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Constitutional Government Defense Fund
1113 Murfreesboro Road, No. 106-167
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Re: Constitutionality of Tennessee's Enacted Laws Licensing Civil Marriage

I am a Professor of Law at the University of Notre Dame, where I have for decades taught constitutional law, including (since 2015) the *Obergefell* case. Before I began teaching at Notre Dame in 1992, I taught constitutional law for nine years at the University of Illinois College of Law. I have also been a Visiting Professor of constitutional law at Princeton University. At Notre Dame I direct (with my colleague John Finnis) the Natural Law Institute. I am also Co-Editor-in-Chief of *The American Journal of Jurisprudence*, an international forum for legal philosophy published by Oxford University Press. I have testified many times as an expert witness in constitutional law before Committees and Sub-Committees of the United States Congress.

My areas of expertise include church and state doctrine; U.S. Constitutional history; U.S. Constitutional interpretation and the history of U.S. Constitutional interpretation; Constitutional law; law and religion; and natural law theory.

You have asked me to examine *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015); *McFarland v. Pemberton*, 530 S.W.3d 76 (Tenn. 2017); Article VII, Section 1 and Article XI, section 18 of the Tennessee Constitution; and the provisions of Tennessee Code Annotated §§ 36-3-103, -104(a)(1), and -113 (Tennessee's statutes governing the need for a license prior to the solemnization of a marriage and setting forth the conditions on which a license can be issued; among these is the limitation of marriage licenses to "only one (1) man and one (1) woman").

I have also reviewed the following pleadings, which are part of the record in *Tanco v. Haslam*, United States District Court for the Middle District of Tennessee, Nashville Division, Case No. 3:13-cv-01159, made after the mandates were issued in *Obergefell* and are related to the Final Judgment and Permanent Injunction entered therein against the state of Tennessee: Motion for Entry of Final Order and Permanent Injunction filed by Plaintiffs' and the proposed Final Order and Permanent Injunction filed therewith, Defendants' Response in Opposition to

Plaintiffs' Motion for the Entry of Order and Permanent Injunction and the proposed Order attached thereto; Plaintiffs' Reply In Support of Its Motion for Entry of Final Order and Permanent Injunction; Judge Aleta A. Trauger's Memorandum and Order in Support of Final Order and Permanent Injunction entered on August 24, 2015, and Judge Trauger's Final Order and Permanent Injunction entered on August 24, 2015. It is my understanding that the *Tanco* case represents the only legal action brought by same-sex couples against the state of Tennessee relative to any of its enacted law governing civil marriage.

Based upon this reading of the foregoing documents and my professional analysis of them, my judgment is that Tennessee Code Annotated §§ 36-3-104(a)(1) and -113 are still in force with respect to the authority of county clerks to issue a license for an enacted form of civil marriage. Furthermore, the provisions of Article XI, section 18 of the Tennessee Constitution are still in force. Those provisions still prohibit the state from enacting laws or the state's judiciary from interpreting those laws in a manner that would authorize a state or local official to issue a license for a civil marriage, unless it is defined in terms of the male-female sex binary.

Consequently, it is my opinion that a county clerk may still issue a license for a civil marriage to opposite sex couples. The provisions of Tennessee's law referenced above and not enjoined in *Tanco* still prohibit the issuance of licenses for a civil marriage to "contracting parties" other than that of a "male and female."

In my professional judgment, however, a county clerk should reasonably expect that denial of a license to an opposite sex couple, if challenged in court, would result in an injunction prohibiting the enforcement (administration) of Tennessee Code Annotated § 36-3-104(a)(1). The injunction would be grounded in *Obergefell's* holding that the 14th Amendment prohibits the enforcement of enacted laws for the licensure of civil marriage if a state does not authorize the issuance of such a license to a same-sex couple on the same terms and conditions.

But even if the provisions of Tennessee Code Annotated §§ 36-3-104(a)(1) and -113 and the provisions of Article XI, section 18 relative thereto *were* enjoined, general principles of separation of powers within the American constitutional system would still hold that it is beyond the scope of the judicial power for any court to order a county clerk or the state to issue a license to a same-sex couple. All that a court could reasonably say in light of *Obergefell* is that a county clerk may not issue any licenses at all, unless authorized by the legislature to do so on an inclusive basis.

It is my opinion that once a county clerk is asked to issue a license to a same-sex couple, that clerk – after giving due consideration and regard to all of these legal considerations as well as the duty to uphold both the state and U.S. constitution -- should discontinue issuing *any* licenses until a court of competent jurisdiction authoritatively specifies how Article XI, section 18 is impacted by *Obergefell's* holdings.

With respect to this last mentioned question, I would observe that, neither in *Obergefell* itself nor in any case since, has the Supreme Court clarified whether it meant to create, for the first time in our country's history, a right *within the provisions of the 14th Amendment* to marry (and, moreover, without regard to the male-female sex binary). The Court has not yet clearly

undertaken this dramatic transformation of our settled tradition that the *states* retain plenary authority over legal regulation of the marital relationship, except for the few specific limiting conditions found in the Constitution (such as that articulated in *Loving v. Virginia*). Thus, the provisions of Article XI, section 18 of the Tennessee Constitution not enjoined in *Tanco* might still be within the powers reserved to the states by the Tenth Amendment.

Respectfully,



Gerard V. Bradley
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University of Notre Dame