stands as a barrier to federal courts rewriting state laws or imposing new laws on statutes. *See e.g. Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 2179 (1996) (Stating that "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution"); *Jenkins*, *supra* p. 17.

No doubt this is the reason the Court of Appeals turned to elision under state law. But eliding the words "male and female" from T.C.A. § 36-3-104(a)(1) creates the following additional problems.[13]

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claimed for the federal judiciary exclusive jurisdiction over marriage and divorce," and that a "state judge would be prudent to wait for the federal courts to explain whether and on what basis the Constitution permits state courts to exercise jurisdiction over divorce proceedings." http://www.thepublicdiscourse.com/2015/09/15729/

[12] If *Obergefell* intended the right to marry under the U.S. Constitution to be self-executing, it failed to provide any insight into how two people are to go about "executing" it given that there can be no common law of marriage under federal law. *Erie*, *supra* 18. In fact, it spoke as if it could require states to issue licenses, even if never authorized by the state.

[13] In addition to the constitutional problems associated with the application of elision in the case at bar, there is a prudential constitutional consideration at issue too. In *Smith v. State of Tennessee*, 2016 WL 7010562 (Tenn. Ct. App. 2016) the Court said using elision to "expand[ ] a statute beyond what the legislature intended is usually problematic" and "is particularly problematic" when the power being expanded "is expressly reserved for the legislature by the Tennessee Constitution" *Id.* at 3. This is exactly what the application of elision would do in he present case because Article VII, Section 1 of the Tennessee Constitution allows only the General Assembly to "prescribe" Defendant's "duties." For the Court of Appeals to apply elision to *expand* the Defendant's duties is to use elision to usurp the Legislature's constitutional authority and a violation of the separation of powers under Tennessee's Constitution.

3. The Real Problem with *Obergefell's* Holdings.

a. *Logical Problems that Make Elision Unconstitutional*

*Obergefell* did not simply allow more combinations of male and females to qualify for a Government-Licensed Marriage under state statutes that still defined marriage in terms of the biological sex of the parties, as was true under *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967) when a black biological male was thereafter allowed to marry a white biological female and vice versa without the threat of the criminal sanctions that were held unconstitutional.[14]

Thus, the real problem created by *Obergefell* lies in the fact that it purports to *create and impose* on the states the licensure of a *new type of legal relationship* that could have been called something other than "marriage," because it is fundamentally and objectively different from the type of relationship the Legislature had already licensed and called a "marriage."[15] No doubt the reason many assume this new type of relationship is a "marital" relationship is because the existing statutes mirrored the historical pre—political institution of marriage recognized under common law for so long that many have come to the uncritical assumption that "marriage" must

[14] *Loving* is not like *Obergefell* in two respects. First, because Virginia's basic licensing statute was *not* held invalid, but only other statutes voiding and criminalizing interracial marriages, the licensure provision did not need to be amended or replaced. *Obergefell* was directed specifically at licensing statutes themselves. Perhaps a question of elision could have been raised after *Loving* regarding the continuing validity of Virginia's statutory *scheme as a whole*, but the issue was never presented as is here being done, and, in any event, a return to common law marriage would not have met Virginia's racist goals because race is not an aspect of common law marriage. Second, and most importantly, the *Loving* Court did not impose on Virginia a *new form of legal relationship* different in nature and kind from that which the state had ever previously recognized. Yet, that is precisely what *Obergefell* majority wants states to think it has done.

[15] *See* Adam J. Macleod, *Rights, Privileges, and the Future of Marriage Law*, 28 Regent U. L. Rev. 71, 73 (2015) (emphasis added) ("The legislation creating same-sex marriage in [New York] declaims, "[i]t is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law." (citation omitted) *By calling same-sex marriage and opposite-sex marriage by different names, the statute treats them at least nominally unequally.* And the difference is more than nominal; the entire scheme of norms attaching to marriage presupposes natural marriage, and the rationality of many of those norms drops out if marriage is something other than the union of a man and woman." (emphasis added)). The male-female marriage presupposition of pre-*Obergefell* family law schemes that made them "rational" explains the irrationality that now has some courts requiring doctors and hospitals to put a biological *lie* on an *original* birth certificate that a child born to two married women has two mothers then rationality and integrity has been lost.

be whatever a statute says it is without looking to see if there are any real, objective differences between the relationship described in *Obergefell* and that described under existing statutes.

But *Obergefell*, over strenuous dissent, divorced the historical and common law understanding of marriage from that which the Legislature could[16] define as a marriage and recast statutory marriage as a relationship that could be whatever a positive enactment of a legislative body says it is. This historical break between the old philosophical understanding of marriage, its source, and the pre-political right inhering in a man and woman to marry and the Supreme Court's positivistic philosophy that marriage is purely a statutory creation by government is why Plaintiffs have denoted the relationships authorized by the In-state Licensing Statutes as "Government-Licensed Marriages." This denotation distinguishes the "*historical*" relationship that gave rise to the "marital contract" referenced in Tennessee's Constitution and to which its statutes conformed from the U.S. Supreme Court's newly articulated belief that marital contracts are only *created by statutory authorization and licensure* and can be divorced from history and defined in whatever manner the legislative body so desires. *Obergefell*, 135 S. Ct. at 2620-2621 (Roberts, J., dissenting) (noting that "the majority goes out of its way to jettison the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18

[16] Of course, if a legislator *or* judge believes marriage is a real thing with objective meaning and therefore the marital relationship *could not have been defined* in statute as anything other than a male and female without denying objective realities, then it could not have been a denial of equal protection to exclude same-sex couples from marriage any more than it could be wrong to exclude a painting submitted on a triangular canvas from a contest requiring that paintings be submitted on a square canvas. Just as there are many geometric shapes, the same is true of relationships—they come in many varieties and some may have many similar features, but those *grounded* in the complementariness of the sexes are different in kind from all others. *This objective understanding of marriage rooted in history and biology is what the people of Tennessee imposed on its state government under the Marriage Amendment and nothing in Obergefell explicitly prohibits common law marriage and a means by which evidence of that marriage could be made public, such as happens with the recording of real estate transactions. See Meister v. Moore,* 96 U.S. 76, 78 (1887) (holding that a jury should be allowed to consider the existence of a common law marriage unless a state's statutes clearly abrogate common law marriage, because those statutes "*do not confer the right*" to marry, but only "regulate the mode of entering into" the "civil contract" of marriage, the "leading purpose" of the statutes being "to secure a registration of marriages, and evidence by which marriages may be proved. (Emphasis added)). Whether such *Meister*-based registration statutes evidencing a common law marriage, if challenged, would pass constitutional muster or result in *Obergefell* being reversed is for a future court to determine.

(quoting 521 U. S., at 721)," which rooted non-textual rights in history and tradition, "effectively overrul[ing] *Glucksberg*, the leading modern case setting the bounds of substantive due process," and "return[ing] the Court to the unprincipled approach of *Lochner*.")

So, in addition to the fact that common law marriage was not before the Court in *Obergefell*, the majority in *Obergefell* had to be addressing only that form of marital contract *created by* positive statutory law. That's because there could have been no equal protection claim if statutorily created and defined marriages are tied to or limited by a pre-political objective understanding of what kind of relationship can constitute a "marital contract."[17]

However, regardless of one's philosophy about marriage's nature and origin, it must be acknowledged that a *relationship* legally defined in terms of the complementariness of the biological sex of the parties is *not objectively the same kind of relationship* as one legally defined without regard to the complementariness of the parties' biological sex, *even though this new type of relationship is given the same name—"marriage—as the old relationship*. This new type of relationship for which licenses are now being issued is nothing short of a new type of *legal* relationship. If is a fact that this new type of legal relationship, *though also being called "marriage,"* is not a legal relationship that has ever been recognized under Tennessee law.

This conclusion is a necessary consequence of antithesis. If a Government-Licensed Marriage now means a relationship in which the biological sex of the parties is irrelevant to its legal definition and meaning, then biological sex cannot still be relevant to the legal definition

[17] Assuming, *arguendo*, the 14th Amendment was intended to place a state's definition of marriage under federal court control, particularly under the rubric of "liberty," the only other means by which a legitimate equal protection violation could have been found relative to statutorily created and defined marriage is if the *Obergefel*l majority held (or assumed) that there are no objective realities by which to distinguish males from females. Then, it would have been a denial of equal protection to allow only certain combinations of human beings, *androgynously understood*, to marry. If this is now the constitutionally required understanding of human anthropology, this has huge implications for all manner of laws.

and meaning of that relationship *for anyone*,[18] unless two kinds of marriage licenses and certificates of marriage are now being issued in Tennessee (though no discovery on this point was had before dismissal). It is in that sense that *Obergefell* is being interpreted by Defendant (and the executive branch) as imposing a requirement on Tennessee that it issue a license for *a new type of legal relationship* without any action by the state's Legislature to authorize the issuance of the license or even an adjudication of *Obergefell* by a state court that, in violation of the separation of powers in Tennessee's Constitution, would judicially supply that statutory authorization. Such an interpretation of *Obergefell* accords to federal courts an unprecedented exercise of federal judicial power. That may explain why the Court of Appeals turned to the general elision statute, T.C.A. § 1-3-110, to buttress its interpretation of *Obergefell*.

However, if elision is applied, then *state courts* will be imposing on the In-state Licensing Statutes *a new type of legal relationship never before recognized by statute*. *See Ex parte State ex rel. Ala. Policy Inst*., 200 So.3d 495 (Ala. 2015). In that case, a majority of the Alabama Supreme Court, Justice Roy Moore *not* participating, said, "[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" 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. …" *Id*. at 531.

Doing so would violate the separation of powers in the state's Constitution. Certainly

[18] While *Obergefell's* majority seemed concerned with curing "dignity wounds" caused to same-sex couples, it is quite ironic that neither opposite sex couples nor same-sex couples are now entering into the *legal* relationship *historically* known as marriage and that *Obergefell's* majority described as having "existed for millennia." *Obergefell*, 135 S. Ct. at 2594. This new form of *legal* relationship, to the extent it is *now* known as marriage, has only existed since the date of the state's implementation of *Obergefell*, June 26, 2015.

lower courts should not be left to think that the elision analysis provided by the Court of Appeals is in accord with *Crank* or that elision can now authorize new duties under state statutes when the authority to prescribe those duties is expressly reserved to the Legislature under Article VII, Section 1 of the Tennessee's Constitution.

Thus, this is the question that gives rise to Plaintiffs' various claims: How did this new form of legal relationship come to be constitutionally[19] and lawfully imposed on their state such that the licenses issued to the Minister Plaintiffs pursuant to T.C.A. § 36-3-104(a)(1) are valid and the actions of Defendant are not *ultra vires* and not in violation of the Citizen Plaintiffs' "right 'indirectly' to vote" under the state Constitution for legislators who will not vote to change Tennessee's statutes until the constitutional crisis created by *Obergefell* is resolved by the judicial system?

*b. State Constitutional Prohibitions on the Application of Elision.*

In addition to the foregoing, the application of elision to the In-state Licensing Statutes after *Obergefell* must also be considered in light of the Marriage Amendment. That Amendment says, "The *historical* institution and legal *contract* solemnizing the relationship of one man and one

[19] The Supremacy Clause cannot be the constitutionally correct answer to this question, because if the equitable or remedial powers implied within the scope of the undefined "judicial power" referenced in the Constitution now allow federal courts to rewrite *state* statutes or create of new types of legal relationships and then impose on every state a requirement that it be *licensed*, *there is no end and no limit to the scope of this new power in the federal judiciary.* This power would essentially allow federal courts to use "liberty" under the 14th Amendment to obliterate at their whim both the dual sovereignty of federalism and the separation of powers between the judicial and legislative branches. *See*, *e.g.,* Yoo, *supra* p. 17, pp. 1123-1124 (stating that "if the remedies needed to correct a constitutional violation lie outside a court's traditional remedial powers, then separation of powers principles require that the answer come from the political branches … ."). That's because the meaning of "liberty" under *Obergefell* goes far beyond *Lochner* and the mere invalidation of state or federal law that it justified. The interpretation of *Obergefell* being given by the Defendant (and the executive branch) is *groundbreaking* if, by it, federal courts now have *power to interpret "liberty" so as to now require positive, affirmative by a state's legislative body or circumvent that body's constitutional prerogatives if it asserts its independence as a dual sovereign by not conforming its statutes to a command from a branch of the federal government that it thinks unconstitutional*. *See Obergefell*, 135 S. Ct. (Thomas, J., dissenting) (stating that "[i]n the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."). This is exactly what Justice Scalia anticipated in his dissent.

woman shall be the only *legally recognized* marital *contract* in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the *historical* institution and legal *contract* between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee."

It must be noted that the Marriage Amendment relates to what kind of relationship *in Tennessee* can give rise to a civil contract that can be considered a "marital contract" by Tennessee's three branches of government (*See* Amendment's reference to "policy, law, or judicial interpretation"). It does not relate *solely and strictly* to the construction of then-existing statutes by which the Legislature may have purported to define a particular relationship as a "marriage" or for which it had then authorized the issuance of a license. In other words, the *civil contract* expressly referenced in the Marriage Amendment is not tied to statutes or the interpretation of statutes that purport to define a relationship as a marriage *but to what kind of "relationships" can give rise to the civil contract of marriage in Tennessee.* And it ties the understanding of that relationship and that contract to what *"history"* says that civil contract is. That is critical because the relationship that *historically* was seen as constituting a marriage has also been considered a "civil contract," under common law. *See* William Blackstone, *Commentaries on the Laws of England*, (Philadelphia: J.B. Lippincott Co., 1893), Book I, Chapter 15, p. 432[20] ("Our law considers marriage in no other light than as a civil contract.").

Moreover, the historical marital contract recognized under the pre-political common law was tied to objective, immutable natural realities. William Blackstone identified "three great relations in private life": "1. That of master and servant. . . 2. That of husband and wife; *which is founded in nature*, but modified by civil society: the one *directing man to continue and multiply*

[20] Available at http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-2-vols

*his species*, the other prescribing the manner[21] in which that natural impulse must be confined and regulated. 3. That of parent and child, *which is consequential to that of marriage, being its principal end and design.*" *Commentaries,* Book I, Chapter 15, p. 422 (emphasis added).

This understanding of the type of relationship that can constitute a "marital" contract is the "historical institution and legal contract" referenced in the Marriage Amendment, and it precludes relationships grounded in companionship, dignity, or a desire to access government benefits from giving rise to a "marital contract."[22] In other words, the Marriage Amendment denominates the type of relationship that can be considered a "marital contract" under state law just as the nature of the relationship between two parties might result in contracts between them being called a "bill of sale" in one instance, a "lease agreement" in another, and an "employment contract" in yet another.

In other words, the nature of the relationship is what controls the name *given* to the relationship and the name *given* the contract arising out of that relationship, not vice versa. This concept is no different from saying one can't call a contract an "employment agreement" when there is no employer-employee relationship. The relationship is determinative of the contract's nature, not the name given the contract.

Thus, the Marriage Amendment is a limitation on the powers of Tennessee's civil government as to the kinds of relationships it can recognize under state law as forming the civil contract of marriage, and therefore a limitation on what relationships it can license. Nothing in

[21] Reference to "manner" is perfectly consistent with the U.S. Supreme Court's understanding of the difference it recognized in *Meister* between statutes granting the right to marry and statutes that only "regulate the *mode* of entering into the contract" of marriage under common law in order "to secure a registration of marriages, and evidence by which marriages may be proved." *Meister*, *supra* note 18 at p. 22 (emphasis added).

[22] Of course, Tennessee must recognize the validity of marital contracts created by statute in other states under *Obergefell,* but this is not the same issue as the licensure of marital contracts under Tennessee statutes. The Marriage Amendment need not be interpreted in a way so as to violate Obergefell and, in any event, application of the doctrine of elision would be more than appropriate in this instance to save as much of what the people of Tennessee intended as possible.

this limitation logically contradicts *Obergefell's* requirement that *if* a state enacts statutes that define a relationship as a "marriage," then it is constitutionally required to allow for certain combinations of individuals to come within that definition for the purpose of licensure. But, a state could simply choose not to license any relationship as a marriage, and that is what the people in their Constitution said its government should do—not enact any statute or issue any judicial interpretation that would authorize what is prohibited. This conclusion is buttressed by the fact that nothing in the U.S. Constitution requires states to enact statutes to license any kind of relationships for state law purposes,[23] let alone tell them what to call those relationships.

QUESTION 1. The Court of Appeals denied Plaintiffs' right to Due Process by failing to provide them a meaningful opportunity to be heard on the disputed questions of law raised by their causes of action, namely, how the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) should be interpreted and applied to the marriage licensing statute, T.C.A. §§ 36-3-104(a)(1), by resolving those disputed questions at that stage of the proceeding in which the only issue before the Court and briefed by the parties was the justiciability of Plaintiffs' claims regarding those disputed questions.

The U.S. Supreme Court has recognized that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," *Logan v. Zimmerman Brush Co*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1154 (1982) *quoting Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950), and the Tennessee Supreme Court has recognized that "[t]he

[23] Even if there were such a requirement, the judicial branch in Tennessee lacks the power to compel the enactment of statutes. See *Biggs v. Beeler*, 180 Tenn. 198, 173 S.W.2d 144, (1943) (stating that "the Legislature may disregard" even "a *mandatory non-self-executing* constitutional provision," and "the Courts are without authority to enforce performance of it by affirmative decree." (emphasis added)). This is also 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, 516, 128 S. Ct. 1346, 1363 (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)). Since marriage is a civil contract, the right to marry under the U.S. Constitution can be no more self-executing under *Obergefell*'s philosophical and theological understanding of marriage than a treaty that is in the nature of a contract.

'law of the land' proviso of our [state] constitution is synonymous with the 'due process of law' provisions of the federal constitution" in all points on which they both pertain. *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980) citing *Daugherty v. State,* 216 Tenn. 666, 393 S.W.2d 739 (1965). Under both Constitutions, "[a] fundamental requirement of due process is notice and an opportunity to be heard." *Phillips v. State Board of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993) citing *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Relevant to this Due Process requirement of notice and hearing in the present case is *Burnette v. Sudeen*, 152 S.W.3d 1(Tenn. Ct. App. 2004). In *Burnette*, plaintiff filed a Motion under Tenn. R. Civ. P. 37.02 for sanctions related to discovery. The motion stated that the Plaintiff would be requesting "any and all relief to which she is entitled, including but not limited to judgment by default." However, the Trial Court went beyond discovery sanctions or entering a default judgment to granting unliquidated damages in the amount of $100,000. The defendant appealed arguing that the trial court erred by ordering damages without ordering a writ of inquiry or a hearing." *Id*. at 3. Quoting *Phillips*, the *Burnette* Court held that the trial court erred because the Motion "did not advise the defendants that the issue of unliquidated damages would be addressed." *Id*. at 5.

Applying this principle to the case at bar, it is clear from a review of the questions presented to the Court of Appeals and the briefs filed by the parties that the only issue before the Court of Appeals was justiciability. The proper interpretation and application of *Obergefell* to the In-state Licensing Statutes was not an issue presented to the Court of Appeals. Nevertheless, the Court of Appeals decided to interpret *Obergefell*, without any notice to the Plaintiffs that it would do so and without giving them any meaningful opportunity to be heard on that issue.

This Due Process problem is compounded by the fact that the Court of Appeals erred by conflating its opinions about the merits of the legal theories underlying Plaintiffs' respective claims with issues of justiciability. But even if the Court of Appeals thought the Defendant would overcome Plaintiffs' legal arguments once the merits of the claims were reached, that is irrelevant to standing. "The fact that the party seeking declaratory relief is not entitled to the judgment sought (that it is on the losing side of the controversy) does not mean that the parties are not entitled to the relief from uncertainty that a declaratory judgment affords." *Cannon County Board of Education v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005). "Thus, a party seeking a declaratory judgment is not required to allege facts in its complaint demonstrating that it is entitled to a favorable decision." *Id.*

In essence, the Court of Appeals erred in using Defendant's Motion under Tenn. R. Civ. P 12.02(6) to test "strength" of the claims made by the various Plaintiffs' in their complaint, not the "legal sufficiency of the complaint." *Stein v. Davidson Hotel Company*, 945 S.W.2d 714, 716 (Tenn. 1997). Moreover, the Court of Appeals tested the strength of Plaintiffs claims without giving them an opportunity to search out its thinking in that regard.[24] By doing so, the Court of Appeals denied Minister Plaintiffs and Citizen Plaintiffs Due Process under both the U.S. and Tennessee Constitutions.

Consequently, permission to appeal should be granted, the decision of the Court of Appeals reversed, and an order entered granting Minister Plaintiffs and Citizen Plaintiffs standing and remanding the case to the Trial Court for disposition on the merits.

QUESTION 2. <u>The Court of Appeals erred in dismissing, for lack of standing, Minister Plaintiffs' complaint for declaratory relief to resolve their uncertainty regarding the effect of</u>

[24] Proverbs 18:17 "He that is first in his own cause seemeth just; but his neighbour cometh and searcheth him. (KJV)"

*Obergefell* on their rights, duties, liabilities as those who are authorized by law to solemnize statutorily defined marriages on behalf of the state pursuant to T.C.A. §§ 36-3-103 and 104(a)(1) by actually resolving the various disputed questions of law created by *Obergefell* and giving rise to those uncertainties, effectively using Defendant's Motion under Tenn. R. Civ. P. 12.02(6) to judge the strength of Minister Plaintiffs' claims rather than the legal sufficiency of their complaint.

Taking the allegations of the Complaint as true and examining them in the light most favorable to the Plaintiffs, there is no question that Minister Plaintiffs are authorized by the state to solemnize or make legal on behalf of the state a marital relationship for the purpose of all other state and federal laws related to marriage.

There should also be no question that the language "invalid to the extent" in *Obergefell* means something, and it cannot be questioned that the ordinary meaning of the word "invalid" means "being without foundation or force in fact, truth, *or law*; an invalid assumption." https://www.merriam-webster.com/dictionary/invalid (italics represent emphasis added). Nevertheless, the Court of Appeals concluded that the Minister Plaintiffs lacked standing because this language could not have created any uncertainty relative to the validity of the licenses being issued post-*Obergefell*.

However, the Court of Appeals' own opinion is the proverbial "Exhibit 1" in support of the Minister Plaintiffs' claim that *Obergefell's* holding created uncertainty with regard to the continuing validity of the In-state Licensing Statutes. It took the Court of Appeals multiple pages to explain why, in *Obergefell's* first holding, the Court's use of the word "invalid' in direct reference to the "State laws challenged by Petitioners" did not mean those "state laws" were "invalid." Opinion, 8-11. In fact, the uncertainty regarding the effect to be given the word

"invalid" was apparently such that the Court of Appeals felt the need to shore up its interpretation of *Obergefell* by holding that the general elision statute would apply in any event to preserve the validity of those statutes. Opinion, 10. Resort to elision would have been unnecessary if the Court of Appeals had no uncertainty regarding its interpretation of *Obergefell*!

It was only on the basis of this summary interpretation of *Obergefell* and erroneous use and application of statutory elision that the Court of Appeals concluded the Minister Plaintiffs' liberty concerns related to the criminal and civil sanctions under T.C.A. §36-3-305 were "hypothetical." The sanctions were hypothetical only because the Court of Appeals had pre-judged the disputed legal questions that created the uncertainty alleged by Minister Plaintiffs in their Amended Complaint.

To further appreciate the fact that the Court of Appeals effectively ruled on the merits of the Minister Plaintiffs' claim, this Court need only consider how the Court of Appeals' conclusion of law—that there is no uncertainty regarding the validity of the In-state Licensing Statutes after *Obergefell* to justify standing to seek a declaratory relief—would apply in another relevant scenario. The Court of Appeals' conclusion would mean that even a County Clerk, required by law to administer those statutes, would not have had standing in 2016 (and would have no standing now) to have any uncertainty regarding his or her rights and duties under those statutes declared post-*Obergefell*. However, this is hard to fathom given precedents by this Court recognizing an elected official's standing to determine his or her responsibilities under a statute that may be unconstitutional as enacted. *See, e.g.*, *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949) (upholding the standing for Tennessee's Secretary of State to seek a declaration to resolve uncertainty he had regarding the constitutionality of an act of the

Legislature that required him to hold a special election after the Attorney General had opined that the statute was unconstitutional).

Yet, if a County Clerk would have had or would now have standing to have uncertainty regarding his or her duties and liabilities post-*Obergefell* resolved and declared, then there must also have been and still be uncertainty relative to the validity of those licenses in the hands of those to whom they were and will be issued, the Minister Plaintiffs.

The Court of Appeals' standing analysis essentially neutered the purpose of the Declaratory Judgment Act. If courts can reach the merits of a legal question that was clearly in dispute in order to decide that there is no uncertainty regarding that disputed legal question, then no one will ever have standing to adjudicate an "uncertainty" regarding a question of law. The uncertainty will just be resolved as a part of the standing issue, and then those cases will dismissed for lack of standing.

Permission to appeal should be granted, the erroneous decision of the Court of Appeals reversed, and an order entered granting Minister Plaintiffs standing and remanding the case to the Trial Court for disposition on the merits.

QUESTION 3. The Court of Appeals erred by disregarding Citizen Plaintiffs' right to standing under *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972), confusing standing based on a plaintiff's mere status as a voter with Citizen Plaintiffs' claim under *Walker* that their "right 'indirectly' to vote" for members of the General Assembly is being violated by Defendant's on-going *ultra vires* act of authorizing herself to perform certain duties that can only be prescribed to her by the legislators for whom Citizen Plaintiffs have a right to vote.

As it did with the Minister Plaintiffs, the Court of Appeals erroneously resolved the disputed legal issues that gave rise to the Citizen Plaintiffs' claim under the guise of a Motion under Tenn.

R. Civ. P. 12.02(6), determining the strength of their claim rather than the legal sufficiency of the Amended Complaint. This is error. But the Court of Appeals compounded this error by saying:

> Even if, in carrying out her responsibilities, the county clerk had rewritten the marriage license laws or prescribed duties to herself not existing in the marriage license statutes, the Citizen Plaintiffs did not allege how such actions would invade or infringe upon their voting rights or deprive them of their life, liberty, or property.

Opinion, 11. In other words, "even if" the Defendant is acting in an *ultra vires* way and usurping authority that is given only to the Legislators for whom the Citizen Plaintiffs' vote, this does not make out a claim that that their right to vote may have been "invade[d] or infringe[d]." Opinion, 11. Such a statement shows a complete and utter disregard of the actual allegations made in the Amended Complaint and how they relate to a claim based on *Walker* that *ultra vires* actions by an elected official can violate a citizen right to vote.

Consistent with *Walker*, the Citizen Plaintiffs' alleged that:

- The In-State Licensing Statutes limited the issuance of licenses to "male and female contracting parties. T.R. Vol. II, p 225-226, ¶¶ 27, 30, 32.
- *Obergefell* held that state statutes were "invalid" to the extent that they limited the issuance of licenses for government-licensed marriage to opposite sex couples. T.R. Vol. II, p. 225, ¶ 25.
- The application of elision to the words "male and female" was questionable because:
    - the very same General Assembly that inserted those words enacted T.C.A. § 36-3-113 that limited marital contracts to "one man" and "one woman" and because the *Crank* decision made the general elision statute non-determinative as to whether "male and female" could be elided. T.R. Vol. II, p. 226, ¶ 32.
    - the consummation of a same-sex marriage would have been a criminal act. T.R. Vol. II, p. 226, ¶ 34.

- Defendant had no authority to "interpret" the statute so as to issue licenses without regard to whether they were "male and female" as "prescribed" by the General Assembly. T.R. Vol. II, p. 226, ¶ 36.

These allegations not only made out a claim under *Spec* that the Defendant should not be issuing any licenses for government-licensed marriages after *Obergefell,* because such would be *ultra vires*, but subsumed under those allegations is the claim that if existing law is still valid, then Defendant's issuance of licenses to two people who are not "male and female" must be *ultra vires.*

Then, using the very words that gave rise to standing in *Walker,* Citizen Plaintiffs' alleged that Defendant's *ultra vires* actions since *Obergefell* had "deprived [them] of *their right to 'indirectly' vote on the laws prescribing the duties of the County Clerk* because the members of the General Assembly are the only branch of civil government authorized under Article II, Sections 1 and 2 of the Tennessee constitution to prescribe the duties of the Defendant." T.R. Vol. II, p. 227, ¶ 43 (emphasis added).

In *Walker*, the citizen plaintiffs brought suit to have "the actions of the [86th] General Assembly and the Governor in ratifying the Twenty-Sixth Amendment to the Constitution of the United States" declared "*ultra vires* and void *ab initio*." *Id.* at 103. They were asserting that public officials (members of the 86th General Assembly) had acted without authority, because Article II, Section 32 of the Tennessee Constitution provides that only members of a General Assembly who are elected after a federal amendment has been submitted to the states can ratify the amendment. The amendment had been submitted to the state during the term of the 86th General Assembly.

The State argued, as did Defendant here, "the plaintiffs have not alleged special injury or real interest in the issues in the suit beyond that of members of the public generally." *Id.* at 104. *Walker* rejected that argument because the citizens weren't just alleging that elected officials had acted in an "*ultra vires*" manner, but alleging that this "*ultra vires*" act had violated their right to vote:

> 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).

Of course, federal constitutional amendments are never voted on directly by the people, but only indirectly through the Representatives and Senators for whom they vote. Similarly, statutes prescribing the duties of the County Clerks are never voted on directly by the people but only indirectly through the legislators for whom they vote. That is the prism through which *Walker's* applicability to the case at bar and this Court's subsequent interpretation of it in *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (2006) must be seen.

While the *Walker* plaintiffs actually asserted that their right to vote for the members of General Assembly subsequent to the 86th General Assembly deprived them of their "right to vote 'indirectly' *on the ratification*" of the amendment, the *Darnell* Court interpreted *Walker* as involving the "right to vote" for members of the General Assembly that, under the state Constitution, were supposed to ratify the proposed federal Amendment.

In *Darnell*, the Court interpreted *Walker* as holding that if the ratification of the federal Amendment by the 86th General Assembly had been upheld, yet its ratification had indeed been

an *ultra vires* violation of Article II, Section 32 of the Tennessee Constitution, then the *Walker* plaintiffs would have been "wholly deprived . . .of their right to vote for the General Assembly that would be charged with ratifying the amendment." *Id.* at 624. In other words, *had the 86th General Assembly's act of ratification been allowed to stand*, the plaintiffs' votes for those who under the Constitution were authorized to reject it would have been meaningless.

Thus, after *Darnell, Walker* stands for the proposition that the plaintiffs therein, as voters, had standing to obtain a determination as to whether the federal Amendment had been ratified contrary to the powers accorded the members of the 86th General Assembly under the state constitution, i.e., in an *ultra vires* manner. And they had standing, because their right to vote for legislators to whom the constitution had given that power and whom they wanted to vote against that amendment would have been meaningless otherwise.

The present case involves the same principle. Like the legislators that the *Walker* Plaintiffs wanted to vote for and who they argued had the sole power under the state Constitution to act *after* the federal amendment had been submitted to the states, Citizen Plaintiffs have asserted that the legislators they want to vote for have the sole power under the state Constitution to act with respect to the prescription of Defendant's duties *after* the U.S. Supreme Court's decision in *Obergefell*.

Yet, like the members of the 86th General Assembly in *Walker* who took it upon themselves to ratify the proposed Amendment after it was submitted, Defendant Anderson has unconstitutionally taken it upon herself after *Obergefell* to issue licenses that have not been authorized by the Legislature, either because the Legislature has not replaced the existing statutes, if invalidated by *Obergefell*, or because it has not amended them to authorize the issuance of licenses to same-sex couples. Either way, Defendant Anderson has interfered with

Citizen Plaintiffs' "right to vote" for members of the General Assembly who are charged under the Tennessee's Constitution with prescribing to Defendant's duties after *Obergefell* and who alone can authorize what is now being done *ultra vires*. Just as the *Walker* plaintiffs had a right to vote on legislators who would not vote to ratify the federal Amendment, Citizen Plaintiffs have a right to vote for members of the General Assembly who will not vote to repeal, amend, or replace T.C.A. §§ 36-3-104(a)(1) and 113 until a court has adjudicated the effect of *Obergefell* on those statutes and determined what limitation, if any, the Marriage Amendment still places upon the various branches of state government in regard to what relationships can give rise to a marital contract under Tennessee law.[25]

And just as the *Walker* plaintiffs had standing because their right to vote for legislators who would not vote to ratify the Amendment would have been effectively nullified or rendered meaningless if an *ultra vires* ratification of that Amendment had been allowed to stand, Citizen Plaintiffs' have standing because their right to vote for legislative candidates who will not "ratify" *Obergefell's* attempted constitutional overreach is being effectively nullified and rendered meaningless if Defendant Anderson's *ultra vires* prescription of duties to herself is allowed to stand.[26]

Finally, it should be apparent that *Darnell* and *Walker* also vitiate the Court of Appeals'

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[25] The General Assembly convened at the time of *Obergefell* adopted House Joint Resolution 529 by a vote of 73 to 18 in the House and a vote of 26 to 2 in the Senate. T.R. Vol. III, 439-440. In that Resolution, the Legislature "express[ed] its strong disagreement with the constitutional overreach in *Obergefell v. Hodges* that, in violation of the constitutional and judicially recognized principles of federalism and separation of powers, *purports to allow federal courts to order or direct a state legislative body to affirmatively amend or replace a state statute."* The legislators voting for this resolution are the kind that Citizen Plaintiffs want to vote for, but their votes for them are meaningless if Defendant can adjudicate *Obergefell's* application to In-State Licensing Statutes or amend or replace them herself. *Perhaps the Legislature plans to take no action until the effect of Obergefell on those statutes and the relationship between Obergefell and the Marriage Amendment have been adjudicated*.

[26] Why might Citizen Plaintiffs want to vote for such candidates? Because it leaves the current statutes that do not expressly authorize same-sex marriage on the books and allows for the critical constitutional questions left by *Obergefell* to be litigated and the principles of federalism and separation of powers preserved. Also, if the statutes are not changed to "conform" to *Obergefell* and *Obergefell* is ever reversed, Citizen Plaintiffs may not have to engage in a political debate over whether to amend the law to return the statutory language to male-female marriage.

erroneous conclusion that "even assuming for the sake of argument that their rights under any of the cited constitutional provisions have been invaded or infringed to a degree, the Citizen Plaintiffs' injuries would be shared by the public at large." Opinion, 13. *Walker* and *Darnell* make it clear that an *ultra vires* act that violates a constitutional right stands on a different footing from an allegation that an act is merely *ultra vires*. The latter, but not the former, does implicate this Court's non-recognition of "citizen standing." *See City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001) (holding that a citizen does not have standing to assert that a city ordinance under which he's convicted violates a District Attorney General's constitutional right to prosecutorial discretion). But, an allegation that an official's *ultra vires* act violates a constitutional right must provide standing, even if the violation is one the plaintiff has in common with other citizens.

The speciousness of the Court of Appeals' conclusion in this regard is easily demonstrated. Consider enactment of a statute by which members of the General Assembly make themselves subject only to retention elections. Would there be no standing by any voter to ask if the statute violated his or her right to vote because the violation, if such existed, would be common to all voters? Of course not, and for that same reason, the Court of Appeals' treatment of Citizen Plaintiffs' allegations and claims as invoking only "citizen standing" must be rejected. The law of *Walker* must be affirmed and its applicability to the case at bar made clear.

Since *Darnell* could have overruled *Walker* and did not and since *Walker* held that *ultra vires* acts could implicate the right to vote, the Court of Appeals' denial of standing to Citizen Plaintiffs was erroneous. Consequently, permission to appeal should be granted, the Court of Appeals' decision as to Citizen Plaintiffs be reversed, and an order entered granting Citizen Plaintiffs standing and remanding the case to the Trial Court for disposition on the merits.

QUESTION 4. Permission to appeal should be granted to settle an important legal issue of first impression created by the Court of Appeals' error in applying elision, which is a remedial tool to be applied only after disputed legal questions are resolved, to determine standing, in this case holding there was no standing in regard to disputed legal questions created by *Obergefell* and raised by the Plaintiffs, because elision would apply to resolve those question.

Plaintiffs have found no authority for the proposition that elision can be applied to determine questions of standing, and the Court of Appeals cited none. That is not surprising given that even our nation's highest court has always considered elision or severability a matter bearing on the merits of a claim, either as a principle of statutory construction or as a remedial tool to be applied once a statute is found to be unconstitutional. *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S. Ct. 2091, 2098 (1971) (noting, in support of severance, the "cardinal principle of statutory construction . . . to save and not to destroy" (quotation omitted)); *Dorchy*, *supra* p. 12; *see also Regan v. Time*, Inc., 468 U.S. 641, 677, 104 S. Ct. 3262, 3282 (1984) (Brennan, J., concurring in part, dissenting in part) ("A court's obligation to leave separable parts of a statute in force is consistent with its general duty to give statutes constructions that avoid constitutional difficulties."); *United States v. Thirty- Seven Photographs*, 402 U.S. 363, 372 (1971) (relying on severability clause to justify construing statute to avoid constitutional difficulties). *But see Ayotte*, 546 U.S. at 328 (treating the choice between partial and facial invalidation as a "question of remedy"); *United States v. Booker*, 543 U.S. 220, 245, 125 S. Ct. 738, 756 (2005) (referring to severability analysis as a "question that concerns the remedy").[27]

Elision is considered a judicial remedy under this Court's precedence. *See Crank*, *infra* p. 13

[27] Interestingly, among the federal authorities listed above is the "remedial" case, *Ayotte,* on which the Court of Appeals relied. While *Ayotte* treats elision as a remedy, the Court of Appeals used *Ayotte* to *interpret Obergefell*. *Ayotte,* by its own terms, would only apply after Obergefell is interpreted as rendering the In-state Licensing Statutes invalid. Thus, the Court of Appeals didn't even apply *Ayotte* correctly, unless it was assuming there is now a federal doctrine of elision applicable to state statutes that, contrary to precedent, is now binding on states.

(agreeing with the state's attorney general that if the statute there in dispute was "unconstitutional, the proper *remedy* would be to elide." (emphasis added)).

Thus, it should be abundantly clear, as a matter of law, that an elision analysis has no place in deciding whether a party has standing to resolve a disputed legal question. Remedial tools are only used *after* a determination on the merits has taken place. But even if elision is considered a tool for statutory construction, its use means that a determination on the merits is taking place. Either way, the Court of Appeals erroneously used elision to determine the strength of the Plaintiff's claims, rather than the legal sufficiency of their complaint. That violated this Court's standing for determining standing. *Stein,* infra 31. Furthermore, the need even to consider elision's applicability is proof that a disputed question of law exists, meaning that none of the Plaintiff's claims could be "hypothetical". Opinion, 11.

Permission to appeal must be granted to reverse the Court of Appeals' erroneous use of elision in connection with a motion under Tenn. R. Civ. P. 12(6) lest it become precedent for the application of that remedial tool in any number of declaratory judgment actions involving disputed questions regarding the constitutionality of statutes and statutory interpretation.

QUESTION 5. Permission to appeal should be granted to settle an important legal issue of first impression created by the Court of Appeals erroneous holding that the "particularized injury" requirement engrafted onto T.C.A. § 29-14-103 also applied to the cause of action for declaratory relief granted by newly-enacted T.C.A. § 1-3-121, even though T.C.A. § 1-3-121 states that the cause of action for declaratory relief provided for therein is "notwithstanding any law to the contrary," thus attributing no intent, meaning or purpose to those words in violation of the principles of statutory construction set forth in *Browder v. Morris*, 975 S.W.2d 308 (Tenn. 1998).

Statutory interpretation is guided by the overarching principle that statutes "should be read naturally and reasonably, with the presumption that the legislature says what it means and means what it says. *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015) *citing BellSouth Telecomms., Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Consistent with this principle, courts "are restricted to the natural and ordinary meaning of the language used by the legislature in the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent." *Browder*, 975 S.W.2d at 311. In determining the natural and ordinary meaning of a word, courts must "consider the language employed in context of the entire statute without any forced or subtle construction which would extend or limit its meaning, and "assume that the legislature used each word in the statute purposely, and that the use of these words conveys some intent and has a meaning and purpose." *Id*.

T.C.A. § 1-3-121 reads as follows:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

The Court of Appeals focused exclusively on the meaning of the word "affected." It held that the new statute "does not relax the particularized injury requirement for standing in cases brought" under the existing Declaratory Judgment Act "regarding the legality or constitutionality of a governmental action." The Court reasoned as follows:

> The language of the new statute is sufficiently similar to the standing provision of the Tennessee Declaratory Judgments Act, which grants standing to "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute." Tenn. Code Ann. § 29-14-103. As such, we conclude that the new statute retains a particularized injury requirement.

While the word "affected" is indeed used to define who may bring a cause of action under the existing Declaratory Judgment Act and while it is also true that courts have grafted a

"particularized injury requirement" onto this word, that Act makes use of the word "affected" in another context as well, the joinder of parties upon whom no "particularized injury requirement" has ever been imposed. It is found in T.C.A. § 29-14-107(a) and reads as follows, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. This provision recognizes the fact that person and a person's right can be "affected" under a statute in any number of ways without having a "particularized injury."

Therefore, even if one were to conclude the potential for sanctions against the Minister Plaintiffs under T.C.A. § 36-3-305 did not rise to the level of a "particularized injury," that would not mean that the Minister Plaintiffs cannot be affected by *Obergefell* based on the effect it may have had on the In-state Licensing Statutes. For example, they may no longer solemnize marriages for legal purposes if courts will not resolve their uncertainty regarding *Obergefell's* affect. And, if *Obergefell* means that sexual complementariness is now legally irrelevant to the definition and meaning of the marriages they solemnize on behalf of the state, then Minister Plaintiffs may stop solemnizing marriages for legal purposes as a matter of conscience, such marriages now being defined in law contrary to their theological and doctrinal beliefs. T.R. Vol. II, p. 222, ¶ 5. So, in this broader and more generalized sense, they are "affected" by the In-state Licensing Statutes post-*Obergefell*.

Given that both T.C.A. §29-14-103 and T.C.A. § 1-3-121 grant a cause of action under the Declaratory Judgment Act and the causes of action under both statutes can involve the constitutionality of statutes and constitutional rights related thereto, the only difference between the word "affect" in those statutes is that the word "affect" in T.C.A. § 26-14-103 is subject to a

"particularized" injury requirement. Therefore, T.C.A. §1-3-121 must mean that the cause of action granted thereunder is "notwithstanding" the particularized injury requirement to which the word "affected" is subject under T.C.A. § 29-14-103.

Thus, the Court of Appeals' construction of the word "affected" in T.C.A. §1-3-121 violates the principles of this Court in *Browder* in two ways. First, its "construction" of the "notwithstanding any law" in T.C.A. § 1-3-121 effectively means that those words do not "convey [any] intent and [have no] meaning and purpose." *Browder*, *infra* p. 3. Second, by this construction, the Court of Appeals necessarily "limit[ed] [the] meaning" of the new statute, despite a clear intent by the Legislature to grant a cause of action "notwithstanding" existing law. *Id.*

But the foregoing analysis also has implications for Citizen Plaintiffs. If T.C.A. §1-3-121 does away with the particularized injury requirement for standing to which the word "affected" in T.C.A. § 29-14-103 is subject and makes the word "affected" broader and more generalized, then that certainly relaxes the standing analysis employed by *Walker* under the narrower sense of that word at the time *Walker* was decided. Citizen Plaintiffs standing should be even more clear.

Because "notwithstanding any law to the contrary" in T.C.A. § 1-3-121 must mean something relative to the types of plaintiffs who have a cause of action for declaratory relief, permission to appeal should be granted, the decision of the Court of Appeals in this regard reversed, and an order entered granting Minister Plaintiffs and Citizen Plaintiffs standing and remanding the case to the Trial Court for disposition on the merits.

QUESTION 6. Permission to appeal should be granted because this Court needs to settle the important issue of law created by the Court of Appeals' erroneous holding that Plaintiffs lacked

standing by drawing conclusions about legislative intent for elision purposes from various actions by the General Assembly taken after submission of the case on oral argument and not in the record and about which the parties were not allowed to submit proof or be heard.

Plaintiffs have found no case involving a court's use of post-submission facts involving the activities of non-litigants—here, the General Assembly—to evaluate the applicability of a remedial tool—here, elision—to a disputed legal issue at the standing stage of a proceeding.

The closest line of authority found by Plaintiffs' counsel involves error created by judges taking personal views or making personal examinations of material objects or evidence. It is reversible error for a decision to rest on evidentiary conclusions drawn by a judge's views or examinations of such objects or evidence without sufficient evidence in the record to otherwise support the judge's conclusions. *Tarpley v. Hornyak*, 174 S.W. 736 (Tenn. Ct. App. 2004). While arriving at evidentiary conclusions is not the same as drawing conclusions about legislative intent, they are similar when both conclusions are based on matters outside the record. In that case, the same concerns articulated in *Tarpley* should apply.

In *Tarpley*, the Court noted that where the judge is essentially providing evidence outside the record, based on his or her view or examination of relevant material objects, the court effectively becomes a witness providing "testimony" that is not in the record. This, the *Tarpley* Court said, is problematic because the "parties have no opportunity to cross-examine, to object to the introduction of the evidence, or to rebut the evidence." *Id.* at 748. This, in turn, violates the principle that "[t]he fair and impartial administration of justice demands that facts be determined only upon evidence properly presented on the record." *Id*. That is why legal conclusions based on views without other "evidence of record sufficient to support the judgment" constitutes reversible error. *Id.*

In the present case, the Court of Appeals said:

> The Legislature has also acted in accord with its preference [that the In-state Licensing Statutes be considered valid]. Just this year the Legislature adopted a bill to amend Tennessee's marriage license laws relative to the minimum age for marriage, making it unlawful for a county clerk to issue a marriage license when "[e]ither of the contracting parties is under seventeen (17) years of age." H.R. 2134, § 3, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018). How can this be, if as plaintiffs claim, the requirement for the issuance of a marriage license has been completely invalidated? The answer is that it cannot.

Opinion, 10 n. 4. Essentially the Court of Appeals put forward "evidence" of legislative intent not in the record and not addressed by any of the parties, and then asked, rhetorically, who could possibly question its conclusion in regard to that "evidence."

Plaintiffs tried to respond in its Petition for a Rehearing by indicating what manner of evidence of legislative history it could have provided, but their response was summarily rebuffed. Furthermore, this "evidence" of Legislative intent was used to support a legal conclusion that was otherwise based strictly on "intent" drawn from the general elision statute. Thus, it is impossible for anyone to determine what weight this "evidence" of legislative intent was given in view of the Court of Appeals' complete disregard of the principles of analysis related to elision set forth in *Crank.* Plaintiffs were not accorded a "fair and impartial administration of justice." *Id*

However, even without further evidence of legislative intent, a sufficient answer to the Court of Appeals' rhetorical question is found in the legal fact that no court has adjudicated the constitutionality and continuing validity of the licensing statute itself, T.C.A. 36-3-104(a)(1). Until *Obergefell* is interpreted and applied and any issues related to elision and its interplay with the Marriage Amendment are adjudicated, it is lawful for Defendant to issue licenses to "male and female contracting parties," and it is lawful for the Legislature to assume such, unless, of course, the *Spec* decision applies, in which case that statute has been invalid since June 26, 2015,

regardless of what the Legislature may think. In that case, all actions by the Defendant since then have been *ultra vires*.

Furthermore, the Court of Appeals' rhetorical question exposes a faulty assumption that underlies its conclusion about legislative intent. The Court of Appeals assumed that if the Plaintiffs' legal assertions as to the invalidity of T.C.A. § 36-3-104(a)(1) were correct, then the Legislature's actions should also align with those assertions. For the Court of Appeals, this discrepancy was proof that the Legislature does not think the Plaintiffs' legal assertions are correct. However, this assumption and the legal conclusion based thereon ignores the fact that the Legislature has a constitutional role to play in this matter that does not pertain to citizens, and thus its interests are not the same. Therefore, it should not be surprising that its response to the issues created by *Obergefell* would not be the same as the Plaintiffs.

This difference in interest but alignment with Plaintiffs' belief that *Obergefell* raises critical constitutional questions is demonstrated by the fact the Legislature, in the session immediately following the *Obergefell* decision, overwhelming adopted House Joint Resolution 529. T.R. Vol. III, pp. 439-440. That Resolution attacked the legal assumption still being made today by Defendant that a federal court can order a state to issue a license that state law has never authorized. The Resolution says, in pertinent part,

> WHEREAS, the majority in *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"; and
>
> WHEREAS, this particular aspect of its ruling raises the broader and even more important constitutional issue of which branch of government in our constitutional republic can enact or amend state laws;

Then, in the resolving clause that immediately followed these Legislative findings, the Legislature "expresse[d] its strong disagreement with the constitutional overreach in *Obergefell v. Hodges* that, in violation of the constitutional and judicially recognized principles of

federalism and separation of powers, *purports to allow federal courts to order or direct a state legislative body to affirmatively amend or replace a state statute*." (emphasis added)

In addition, the resolving clause "acknowledges the reminder of Justice Antonin Scalia in his dissenting opinion in *Obergefell v. Hodges* that 'With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the reasoned judgment of a bare majority of this Court—we move one step closer to being reminded of our impotence.'" *Obergefell*, S. Ct. at 2631. It is this dissenting Justice and, in particular, this portion of his dissenting opinion that the Court of Appeals ignored in its ruminations concerning the import of the other three dissents on how *Obergefell* should be interpreted.

In other words, the Legislature has not changed the language in T.C.A. § 36-3-104(a)(1) regarding "males and females" or repealed or amended the "one man" and "one woman" requirement in T.C.A. § 36-3-113 law for a reason. It is allowing the "impotence" of the Supreme Court to change a state law or compel a state Legislative body to enact a state law to be challenged by these very proceedings and for the legal process to work itself out before taking any action in regard to the male-female requirements in the In-state Licensing Statutes.[28]

For the foregoing reason, permission to appeal should be granted, standing granted, and all the issues created by the Court of Appeals' erroneous application of the judicial remedy of elision at the standing stage of this lawsuit can be adjudicated on the basis of a full record.

## CONCLUSION

[28] It is doubtful that the Legislature, as a Legislative body, has standing to bring a mandamus action to enforce T.C.A. 36-3-104(a)(1) and T.C.A. §36-3-113(a) and (b) as enacted and re-enactment of the same statutes would be a vain act. Thus, the Legislature's most obvious means of addressing an apparent usurpation of its Legislative authority by the U.S. Supreme Court is to not take any legislative action with respect to the male and female language in T.C.A. § 36-3-104(a)(1) or the one man and one woman language in T.C.A. § 36-3-113 that would imply its consent thereto. That it has taken action in regard to other aspects of the In-state Licensing statutes is not legally conclusive as to Legislative's interpretation of *Obergefell's* requirements and its effect on those statutes.

The case at bar involves a matter of great public importance, raising not only critical questions of law and the balance of constitutional authority respecting the state's sovereignty and the separation of powers, but legal questions of first impression. Consequently, Minister Plaintiffs and Citizen Plaintiffs respectfully submit that permission to appeal be granted, that the decision of the Court of Appeals be reversed, and that an order be entered granting them both Minister Plaintiffs and Citizen Plaintiffs standing and remanding the case to the Trial Court for disposition on the merits.

Respectfully submitted,

_____
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Application and all attachments hereto have been served via U.S. Mail, postage prepaid, upon counsel of record for Defendant, Lisa M. Carson, 306 Public Square, Franklin, TN 37064, and by U.S. mail, postage prepaid, on Herbert H. Slatery, III, c/o Alexander S. Rieger, P.O. Box 20207, Nashville, TN 37202, on this the _____ day of August, 2018.

_____
David E. Fowler

# APPENDIX

Exhibit 1 – Court of Appeals' Opinion filed May 22, 2018

Exhibit 2 – Court of Appeals' Order Denying Rehearing filed June 13, 2018

Exhibit 3 – Relevant Constitutional Provisions and Statutes