IN THE COURT OF APPEALS FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

George Grant, Lyndon Allen, Tim McCorkle, Larry Tomczak, and Deborah Deaver	)	
Plaintiffs,	)	
v.	)	**APPEAL NO. M2019-01099-COA-R3-CV**
	)	**(Trial Court Case No. 44859)**
Elaine Anderson, Clerk of Williamson County, TN And **Herbert H. Slatery, III, Attorney General And Reporter for the State of Tennessee,**	)	
Defendants.	)	

BRIEF OF AMICI CURIAE TENNESSEE INDEPENDENT BAPTIST FOR RELIGIOUS LIBERTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

TENNESSEE CONSTITUTION

STATUTES AND RULES

ARGUMENT OF LAW

I. Introduction

The basis for the Minister Plaintiffs' Motion for Relief from Judgment Pursuant to Tenn. R. Civ. P. 60.02 was "that in dismissing Plaintiffs' claims for lack of standing this Court interpreted Tennessee's statute for the licensing of marriages, T.C.A. § 36-3-104(a)(1), in a manner that authorized the issuance of marriage licenses to other than "male and female contracting parties" as provided for in that statute and that such an interpretation is expressly made 'void and unenforceable' by virtue of second sentence of Article XI, Section 18 of the Tennessee Constitution (hereafter the 'Marriage Amendment')." Such a construction of Tenn. Code Ann. § 36-3-104(a)(1) raises precisely the kind of interest for the ministers represented by Tennessee Independent Baptist for Religious Liberty (hereinafter "TIBRL"), and perhaps the original Minister Plaintiffs, for which declaratory relief was intended under Chapter 14 of Title 29. For this reason, TIBRL would have standing to assert these interests on their behalf. See *A.C.L.U. v. Darnell*, 195 S.W.3d 612, 626 (Tenn. 2006) (stating that "[t]o establish standing, an association . . . must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.)

There is no question that TBIRL's constituent ministers have a legal status as state-approved marriage officiants pursuant to Tenn. Code Ann. § 36-3- 301 that "distinguishes [them] from the undifferentiated mass of the public.'" *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (2001) quoting 32 Am.Jur.2d Federal Courts § 676 (1995). Not just any Tennessee resident or citizen, or even public official, can solemnize a marriage for the purpose of it being accorded legal status under state and federal law. Thus, the ministers represented by TIBRL certainly have "rights" in

regard to the legalization of marriages in Tennessee and a "status" in regard to those marriages and the parties thereto that the general citizenry do not have.

In addition, they are certainly "interested" in and "affected by" the "statute[s]" comprising Chapter 3 of Title 36 of the Tennessee Code Annotated (hereinafter "Marriage Licensing Statutes") as it regulates, under pain of criminal and monetary sanctions, the circumstances under which they have authority to solemnize a marriage and what they must do with respect to the licenses presented to them for solemnization. Tenn. Code Ann. § 29-14-103. By the express terms of Tenn. Code. Ann. § 36-3-103(a), it is the license issued pursuant to Tenn. Code Ann. § 36-3-104(a)(1) that authorizes officiating ministers to solemnize the intended marriage as legally recognized marital contract. And what TIBRL seeks to address on behalf of its constituent ministers is a "question of construction" made in its opinion regarding those statutes, specifically, (A) the nature of the act in which they are engaged when they solemnize a marriage under those statutes for legal recognition purposes as a designated agent for the state, and (B) whether the nature of the act as defined by that construction presents to them a matter of conscience that, in the words of Article I, section 3 of the Tennessee Constitution is in conflict with "human authority."[1]

II. The Standing of Minister Plaintiffs Through the Eyes of TIBRL and its Ministers.

A. Introduction.

In its opinion justifying its affirmation of the original dismissal of the Minister Plaintiffs' claims for lack of standing, this Court said, "On appeal, the Minister Plaintiffs claimed to have 'alleged that they would continue to solemnize opposite-sex marriages in the future.'" Opinion,

[1] Article I, section 3 of the Tennessee Constitution provides, in pertinent part, "no human authority can, in any case whatever, control or interfere with the rights of conscience."

T.R. Vol. I, p. 145. That allegation, however, was clearly based on whether the Marriage Licensure Statutes were still valid after the U.S. Supreme Court's decision in *Obergefell v. Hodges,* 576 U.S. ___, 135 S. Ct. 2584 (2015). The Ministers represented by TIBRL would have alleged the same.

However, the Court's opinion also noted, relative to the Minister Plaintiffs, "To the extent their uncertainty arises from licensing of same-sex marriage, they have no real interest for purposes of standing." Opinion, T.R. Vol. 1, p. 145. This is incorrect as to TIBRL's pastors and, as to them (and mostly likely the Minister Plaintiffs'), herein lays the error of this Court. It reflects a profound misunderstanding by this Court as to the relationship between ministers, at least TIBRL's constituent ministers, and how the state law under which they operate defines marriage. TIBLR's ministers have a particular and unique concern[2] and stake in how the civil law defines marriage and how the civil law's definition corresponds to their religious belief about marriage.

For example, by the following statement, the Court appears to have thought that Defendant (and all county clerks) issuing licenses to same-sex couples was of no significance or importance to the Minister Plaintiffs, "the amended complaint shows no factual allegation that the Minister Plaintiffs have or intend to solemnize same-sex marriages." Opinion, T.R. Vol. 1, p. 145. However, that is exactly the problem as regards the interest of TIBRL's constituent ministers: They (and perhaps the original Minister Plaintiffs) have no intention of solemnizing a same-sex marriage. Yet, that may be exactly what TIBRL's Ministers have been doing for the last four

[2] The concerns of TIBRL's ministers is of particular and unique concern vis-à-vis public officials who are authorized agents of the state for solemnizing marriages because those officials may have no religious convictions regarding the true nature of marriage, may draw a distinction between their public and private lives, and, in any event, do not have a what in Christianity is a particular calling in regard to the other members comprising the Body of Christ, that of pastor or minister. See Holy Bible, Ephesians 4:11 ("And He gave some, apostles; and some, prophets; and some, evangelists; and some, pastors and teachers. (KJV))

years and may be doing if they continue to solemnize marriage licenses.

This is so because *all marriages in Tennessee are same-sex marriages* if this Court's interpretation of *Obergefell* and elision are correct and Defendant has had the legal authority, *since Obergefell*, to issue licenses to couples without regard to their sex. But, if the Defendant has the legal authority to issue a marriage license to same-sex couples *that can only mean that the law now defines marriage without regard to sex, and such a definition is in direct conflict with the express beliefs*[3] *represented by TIBRL to its minister constituents.* This point either was not considered by or presented to this Court or to the Trial Court.

Defendant has not contested the Minister Plaintiffs standing on the ground that she is issuing one kind of license for a marriage defined without regard to the two different biological sexes and a different one for a marriage defined in terms of the differences between the two biological sexes. There is only one license because there is only one licensing statute—either the Defendant is breaking the law by issuing licenses to same-sex couples or the law now defines marriage without regard to biological sex.

This Court and the Trial Court may have conflated *the existential fact* that the marriages solemnized by Minister Plaintiffs were or would be comprised of an opposite sex couple *with the definition* of marriage by statute. *It is to the civil law that TIBRL's constituent ministers must bow if they are to solemnize a marital relationship as a "legal union," as such is affirmed in TIBRL's by-laws, and if that law creating that legal union is contrary to God's law, then many, if not most, of TIBRL's constituent ministers cannot in good conscience*[4] *bow down to such a civil*

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[3] TIBRL'S by-laws "affirm the biblical teaching of marriage defined as the legal union between one man and one woman as husband and wife and a spouse as a husband and wife of the opposite gender (Holy Bible, Genesis 1:27–28, 2:20–25; Matthew 19:3–6; 1 Corinthians 7:1–3; Ephesians 5:21–33)."

[4] The importance of conscience in the life of those who profess Jesus Christ as their Lord and Savior is demonstrated by any number of passages from the Holy Bible. See e.g. Acts 23:1, 24:16; Romans 9:1; 1 Corinthians 8:12; 2 Corinthians 1:12, 4:12; 1 Timothy 1:5, 19, 3:19; 2 Timothy 1:3; Hebrews 9:9, 10:22, 13:18; 1 Peter 3:16, 21.

law.

B. Defendant's Interpretation of Tenn. Code Ann. § 36-3-104(a)(1) has caused a violation of the free speech rights of TIBRL's constituent ministers under First Amendment to the U.S. Constitution.

As a result of foregoing, if Tennessee law was, in fact, changed by a holding in *Obergefell*, even though it has never been applied by any court at any level to either Defendant or the state of Tennessee so as to enjoin enforcement of or abrogate the provisions of the Marriage Amendment and state DOMA statute and sever the express language of "male and female" found in Tenn. Code Ann. § 36-3-104(a)(1), then TIBRL's constituent ministers, by signing and returning the marriage licenses issued by Defendant and other county clerks, have been and will be signing a license that defines the marital relationship and marital contract in a manner that directly conflicts with their beliefs regarding the very nature of the marital relationship and the marital contract they solemnize. Because state law requires TIBLR's constituent ministers to sign the marriage license in order for the martial relation and martial contract they solemnize to be given legal recognition by the state of Tennessee, state law violates and will continue to violate the rights of these ministers under the First Amendment to the United States Constitution.

With respect to the First Amendment, the United States Supreme Court has said, "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Woolsey v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, ____ (1977), quoting *Board of Education* v. *Barnette,* 319 U. S. 624, 637 (1943). This "right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.*

In *Woolsey*, the constitutional question was "whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs." *Id.* at 706-707. In stating that the sanctions were unconstitutional, the Court said,

> As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day. (Footnote omitted). The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Id. at 715.

Similarly, "as a condition" of bringing about "the *legal* union between one man and one woman as husband and wife and a spouse as a husband and wife of the opposite gender," as marriage is defined in TBIRL's by-laws, TBIRL's constituent ministers sign marriage licenses (and the Department of Health's Certificate of Marriage, see Tenn. Code Ann. 68-3-401) and return them to county clerks where they become a matter of public record. This is compelled speech and is a requirement that TIBRL's constituent ministers endorse the definition and therefore the meaning of marriage set forth is this supposed new, re-written version of Tenn. Code Ann. 36-3-104(a)(1).

Again, *Woolsey* is instructive. With regard to the message conveyed on New Hampshire's license plate, the U.S. Supreme Court said,

> The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

Similarly, the state's marriage licensure law communicates the state's "official view" as to the nature and meaning of marriage. After all, the United States Supreme Court, in *Obergefell*, the holdings of which Defendant has imposed on TIBLR's constituent ministers absent a court order or change in any statutory language, ascribed to marriage "transcendent importance" and "meaning" and spoke of marriage as a "reality," all of which communicate ideas and all of which have theological and philosophical connotations.

The communicative aspect of civil law in relation to marriage was made clear in *Obergefell*. With respect to the Kentucky, Michigan, and Ohio marriage licensing laws that were at issue under the decision styled, *Obergefell v. Hodges*, the U.S. Supreme Court said, "Were the Court to uphold the challenged laws as constitutional, *it would teach the Nation* that these laws are in accord with our society's most basic compact." *Obergefell*, 135 S.Ct. at 2606 (emphasis). Tenn. Code Ann. § 36-3-104(a)(1), as being interpreted and administered by Defendant, "teaches" Tennesseans a view about the "reality" about marriage and that which gives the marital relation "meaning" and makes it a form of "transcendent importance" that is inimical to the beliefs of TIBLR's constituent ministers and contrary to what they desire to "teach." In being required to sign the license issued by Defendant, which this Court seems to think now defines marriage without regard to biological sex, as a condition of the marital relation being given legal recognition, TIBRL's ministers are required to "teach" a view of marriage with which they strongly disagree. And, again, this is because there can only be one legal definition of a licensed marriage and apparently that definition, according both to Defendant and this Court, now excludes from its meaning the element of "male and female contracting parties." Tenn. Code Ann. § 36-3-104(a)(1).

Moreover, the execution of these licenses since *Obergefell* could be used against any of

TIBRL"s ministers by a same-sex couple insistent on having them solemnize their marriage as evidence or on using some part of their church facility for the ceremony or reception in a discrimination claim.[5] The argument is simple: their past conduct in signing marriage *licenses* and doing so as pastor of their church and in their church demonstrates that they have no objection to solemnizing marriages *under a state law* that violates their personal religious beliefs.

TIBRL's constituent ministers who solemnized marriage since *Obergefell* relied on the fact that the Marriage Amendment had never been repealed or enjoined or the licensing statutes amended to presume, as they should have been entitled by law to do, that those licensing laws and the licensing they were signing were still in accord with their religious beliefs and convictions.

However, if those laws were swept away by a mere holding in *Obergefell*, and not by the actual judgment in *Tanco v. Haslam*, as the prior opinion of this Court seems to say, then a number of TIBRL's constituent ministers have already acted, albeit unintentionally, in a manner they would not otherwise have acted. Moreover that harm will continue if they solemnize marriages in the future only to later find that the law was changed on June 26, 2015 (or August 24, 2015 when the Final Order and Permanent Injunction was entered in *Tanco v. Haslam*).

Therefore, the free speech rights of TIBRL's constituent ministers under the First

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[5] The discrimination could be based on the word "sex," which has increasingly been interpreted by courts as including orientation, the argument being that the denial of some service is not because of a religious belief about same-sex marriage, but about an underlying belief about homosexuality that is "sex" discrimination. This very issue of sexual orientation as within the meaning of sex is now pending before the United States Supreme Court in regard to Title VII of the United States Code. See United States Supreme Court Case Nos. 17-1618, *Bostock v. Clayton County*, 17-1623, *Altitude Express v. Zarda*, and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC*, et al.; see *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574-575 (2018) ("We also hold that discrimination on the basis of transgender and transitioning status violates Title VII.") ; see *Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission*, 584 U. S. ____, 138 S.Ct. 1719, 1722 (2018) (noting "the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face [sexual orientation] discrimination when they seek goods or services").

Amendment are being violated by the actions of Defendant (and other county clerks acting similarly) through her unlawful interpretation of Tenn. Code Ann. § 36-3-104(a)(1) when, in fact, there would be no such violation if Defendant and other county clerks were faithfully administering the marriage licensing statutes according to the un-enjoined provisions of Article XI, section 18 and Tenn. Code. Ann. § 36-3-113. For this injury, TIBRL's constituent members would have standing and, accordingly, TIBRL would have standing.

C. Defendant's Interpretation of Tenn. Code Ann. § 36-3-104(a)(1) has caused a violation of TIBRL's constituent ministers' conscience rights under Article I, section 3 of the Tennessee Constitution.

While the issue of standing under the jurisprudence of the Tennessee Supreme Court "parallels the constitutional restriction on federal court jurisdiction to 'cases and controversies,'" that Court has nevertheless said "the issue of standing [is] a *judge*-made doctrine." *Mayhew*, 46 S.W.3d at 766. According to the state's Supreme Court, "'the focus should be on whether the complaining party has alleged an injury in fact, economic *or otherwise*, which distinguishes that party, in relation to the alleged violations, from the undifferentiated mass of the public.'" *Mayhew*, 46 S.W.3d at 767.

In this regard, Article I, section 3 of the Tennessee Constitution provides, "[N]o human authority can, in any case whatever, control *or interfere with* the *rights of conscience*." Given this constitutional restriction on government action, surely, the courts of Tennessee would not hold that injuries to one's religious beliefs, which for TIBRL's ministers are matters of conscience, are inconsequential and cannot constitute an injury to them. Surely the courts of Tennessee would not hold that TIBRL's constituent ministers have no standing to have a court determine if, by signing the license issued by Defendant (and other county clerks) in accord with her interpretation of Tenn. Code Ann. § 36-3-104(a)(1), Defendant has interfered with their

rights of conscience, for there is now no means by which they bring about the "legal union" of a man and woman as husband and wife as described in their by-laws except by signing the license Defendant has issued.

Therefore, for a court to use a "judge-made" doctrine—human authority—that imposes no *constitutional* bar to jurisdiction under the Declaratory Judgment Act[6] to keep ministers from knowing what they are doing and what message they are "teaching" about the "meaning" and "transcendent importance" of the marital relation by signing a marriage license is to "interfere" with conscience and seemingly to treat conscience as an aspect of the human person to which no injury can accrue. But this is contrary to human experience, for every person has a conscience by which they find themselves condemned or justified according to even their own standards of right and wrong. Moreover, from the viewpoint of TIBRL's constituent minsters, this view of the human experience in regard to conscience is affirmed in Scripture. See Holy Bible, Book of Romans 2:14-16 (" For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law written in their hearts, their conscience also bearing witness, and *their thoughts the mean while accusing or else excusing one another*; in the day when God shall judge the secrets of men by Jesus Christ according to my gospel." (KJV)) (emphasis added).

It is not defense for this Court to tell TIBRL's constituent ministers they can avoid the injury by discontinuing their historical practice of making legal the marital relationships they solemnize. The same could have been said by the United States Supreme Court about the

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[6] This ought particularly to be true in view of Tenn. Code Ann. § 1-3-121 that was adopted following the institution of the original action. The effect of that statute on the judge-made doctrine of standing would most certainly be pled in any new action and briefed and argued with greater specificity. That statute states, "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."

Woolseys in regard to the message communicated on New Hampshire's license plates. There was no law requiring the Woolseys to operate an automobile and, therefore, display the offending message on a car license plate; they had, as do all people, other means of transportation, even if less convenient. Similarly, this Court cannot dismiss the violation of rights asserted by TIBRL's ministers by telling them to exclude from their ministry the solemnization of marital relations because other people can solemnize the marrying couple's relationship.

Therefore, TIBLR's constituent ministers now suffer an injury to their conscience by the actions of Defendant (and other county clerks acting similarly) when, in fact, there would be no such violation if Defendant and other county clerks were faithfully administering the marriage licensing statutes according to the un-enjoined provisions of Article XI, section 18 and Tenn. Code. Ann. § 36-3-113. For this injury, TIBRL's constituent members would have standing and, accordingly, TIBRL would have standing.

III. TIBRL's Minister's Support for Relief under Rule 60.02.

While TIBRL's Ministers join in support of the arguments made by the Minister Plaintiffs in regard to Tenn. R. Civ. P. 60.02(3) and (4), they particularly support relief under Tenn. R. Civ. P. 60.02(5).

In regard to that provision, the Tennessee Supreme Court has said, "Reasons justifying relief are found only '*in cases of overwhelming importance* or in cases involving *extraordinary circumstances* or extreme hardship.'" *Hussey v. Woods*, 538 S.W.3d 476, 485-486 (2017) (emphasis added). TIBRL can think of no case of more overwhelming importance than bringing resolution and finality.

What makes the issue raised by original Amended Complaint and the issue raised by present Motion, namely, the extent to which the holdings in Obergefell apply to the second sentence in

Article XI, section 18 of the Tennessee Constitution, of such overwhelming importance is what the majority in *Obergefell* acknowledged, "[t]he centrality of marriage to the human condition." *Obergefell v. Hodges*, 135 S.Ct. at 2594. The majority went on to acknowledge:

> Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

Id. Yet, this status of the marital relation that is central to the human condition and binds society together is and must be unsettled as long as the Tennessee Constitution still makes "void and unenforceable" any "policy, law, or judicial interpretation purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman.

This Court cannot turn a blind eye to the evidence that was brought before the Trial Court in support of this Motion—the limited scope of Final Order and Permanent Injunction entered in *Tanco v. Haslam*. This Court should not allow a *judge*-made doctrine to keep a party from being heard when it is clear that the original pleadings put the Defendant (and the Trial Court) on "notice" of serious questions regarding the application of *Obergefell's* holdings to Tennessee Marriage Licensure Statutes.

Moreover, the definition of marriage is central to so many other issues under Tennessee law, such as the nature of the parent child relationship. As Justice Alito said in his *Obergefell* dissent,

> Family structure reflects the characteristics of a civilization, and *changes in family structure* and in the popular understanding of marriage and the family *can have profound effects. Past changes in the understanding of marriage*—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—*have had far-reaching consequences.* (emphasis added)

Obergefell will be to all other issues related to the family and human sexuality as *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472 (2003) was to *Obergefell*.

In *Lawrence*, Justice Kennedy, *Obergefell's* author, in writing for five of his colleagues, held that state sodomy laws were unconstitutional. Justice Scalia's dissent as to the effects of that holding on marriage was prescient:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante,* at 578; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante,* at 567; *what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," ibid.* Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. *This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.* (emphasis added)

Lawrence, 539 U.S. at 604-605.

Justice Alito's dissent was proven prescient less than two years later by the *per curiam* manner in which the U.S. Supreme Court jettisoned Arkansas Birth certificate laws because it made the common sense assumption that a husband might be the father of his wife's child while denying a presumption to a woman whose wife had a child by a sperm donor. *Pavan v. Smit*h, 582 U. S. ___, 137 S.Ct. 2075, 2077 (2017) (rejecting the argument that "the State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State . . . [b]ecause that differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'").

Finally, what makes this case one of such "overwhelming importance" and one of such "extraordinary circumstance" that Rule 60.02(5) should be applied to reinstate the Amended Complaint for further proceedings, including further amendment if necessary, and intervention by other interested parties, such as TIBRL and same-sex couples whose licenses may be "void

and unenforceable," is the destruction of any semblance of true constitutional governance that is taking place in our legal and judicial system. This is not said lightly, but was, in fact, said by Justice Alito in his *Obergefell* dissent:

> *Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed.* A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. *What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.*

Obergefell, 135 S.Ct. at 2643 (J. Alito, dissenting)

TIBRL respectfully submits that Justice Alito's observation may be true with respect to restraints internal to the Court itself, but our system of dual sovereigns is a check available to the states and one that Justice Scalia urged upon them:

> 'The Judiciary . . . must ultimately depend upon the aid of the executive arm' an*d 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.*

Obergefell, 135 S.Ct. at 2631 (Scalia, J. dissenting) (emphasis added).

This check—the assertion of state sovereignty—is not one that can be applied by Chief Justice Roberts, who said of majority's opinion in *Obergefell*, "[D]o not celebrate the Constitution. It had nothing to do with it." 135 S.Ct. at 2626. Nor can that check be applied were the Chief Justice to join with Justices Thomas, Alito, Gorsuch, and Kavanaugh, though they could now check *Obergefell's* abuse of power *if presented with a case or controversy grounded in the inability of federal courts to commandeer states into enacting positive laws under the 14th Amendment.* In this regard, TIBRL joins in the arguments made by the Minister Plaintiffs on pages 29 through 32 of their Brief.

But this Court is not likewise powerless. *Obergefell* left open or even created at least six different constitutional issues:

1. Do the powers of the federal judiciary extend to imposing on states a requirement that they enact laws by which a license is provided for the form or kind of marriage to which people have a right under the Fourteenth Amendment according to the opinion of the United States Supreme Court in *Obergefell*?

2. In regard to the proceeding questions, does clause 5 of the Fourteenth Amendment not make it clear that Congress alone has the constitutional power to remedy violations of that Amendment and, to whatever the extent federal courts may originally have had such remedial powers under Article III of the U.S. Constitution, did clause 5 of the Fourteenth Amendment curtail those powers in regard to state violations of Fourteenth Amendment rights? If so, is this not then the impotence of which Justice Scalia spoke?

3. Did the holdings in *Obergefell* abrogate the powers of the state in our constitutional system of dual sovereigns so as to take away the power of the states to decide what branches or office of its government—if any—should issue licenses for a Fourteenth Amendment form of marriage (or even a state marriage, for that matter)? If not, then the *Obergefell* Court did not and could not order an official authorized by Tennessee to issue a license for a marital relation *defined by state law* (in terms of male and female) to also issue a license for a marital relation *defined by the Fourteenth Amendment* without regard to male and female.

4. Is there, in fact, a constitutional incompatibility between a provision in the Tennessee constitution forbidding the state to license a marriage by state statutes unless defined in terms of male and female union and a federal right to marry that is provided for *under and defined by the Fourteenth Amendment* for the licensing of which the federal government is responsible?

5. Is a state official authorized to issue a license for a relationship defined in state law only in terms of male and female union *ipso facto* authorized to issue a license for a relationship, unknown to state law, defined without reference to male and female union and, if not, is this then the impotence of which Justice Scalia spoke?

6. Since *Obergefell* dealt with "enacted law and policy" and expressly stated that it did not "disparage" other views and understandings of the marital relation, are the holdings in *Obergefell* conclusive as to the constitutionality of Tennessee's licensing statutes, the language of which shows an intent to secure to a man and woman the pre-political form of marital contract envisioned by Tennessee's Constitution as existing at common law? If not, is this then the impotence of which Justice Scalia spoke?

These question are important, as part of a system of checks and balance on the federal judicial

power, because state courts are free to resolve these open and unresolved issues resulting from the "right to marry" according to their own interpretation of the U.S. Constitution and their interpretation of *Obergefell's* holdings.

Federal courts have recognized that state courts have the constitutional authority to review constitutional questions and that their authority to do so is the same authority as that lodged in the lower federal courts. "'In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramouncy *for both sets of courts are governed by the same reviewing authority of the Supreme Court.*'" *United States ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075 (7th Cir. 1970) (quoting *State v. Coleman,* 46 N.J. 16, 36, 214 A.2d 393, 403 (1965)) (emphasis added).

Moreover, there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, "such results were contemplated by our federal system, and neither sovereign is required to, nor expected to, yield to the other," except as to matters in which federal law clearly controls. *Surrick v. Killion,* 449 F.3d 520, 535 (3d Cir.2006). In fact, the United States Supreme Court has acknowledged that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc. v. Kadish,* 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

In fact, two Justices of the United States Supreme Court have elaborated on this principle.

> The Supremacy Clause demands that state law yield to federal law, *but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.* In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

Lockhart v. Fretwell, 506 U.S. 364, 375-76, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring). See also *Steffel v. Thompson,* 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (Rehnquist, J., concurring) (noting that a state court "would not be compelled to follow" a lower federal court decision).

Thus, to the extent there are constitutional issues still be to resolved as a consequence of *Obergefell*, this Court has the same constitutional authority (and duty) to resolve them as would a federal court. The U.S. Supreme Court is then free to review the state judiciary's holdings, in this case, either by Defendant's appeal from the Tennessee Supreme Court or by a party, allegedly injured by those holdings, bringing suit against Tennessee or a County Clerk in federal court and proceeding through the federal system.

The legislature has exercised its power by choosing not to take any action to conform to the holdings in *Obergefell* and by adopting House Joint Resolution 529, which is before this Court, is evidence of the fact that their inaction is intentional.

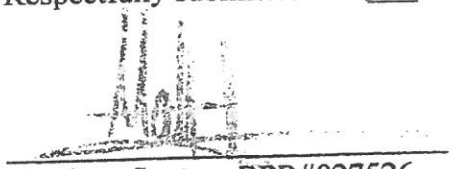
Now, it is time for this Court to exercise the check and balance it has been provided and that was invited by the esteemed late Justice Scalia and to let Justice Alito know that the "*corruption of our legal culture's conception of constitutional interpretation*" is not *"irremediable."* This Court has the authority to put to the U.S. Supreme Court the question of just how far the holdings in *Obergefell* go in obliterating the separation of powers and the protections of liberty entailed in our system of dual sovereigns. The very idea of representative government is at issue when the U.S. Supreme Court is treated as though it has the power to force states to enact laws and order state officials to do what state law has never authorized them to do.

CONCLUSION

For the following reasons, TIBRL respectfully request that this Court reverse the judgment

of the Trial Court denying the Minister Plaintiffs' Motion for Relief from Judgment, set aside the judgment of this Court dismissing their claims for lack of standing, and remand this case to the Trial Court for reconsideration of the original Motion to Dismiss in light of the provisions of the Marriage Amendment not enjoined in *Tanco v Haslam*.

Respectfully submitted this 6th day of November, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served via United States Postal Service, postage prepaid, upon counsel of record for Defendant Anderson, Lisa M. Carson, 306 Public Square, Franklin, TN 37064, and via United States Postal Service, postage prepaid, upon counsel of record for Plaintiffs, David E. Fowler, 1113 Murfreesboro Road, No. 106-167, Franklin, TN 37064, and via the United States Postal Service, postage prepaid, upon Herbert H. Slattery, III, c/o Alexander S. Rieger, Assistant Attorney General, P.O. Box 20207, Nashville, TN 37202-0207 on this the 6th day of November, 2019.

Matthew Sexton