

## Constitutional Government Defense Fund

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January 2, 2020

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County Officials Association of Tennessee  
226 Anne Dallas Dudley Boulevard, Suite 200  
Nashville, TN 37219

Re: Constitutionality of Marriage Licenses; Petition for Declaratory Order with Tennessee  
Department of Health

Dear Messr. Roberts and Archer:

I am General Counsel for the Constitutional Government Defense Fund. In that capacity, I am counsel of record for a number of Christian ministers and an organization called Independent Baptists for Religious Liberty in connection with a Petition for Declaratory Order filed with the Tennessee Department of Health. I have enclosed a copy of the Petition for your information as Enclosure No. 1.

The Petition asks the Department whether the Certificate of Marriage provided by the Department to the County Clerks after the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (June 26, 2015) complies with the provisions regarding marriage found in Article XI, section 18 that were not enjoined by the Final Order and Permanent Injunction entered on October 24, 2015, by federal District Court Judge Aleta Traugher, in *Tanco v. Haslam*. I have enclosed a copy of that Final Order and Permanent Injunction as Enclosure No. 2.

While that proceeding does not directly implicate County Clerks, the Department's Certificate is inextricably tied to the marriage license issued by County Clerks that, according to Tenn. Code Ann. 36-3-103(a), is the legal document that actually authorizes my clients to solemnize the marriages they conduct by ceremony. That solemnization is necessary for a marital relation *contracted in Tennessee* to be given legal recognition.

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However, the issuance of licenses by county clerks to persons other than a "male and female contracting party" as stated in Tenn. Code Ann. § 36-3-104(a)(1) presents my clients with a grave civil rights issue of conscience under the Tennessee Constitution, Article I, section 3, as well as a grave civil rights issue under the First Amendment to the U.S. Constitution regarding the free exercise of religion and government-compelled speech.

Specifically, the issue for my clients is the meaning and nature of the marital relation as set forth in Title 36, Chapter 3 of the Tennessee Code to which they are ascribing or affirming when they sign the marriage licenses being issued by Tennessee's County Clerks, namely, is the marriage they solemnize under those statutes defined in terms of the two biological sexes, male and female, or is it defined without regard to the existence of the two biological sexes.

My clients are of the opinion that the first two sentences of Article XI, section 18 of the Tennessee Constitution are still enforce relative to the licensure of marriages because they were not enjoined in *Tanco v. Haslam*. They provide 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.*

Notwithstanding the fact that this provision was not enjoined in *Tanco* relative to the marriage licensure laws and such was done at the urging of the Attorney General & Reporter (see "Defendants' Response," attached as Exhibit 2), it would appear that all the offices of Tennessee's county clerk are issuing licenses for marital contracts in reliance on the Attorney General's advice. See enclosed CTAS email dated June 26, 2015, 10:37 a.m. to [mgaiter@tiptonco.com](mailto:mgaiter@tiptonco.com), attached as Exhibit 3.

Therefore, it would appear that the county clerks are effectively interpreting and administering Tenn. Code Ann. § 36-3-(104(a)(1) in a manner that "purport[s] to define marriage as [some]thing other than the historical institution and legal contract between one man and one woman."

However, under the Tennessee Constitution this interpretation of Tenn. Code Ann. § 36-3-104(a)(1) "shall be void and unenforceable" or at least void and unenforceable as to those licenses being issued to same-sex couples. The latter possibility, however, does not bear on the conscience, free exercise, and compelled speech concerns of my clients.

As you know, General Slatery has no power to enjoin as unconstitutional the enforcement of any law because of Article II, section 2 of the Tennessee Constitution and his opinion as to the constitutionality of a law is not determinative with respect to the duties of ministerial officers

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in the performance of ministerial duties. See Attorney General Opinion 84-57, a copy of which is also enclosed as Exhibit 4.

I bring this to your attention as a matter of professional courtesy as my clients consider what steps should next be taken by them and perhaps their ministerial colleagues in order to be assured that they are not, in fact, solemnizing and affirming a form of *civil* marriage that *the laws* of Tennessee define contrary to or inconsistent with what they believe is true about the nature and meaning of marriage.

If you should have any questions concerning the foregoing, please do not hesitate to contact me.

Sincerely,



David Fowler

Cc: All Tennessee County Clerks  
The Honorable Bill Lee c/o Lang Wiseman