No. 14-562

In the Supreme Court of the United States

VALERIA TANCO, ET AL., PETITIONERS

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

ABBY R. RUBENFELD
RUBENFELD LAW OFFICE, PC
2409 Hillsboro Road,
Ste. 200
Nashville, TN 37212

WILLIAM L. HARBISON
PHILLIP F. CRAMER
J. SCOTT HICKMAN
JOHN L. FARRINGER
SHERRARD & ROE, PLC
150 3rd Ave. South,
Ste. 1100
Nashville, TN 37201

MAUREEN T. HOLLAND
HOLLAND & ASSOC., PC
1429 Madison Avenue
Memphis, TN 38104

REGINA M. LAMBERT
7010 Stone Mill Drive
Knoxville, TN 37919

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
700 12th Street, N.W., Ste. 900
Washington, D.C. 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

CHRISTOPHER THOMAS BROWN
JUSTIN G. FLORENCE
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

SHANNON P. MINTER
DAVID C. CODELL
CHRISTOPHER F. STOLL
AMY WHELAN
ASAF ORR
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Ste. 370
San Francisco, CA 94102

Additional counsel on inside cover

PAUL S. KELLOGG
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, New York 10036

SAMIRA A. OMEROVIC*
EMERSON A. SIEGLE
JOHN T. DEY*
ROPES & GRAY LLP
One Metro Center
700 12th Street, N.W., Ste. 900
Washington, D.C. 20005

JOSHUA E. GOLDSTEIN
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

* Not admitted to practice in the District of Columbia; supervised by Ropes & Gray LLP partners who are members of the District of Columbia bar

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The Fourteenth Amendment prohibits Tennessee from treating petitioners' existing marriages as nullities under state law. Tennessee's Non-Recognition Laws strip petitioners of both the status and the protections of marriage, stigmatize their families, deprive them of critical legal protections, and leave them vulnerable to harm in virtually every aspect of their lives. None of the interests that respondents have asserted can justify the intentional imposition of such profoundly unequal treatment.

Rather than focus on the Fourteenth Amendment question on which the Court granted certiorari, respondents change the topic, arguing that the Full Faith and Credit Clause permits the State to disregard petitioners' marriages. That Clause, however, imposes *obligations* on Tennessee; it does not shield the State from the independent requirements of due process and equal protection. Contrary to respondents' argument, marriage is not a transient status, the validity of which is in constant flux as a family traverses the country. As

a fundamental familial relationship underpinning our society, marriage is a status that carries substantial constitutional protection and cannot be invalidated or disregarded by any state without compelling justification. By stripping petitioners of that status as a condition of entering the State, Tennessee deprives them of a fundamental aspect of personal liberty in violation of the Due Process Clause.

Tennessee's Non-Recognition Laws also deny equal protection to petitioners and other married same-sex couples and their children. Those laws are a highly unusual departure from Tennessee's longstanding practice of recognizing marriages that are valid where celebrated and create for the first time, apart from the State's prior refusal to recognize interracial marriages, a categorical rule of non-recognition based on disapproval of a particular group. Despite respondents' assertion that the State simply seeks to promote marriage between couples capable of unassisted procreation, Tennessee has never denied recognition to the marriages of opposite-sex couples who cannot, or choose not to, engage in unassisted procreation, and Tennessee's family law strongly protects the bonds between parents and their non-biological children. Married same-sex couples bring children into their families in the same ways that many opposite-sex couples do. The Non-Recognition Laws *undermine*, rather than promote, the asserted policies of "family stability" and "increasing the likelihood that when children are born, they will be born into stable family units." Resp. Br. 39. Tennessee's policies favoring the recognition of virtually all other marriages and protecting non-biological parent-child bonds demonstrate that the Non-Recognition Laws have both the purpose and the effect

of imposing inequality on same-sex couples and their children. In addition to violating equal protection in that most basic way, the Non-Recognition Laws also discriminate on the bases of sex and sexual orientation and cannot survive the heightened scrutiny required for such laws.

Finally, accepting respondents' invocation of state sovereignty would undermine the national unity that our federal system forges from separate sovereigns. It is the fundamental right of citizens to be free to travel and relocate from one state to another, without undue burdens on their migration. Respondents offer no state interest that could justify subjecting petitioners' marriages to legal nullification in their new home state.

I. NEITHER THE FULL FAITH AND CREDIT CLAUSE NOR CHOICE-OF-LAW PRINCIPLES PERMIT TENNESSEE TO DENY PETITIONERS' RIGHTS UNDER THE FOURTEENTH AMENDMENT

Respondents' brief attempts to evade the question presented by arguing that Tennessee may disregard petitioners' marriages because the Full Faith and Credit Clause and choice-of-law rules do not, in the State's view, require Tennessee to recognize petitioners' marriages. Wholly apart from any question regarding the Full Faith and Credit Clause or choice-of-law rules, however, petitioners' claims are that the Fourteenth Amendment prevents Tennessee from disregarding their marital status because that amendment protects petitioners' due process interests in their existing marriages, their right to equal protection of the laws, and their right to travel between the states without undue burden. Regardless of what obligations the Full Faith and Credit Clause independently imposes on Tennessee

to recognize the official acts and records of another state, that clause does not affirmatively empower Tennessee to do something that another, later-enacted provision of the Constitution forbids. Cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies * * * are necessarily limited by * * * the Fourteenth Amendment."). Nor does the latitude that the Constitution affords states in choice of law leave states' marital recognition laws free from Fourteenth Amendment scrutiny. Cf. *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (holding that the Fourteenth Amendment barred enforcement of Virginia statute imposing criminal penalties on interracial couples who traveled out of state to enter into lawful marriage in another jurisdiction).

Rather than affirmatively granting states permission to do anything, the Full Faith and Credit Clause imposes an *obligation* on the states: "Full Faith and Credit *shall be given* in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, § 1 (emphasis added). "The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Milwaukee Cnty.* v. *M.E. White Co.*, 296 U.S. 268, 276-277 (1935). By depriving married same-sex couples who move to Tennessee of something so fundamental as their marital status, the Non-Recognition Laws frustrate the goal of forming a "single nation." None of the Full Faith and Credit Clause cases upon which respondents rely involved fundamen-

tal constitutional rights, much less the denial of such rights on an impermissibly discriminatory basis. Petitioners' Fourteenth Amendment claims, in contrast, are grounded in the rights of persons to respect for their fundamental liberty interests, equal protection of the laws, and rights to interstate travel.

Further, respondents' attempt to reframe the issue fails on its own terms. Although marriages are not judgments, they occupy a unique legal status in our tradition. As this Court has recognized, the rights "to marry, establish a home and bring up children" are "essential to the orderly pursuit of happiness by free" persons. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Indeed, in the divorce context, this Court has emphasized the "intensely practical considerations," including the need to avoid "considerable disaster to innocent persons," that underlie the "command" of the Full Faith and Credit Clause that "decrees of a state altering the marital status of its domiciliaries [must be] valid throughout the Union." *Williams* v. *North Carolina*, 317 U.S. 287, 301 (1942). The same considerations apply to recognition of marriages. "Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises." *Williams* v. *North Carolina*, 325 U.S. 226, 230 (1945). Although this Court has never addressed the issue directly, no state should be permitted categorically to deny full faith and credit to an entire class of persons' valid marriages entered into out of state in the absence of a weighty justification, given "the basic position of the marriage relationship in this society's hierarchy of values." *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971).

Nor does a state's broad constitutional leeway in applying choice-of-law rules support categorically denying recognition of same-sex couples' marriages. Interstate recognition of marriages is not merely a matter of choice of law, but also involves the question whether a state should or must recognize a legal status validly obtained in another state. Accordingly, states have not treated marriages as governed only by ordinary choice-of-law rules, but rather have afforded the strongest possible presumption of validity and respect to marriages. Because of the need to avoid "the unseemly spectacle of the same persons being held to be differently mated in marriage in different countries," states have long recognized the rule that "every government ought to accept of all marriages celebrated within the territorial limits of other governments, whether they are such marriages as itself approves or not." 1 Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce* § 360 (5th ed. 1873). Indeed, the place-of-celebration rule "is widely recognized as a central element of American Family Law." See Conflict of Laws and Family Law Professors Amicus Br. 5.

States' longstanding adherence to the place-of-celebration rule "avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." William M. Richman et al., *Understanding Conflict of Laws* § 119, at 415 (4th ed. 2013) (describing the "overwhelming tendency" of states to recognize valid marriages from other states). Although some states have reserved the right to deny recognition to an out-of-state marriage when it violated a strong public policy, actual denials of recognition have been extremely rare. See Conflict of Laws and Family Law Professors Amicus Br. 6. Indeed, before the cur-

rent wave of state laws targeting married same-sex couples, "the public policy exception was on the verge of becoming obsolete." See *id.* at 8 (internal citations and quotation marks omitted). In practice, apart from laws barring interracial marriages, states, including Tennessee, have departed from the place-of-celebration rule only rarely, based on an individualized analysis of the facts presented by a particular case, and only when recognition would be deeply offensive to an important state policy, such as by condoning violation of a criminal law. See *id.* at 5-6.

Tennessee cannot plausibly claim that recognizing the marriages of same-sex couples would be deeply offensive to any strong, constitutionally permissible state policy or even harm the state's interests in any way. That is all the more so because respondents deny any intent to "exclude" or otherwise "denigrat[e]" same-sex couples. Resp. Br. 45. Respondents' representations confirm that there is no important substantive policy interest that would be harmed by recognizing petitioners' marriages. The assertion of such an interest in the Non-Recognition Laws is merely *ipse dixit* that does not justify legal disregard of petitioners' marital status. In reality, the Non-Recognition Laws, of course, do exclude same-sex couples and denigrate them and their children in many of the same ways that this Court in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), acknowledged that the federal Defense of Marriage Act (DOMA) denigrated and humiliated married same-sex couples and their children. As more fully explained below, see pp. 20-23, *infra*, under the Fourteenth Amendment, any purported public policy supposedly served by the State's denial of recognition of petitioners' marriages is constitutionally insufficient to justify

depriving petitioners' existing marriages of legal recognition.

In sum, the State's attempt to reframe the question before the Court fails to account for the nature of petitioners' Fourteenth Amendment claims, misapplies the Full Faith and Credit Clause, ignores the longstanding adherence of states to the place-of-celebration rule, and, on all these counts, misunderstands the very institution of marriage.

II. TENNESSEE'S NON-RECOGNITION LAWS VIOLATE THE FOURTEENTH AMENDMENT

A. Tennessee's Non-Recognition Laws Infringe Upon Fundamental Rights And Liberty Interests In Violation Of The Due Process Clause

As petitioners' opening brief explained (Br. 21-22), because the fundamental right to marry protected by the Fourteenth Amendment's Due Process Clause includes the right to remain married, a state's wholesale disregard of a couple's marital status warrants strict scrutiny. Contrary to respondents' argument (Br. 24), this Court's precedent provides no basis for limiting the scope of that heightened protection to marriages of opposite-sex spouses. As an initial matter, it is no answer to argue, as do respondents (Br. 17-24), that the scope of the Constitution's protection of existing marriages must be assessed at the narrowest possible historical level and that, because prior cases have involved opposite-sex spouses, the right to remain married must be so limited. This Court has rejected that method of constitutional analysis, observing that it would leave those once excluded from a fundamental right always so. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505

U.S. 833, 847-848 (1992) (observing that "the Court was no doubt correct" to uphold in *Loving* the substantive due process right of interracial couples to marry, although "interracial marriage was illegal in most States" at the time of the Fourteenth Amendment's adoption).

Moreover, there is no merit to respondents' argument that the fundamental right to be and remain married is limited to opposite-sex couples because of "the procreative capacity of [the] man-woman relationship." Resp. Br. 18. Same-sex couples have the same interests in, and the same need for, the constitutional protections afforded to existing marriages as opposite-sex couples, including interests relating to children. Petitioners agree that one of the reasons this Court has afforded significant constitutional protection to an existing marital relationship is that, once married, spouses often share responsibility for raising children. See, *e.g.*, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the rights "to marry, establish a home and bring up children" are "essential to the orderly pursuit of happiness by free" persons). But as this Court recognized in *United States* v. *Windsor*, and as the families of the petitioners in this case illustrate, same-sex spouses can and do have children. 133 S. Ct. 2675, 2694 (2013). The stability provided by marriage is no less important for their children than it is for others'.

Nowhere in their brief do respondents acknowledge that married same-sex couples have and raise children together. The State's disregard of these families undermines the State's avowed policy of "promotion of family stability" and "increasing the likelihood that when children are born, they will be born into stable family units." Resp. Br. 39. Rather than promoting that goal, Tennessee's Non-Recognition Laws

"diminish[] the stability and predictability" that marriage provides, "humiliate[] * * * children now being raised by [married] same-sex couples" in Tennessee by communicating to them that their parents' "marriage is less worthy than the marriages of others," and "bring[] financial harm" to these children and their parents. *Windsor*, 133 S. Ct. at 2694-2696.

Further, this Court's precedent establishes that the constitutionally protected aspects of marriage are not limited to procreation-related interests. Rather, the Due Process Clause protects bilateral relationships of mutual obligation and support, including between married couples for whom sexual intimacy for the purpose of procreation is either not feasible or not desired. In *Turner* v. *Safley*, the Court noted that marriages "are expressions of emotional support and public commitment," that "[t]hese elements are an important and significant aspect of the marital relationship," and that, despite prisoners' inability to engage in sexual intimacy, "*these remaining elements* are sufficient to form a constitutionally protected marital relationship." 482 U.S. 78, 95-96 (1987) (emphasis added); see *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965) (married couples have a constitutionally protected right to use contraception so as *not* to procreate).

Respondents do not suggest that the State could withhold recognition from married opposite-sex couples who are unable to procreate. Respondents' amici make this concession explicitly, admitting that "[a]nnulment of childless marriages * * * would surely trench upon constitutionally protected privacy rights." Scholars of History and Related Disciplines Amicus Br. 17. That is equally true of married same-sex couples, regardless of whether they can have children through unassisted

procreation. Respondents' fixation on whether couples' procreation is assisted or unassisted is demeaning not only to the equal dignity of same-sex couples, many of whom are raising children, but also to the dignity of marriage itself. Cf. *Lawrence* v. *Texas*, 539 U.S. 558, 567 (2003) (noting that "it would demean a married couple were it said that marriage is just about the right to have sexual intercourse"). The fundamental right to be and remain married does not turn on procreative abilities or choices; Tennessee's non-recognition of same-sex couples' marriages infringes upon that right and is therefore subject to strict scrutiny.

Under the reasoning of *Windsor*, the marriage of a same-sex couple, like the marriages of other couples, gives rise to a "liberty protected by" the Constitution's guarantee of due process. *Windsor*, 133 S. Ct. at 2695. In *Windsor*, the Court held that Edith Windsor's marriage to Thea Spyer "conferred upon them a dignity and status of immense import," *id.* at 2692, and that, by prohibiting recognition of their marriage, DOMA denied them "[t]he liberty protected by the Fifth Amendment's Due Process Clause," *id.* at 2695. That was so even though the couple had no children. Once a liberty interest is created through a valid marriage of a same-sex couple in a state, the Fourteenth Amendment's Due Process Clause prohibits other states from denying recognition to that marriage, just as the Fifth Amendment's Due Process Clause prohibits the federal government from denying recognition to that marriage.

B. The Non-Recognition Laws Violate Petitioners' Rights To Equal Protection Of The Laws

1. *The Non-Recognition Laws' sharp departure from Tennessee's policies to recognize out-of-state marriages and strengthen non-biological parental ties warrants careful consideration*

Respondents have not rebutted petitioners' demonstration that Tennessee's Non-Recognition Laws are "'discriminations of an unusual character' [that] especially require careful consideration." *Windsor*, 133 S. Ct. at 2693 (citation omitted). The policies that the Non-Recognition Laws purportedly advance—to deny recognition to any marriage inconsistent with the State's own marriage policy (Resp. Br. 31) or to promote only marriages between couples that possess "inherent[] procreative capacity" (*id.* at 39)—depart sharply from how Tennessee has in practice treated the marriages of opposite-sex couples. The fact that Tennessee targets only same-sex couples while pursuing contrary policies for similarly situated opposite-sex couples is strong evidence that the Non-Recognition Laws were enacted for the impermissible purpose of treating married same-sex couples and their children unequally.

First, the State's Non-Recognition Laws are a stark departure from the well-established policy in Tennessee that, because of the fundamental interest that spouses have in their existing marriages, and that society has in the stability of their unions, "a marriage valid where celebrated is valid everywhere," *Farnham* v. *Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009)

(quoting *Pennegar* v. *State*, 10 S.W. 305, 306 (Tenn. 1889)). Tennessee consistently applies the place-of-celebration rule even if doing so would be contrary to the State's own marriage licensing laws. See Pet. Br. 6-7.[1]

In modern times, apart from the Non-Recognition Laws, Tennessee has made only a narrow exception to the general rule of recognition: when sexual relations between the spouses would be a crime. *E.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 523 (Tenn. 1970) (voiding a marriage where a participant would be "deemed guilty of incest" and required to "undergo confinement in the penitentiary"). In the past, Tennessee also denied recognition to valid out-of-state marriages for two other purposes: to express moral condemnation of the relationship between the spouses, *e.g.*, *Pennegar*, 10 S.W. at 305 (denying recognition to marriage of man and woman who had committed adultery as contrary to "public morals," where woman's former husband was still living); or to "dissuade [certain types of] couples

[1] Respondents' assertion that the non-recognition statute does not single out the marriages of same-sex couples to be disregarded (Br. 31-32) has no merit. The title of the statute, which under Tennessee's Constitution limits the application of the law, see *Tennessee Mun. League* v. *Thompson*, 958 S.W.2d 333, 338 (Tenn. 1997), describes it as "AN ACT To amend [the Code] *relative to same sex marriages* and the enforceability of *such* marriage contracts." 1996 Tenn. Pub. Acts 1031 (emphasis added). The constitutional amendment that petitioners challenge is likewise limited to the marriages of same-sex couples. Pet. App. 132a. Since these measures were enacted, Tennessee courts have continued to recognize out-of-state marriages of opposite-sex couples that could not have been entered into in Tennessee. See, *e.g.*, *Farnham* v. *Farnham*, 323 S.W.3d 129, 140 (Tenn. Ct. App. 2009).

from migrating to the state," Conflict of Law Scholars Amicus Br. 21; *e.g.*, *State* v. *Bell*, 66 Tenn. 9 (1872) (denying recognition to interracial marriage entered into in Mississippi).

Plainly, the State may not apply any of these exceptions to deny recognition to marriages of same-sex couples. See *Lawrence*, 539 U.S. 558 (holding state may not criminalize consensual sexual conduct between adults of the same sex); *Windsor*, 133 S. Ct. at 2693 (holding that expressing moral disapproval of same-sex relationships is not a valid governmental purpose); *Saenz* v. *Roe*, 526 U.S. 489, 511 (1999) ("The States * * * do not have any right to select their citizens."). Even though the marriages of same-sex couples implicate none of the public policies that Tennessee has ever regarded—or constitutionally may regard—as sufficient to warrant invalidation of a marriage, the State nevertheless categorically denies legal recognition to this entire class of married couples. The "unusual character" of this discrimination, *Windsor*, 133 S. Ct. at 2693 (citation omitted), is evidence that it is not supported by any legitimate state policy, but instead is aimed at "impos[ing] a disadvantage, a separate status, and so a stigma" on married same-sex couples and their families. *Ibid.*

Second, while respondents assert a purported interest in promoting families in which the spouses can "procreate naturally" (Br. 39), Tennessee's marriage and parentage laws include numerous policies supportive of opposite-sex couples without regard to whether they can "procreate naturally." Not only does Tennessee permit opposite-sex couples who are unable to "procreate naturally" to marry and to have their out-of-state marriages recognized, it also strongly protects

parental ties between parents and their non-biological children. For example, Tennessee allows a married person to adopt the biological child of her spouse. Tenn. Code. Ann. § 36-1-115(c). An adoptive parent is legally equivalent to a biological parent. See *id.* § 36-1-121(a). Similarly, Tennessee provides that "[a] child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife," though the husband has no biological connection to the child. *Id.* § 68-3-306; see Family Law Scholars Amicus Br. 11-18 ("State laws permit and protect non-biological parent-child relationships established through adoption, assisted reproduction, and other ties.").

The State's selective application of its avowed preference for "natural procreation" only to same-sex couples demonstrates that the stated purpose cannot explain Tennessee's non-recognition of the marriages of same-sex couples. Destabilizing existing marriages and families simply because the couple are of the same sex does not promote family stability for married opposite-sex couples raising their biological children, but serves only to mark married same-sex couples "as living in marriages less respected than others." *Windsor*, 133 S. Ct. at 2696. In light of the State's strong policies protecting the bonds between parents and their non-biological children, the State's purported justification for the Non-Recognition Laws can only be regarded as pretext for an improper purpose to "impose inequality," *id.* at 2694, on married same-sex couples and their children. For these reasons, this Court should subject the Non-Recognition Laws at least to the "careful consideration" that this Court applied in *Windsor*.

2. Tennessee's Non-Recognition Laws are subject to heightened scrutiny under the Equal Protection Clause because they discriminate on the basis of sex

Respondents do not dispute that Tennessee law on its face limits recognition of marital relationships based on the sex of the participants by expressly limiting a man's chosen spouse to a woman and a woman's chosen spouse to a man. See Pet. Br. 34-39. Respondents' argument that Tennessee's Non-Recognition Laws nevertheless do not discriminate on the basis of sex because they do not "give advantage, disadvantage, or preference" to men over women or women over men (Br. 42) ignores this Court's admonition in *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), that heightened scrutiny is appropriate "under the Equal Protection Clause" even where there is "a showing of equal application among the members of the class defined by the legislation," *id.* at 191.

For similar reasons, respondents fail in their attempt (Br. 42) to distinguish *Loving* by pointing out that the restriction invalidated in that case was adopted for the purpose of promoting racial disparity. With respect to both race and sex, this Court has held that the Equal Protection Clause prohibits not only classifications that impose inequality on racial minorities and women as groups, but also classifications that "serve[] to ratify and perpetuate invidious, archaic, and overbroad stereotypes," such as those "about the relative abilities of men and women." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). Tennessee's Non-Recognition Laws perpetuate gender-based stereotypes or expectations such as the view that a woman should form a family and raise children only with a man,

and vice versa. See Pet. Br. 36-39. "The government has no authority to restrict these choices based on gender-based stereotypes or expectations, just as it has no authority to dictate the roles that men and women fill within marriage on such bases." National Women's Law Center Amicus Br. 4.

3. Tennessee's Non-Recognition Laws are subject to heightened scrutiny under the Equal Protection Clause because they discriminate on the basis of sexual orientation

Respondents do not deny that Tennessee's Non-Recognition Laws treat married gay and lesbian couples unequally compared to other married couples. Notwithstanding this facial discrimination, respondents argue that the Court need not determine the level of scrutiny applicable to state laws that discriminate on the basis of sexual orientation and should apply only rational-basis scrutiny under the Equal Protection Clause because Tennessee's marriage laws have "always defined marriage in the traditional way" and are not the result of discrimination. Resp. Br. 43.

Respondents' argument misapprehends the nature of the heightened-scrutiny inquiry. Application of a heightened level of scrutiny turns on whether the *classification* employed is one that is constitutionally suspicious. This Court has recognized that when a law classifies persons on certain "suspect" bases, such as race, sex, and national origin, such classifications warrant close consideration because they "tend to be irrelevant to any proper legislative goal." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

Contrary to respondents' argument, Tennessee's Non-Recognition Laws are not immune from heightened scrutiny simply because they codify a longstanding "tradition." "Ancient lineage of a legal concept does not give it immunity from attack" under the Equal Protection Clause. *Heller* v. *Doe*, 509 U.S. 312, 326 (1993). Rather, as this Court has repeatedly noted, equal protection principles prevent states from relying on generalizations that perpetuate "historical patterns of discrimination," *J.E.B.*, 511 U.S. at 139 n.11, even when the State's asserted purpose for the classification is "benign," *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 728 (1982). The long history of gay and lesbian persons' exclusion from full participation in society, including from marriage, began as a history of gay and lesbian people essentially being unseen or treated as nonexistent by the law, and was followed by a history of gay and lesbian people being specifically targeted for unequal treatment by the law. See Pet. Br. 39-45. Both parts of that history support petitioners' arguments as to why heightened scrutiny, not a presumption of validity, is appropriate for laws that discriminate based on sexual orientation.

Tennessee's Non-Recognition Laws perpetuate and intentionally codify the exclusion of gay and lesbian persons from marriage. As such, they should be regarded with the same close scrutiny applied to laws that discriminate on other suspect bases.

C. Tennessee May Not, Consistent With The Fourteenth Amendment Right To Travel, Require Same-Sex Spouses To Abandon Their Marital Status To Enter The State

Respondents' assertion that "it was petitioners who moved into Tennessee" (Br. 26) and did so knowing "that their marriages would not be recognized" (*id.* at 14) presents no defense at all to petitioners' right to travel argument. Tennessee's cramped view of the right to travel is incompatible with our nation's constitutional framework and with the modern realities of national life and commerce. Petitioners came to Tennessee for many reasons—including to pursue their careers, earn a livelihood, or serve their country. In some instances, they had little practical choice in the matter, whether due to orders from the U.S. Army or the decisions of an employer. Before moving, they had married and begun their lives as a family, including with the addition of children. That is a reality of our socially and economically unified nation. Americans, "as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *The Passenger Cases*, 48 U.S. 283, 492 (1849).

Tennessee cannot cure its infringement of the right to travel by placing travelers on notice of the burdens the State will inflict upon them. Nor can it condition travel to or through the State on relinquishment of petitioners' constitutionally protected liberty interest in their marriages. Cf. *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972) (Tennessee may not deprive citizens of the right to vote as a condition of entry).

By minimizing the harms the Non-Recognition Laws cause to petitioners, respondents ignore the aspect of the right to travel that prohibits a state from "unreasonably burden[ing]" travel to the State. *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969). Respondents rightly acknowledge that the status, dignity, and other benefits of marriage are critical to opposite-sex couples and the welfare of their children; however, when petitioners note the profound injury inflicted upon their families by being stripped of those same protections, respondents dismiss them as a mere "laundry list" or "litany" of "'harms.'" Resp. Br. 26 (quotes in original). For the same reasons that respondents recognize the importance of marriage to opposite-sex couples, stripping married same-sex couples of their marital status under state law—a status that is for many the "most important relation in life," *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted)—is precisely the kind of injury that "unreasonably burdens" their migration into the State.

D. The Non-Recognition Laws Fail Any Standard Of Review Because There Is No Legitimate, Much Less Important Or Compelling, Basis For Denying Legal Protection To Petitioners' Existing Marriages And Families

Respondents contend that the Non-Recognition Laws are justified by the State's interest in encouraging couples who can "procreate naturally" to marry so as to regulate "'the intended and unintended effects of male-female intercourse'" and thereby "increas[e] the likelihood that when children are born, they will be born into stable family units." Resp. Br. 39 (quoting Pet. App. 31a). But the State's interest in providing a stable setting for raising children is the same regard-

less of how those children come into the world. Respondents offer no plausible explanation why the stability of petitioners' families is less deserving of protection than others'.

The State's proffered rationale is particularly unpersuasive when offered as a reason to disregard the *existing* marriages of couples who are *already* raising children. Mr. Mansell and Mr. Espejo, who were married in California in 2008, had children there before they moved to Tennessee in 2012. And Dr. Tanco and Dr. Jesty, who were married in New York before moving to Tennessee, were expecting a (since-born) child at the time of the district court complaint. As demonstrated above, the State's claim that its interest is to encourage "naturally procreative" couples to marry is belied by its recognition of all other marriages for opposite-sex couples, and its promotion of the ties within those marriages between non-biological parents and children. See pp. 14-15, *supra*.

Even apart from that telling inconsistency, there is no rational connection between the State's asserted interest and nullifying, for all state-law purposes, the legal status of existing families already headed by same-sex couples. To the contrary, depriving petitioners of that protected status demonstrably undermines the State's interest in "promot[ing] family stability" and "increasing the likelihood that when children are born, they will be born into stable family units." Resp. Br. 39.

Finally, respondents' reliance on principles of federalism and democratic government (Br. 46-49) is misplaced. Such principles support rather than undermine the strength of petitioners' Fourteenth Amendment

claims and their right to invoke those constitutional protections.

Respondents seek to cabin this Court's analysis in *Windsor* by noting the Court's discussion of the historical role of states in regulating marriage. But *Windsor* focused on that division of authority between state and federal governments to highlight the unusual nature of DOMA. See 133 S. Ct. at 2693. The Non-Recognition Laws are similarly unusual as relates to the exercise of authority by the several states, given the nearly universal comity that the states traditionally have extended to one another in marriage recognition.

When states license a marriage, they create a new family unit that is designed to be enduring. States encourage, and spouses rely on, an expectation that marriage creates stability and permanence, precisely in order to achieve the other important goals of marriage, including the care and nurture of children. Especially in our mobile society, that stability would be impossible if the married couple believed that the continued recognition of their marriage might change upon crossing a state border. Thus, in comity to each other, states have always, with narrow exceptions not applicable here, given recognition to marriages celebrated in their sister states. The Non-Recognition Laws "depart[] from this history and tradition of reliance" on the place of celebration. 133 S. Ct. at 2692.

Nor can deference to the democratic process shield the Non-Recognition Laws from judicial review. A state policy's adoption by popular vote or relation to a subject historically regulated by the states does not immunize the policy from Fourteenth Amendment review. "A citizen's constitutional rights can hardly be

infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 736-737 (1964).

Moreover, even if the democratic process in Tennessee might someday lead to recognition of petitioners' marriages, the harms petitioners face are concrete and ongoing and warrant a remedy now. Although our states are laboratories of democracy, our constitutional system would lose much of its meaning if the ambit of their experimentation could include the denial of fundamental liberties or equal protection under the law. It is impossible, in retrospect, to look back on the landmark civil rights decisions of this Court in other areas and believe that our country would now be a more perfect union if only the freedoms and rights recognized in those cases had been withheld longer. While "[i]t is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world," *Edwards* v. *California*, 314 U.S. 160, 173-174 (1941), the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union, and not division," *ibid.* (quoting *Baldwin* v. *Seelig*, 294 U. S. 511, 523 (1935)). Under our Constitution, Tennessee cannot—even for a short time—shut its gates to married same-sex couples—as married couples—without a permissible reason for doing so. No such justification is present here.

* * * * *

Tennessee's Non-Recognition Laws violate the Fourteenth Amendment—infringing petitioners' rights to remain married, to enjoy equal protection of the

laws, and to travel unburdened to the State. The Non-Recognition Laws subject only one class of legally married couples to this treatment, marking a sharp retreat from the longstanding tradition of recognizing marriages valid in the place of celebration. Respondents offer neither a plausible interest that supports disregarding these lawful marriages, nor any rationale that can survive the judicial consideration required by the Constitution. The State's only proffered explanation for voiding these marriages under state law—promoting the stability of the family as the fundamental building block of society—is undermined, not advanced, by laws that disregard marriages and destabilize families of same-sex couples.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ABBY R. RUBENFELD
RUBENFELD LAW OFFICE, PC

WILLIAM L. HARBISON
PHILLIP F. CRAMER
J. SCOTT HICKMAN
JOHN L. FARRINGER
SHERRARD & ROE, PLC

MAUREEN T. HOLLAND
HOLLAND & ASSOCIATES, PC

REGINA M. LAMBERT

DOUGLAS HALLWARD-DRIEMEIER
CHRISTOPHER THOMAS BROWN
JUSTIN G. FLORENCE
PAUL S. KELLOGG
SAMIRA A. OMEROVIC
JOSHUA E. GOLDSTEIN
EMERSON A. SIEGLE
JOHN T. DEY
ROPES & GRAY LLP

SHANNON P. MINTER
DAVID C. CODELL
CHRISTOPHER F. STOLL
AMY WHELAN
ASAF ORR
NATIONAL CENTER FOR LESBIAN RIGHTS
Counsel for Petitioners

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