No. 14-562

In the Supreme Court of the United States

VALERIA TANCO, *et al.*,
Petitioners,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a State that embraces and maintains a traditional definition of marriage violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution by not recognizing the marriages of same-sex couples entered into in other States that have adopted an expanded definition of marriage.

2. Whether a State that embraces and maintains a traditional definition of marriage, by not recognizing the marriages of same-sex couples entered into in other States that have adopted an expanded definition of marriage, violates those couples' right to travel.

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The March 14, 2014 memorandum opinion of the district court granting plaintiffs' motion for a preliminary injunction is reported at 7 F. Supp. 3d 759. Pet. Apx. 108a. The corresponding district-court orders are unreported. Pet. Apx. 104a, 106a. The March 20, 2014 order of the district court denying respondents' motion for a stay pending appeal is unreported but is available at 2014 WL 1117069. The April 25, 2014 order of the United States Court of Appeals for the Sixth Circuit granting respondents' motion for a stay pending appeal is unreported. Pet. Apx. 101a. The November 6, 2014 opinion of the Sixth Circuit reversing the preliminary-injunction order of the district court is not yet reported but is available at 2014 WL 5748990. Pet. Apx. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims concern two separate Tennessee laws defining marriage. Tennessee Code Ann. § 36-3-113, enacted in 1996, states:

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

> in order to provide the unique and exclusive rights and privileges to marriage.
> (b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state.
> (c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee.
> (d) If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.

In 2006, Tennessee voters adopted an amendment to the Tennessee Constitution also defining marriage:

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Tenn. Const. art. XI, § 18.

STATEMENT OF THE CASE

Tennessee statutes regulating marriage are set forth in Chapter 3 of Title 36 of the Tennessee Code. *See generally* Tenn. Code Ann. §§ 36-3-101 to -505. Petitioners are three same-sex couples who were married in other states (New York and California) and subsequently relocated to and now reside in Tennessee. Petitioners filed a complaint in October 2013 challenging the constitutionality of Tenn. Const. art. XI, § 18, and Tenn. Code Ann. § 36-3-113 ("Tennessee's Marriage Laws"), both of which codify the traditional definition of marriage, i.e., "the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman." Petitioners alleged that their marriages are not recognized under Tennessee's Marriage Laws and that this non-recognition violated their rights to due process and equal protection, as well as their right to travel, under the Fourteenth Amendment to the United States Constitution. (RE 1, at 2).[1]

Petitioners moved for a preliminary injunction. (RE 29, 30). Respondents opposed the motion, arguing that Tennessee's Marriage Laws are constitutional, that Plaintiffs' claims were untimely,[2] and that petitioners'

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[1] There were originally four couples who filed the action, but one couple withdrew, and the parties jointly stipulated to their dismissal. (RE 59).

[2] Respondents preserved this statute-of-limitations defense in the Sixth Circuit (6th Cir. Doc. 32, at 8 n.3), though the district court had addressed and rejected it in the context of its ruling granting a preliminary injunction, Pet. Apx. 119a-120a. This case is in an interlocutory posture, and this extant procedural defense counters

alleged injury was insufficient to support injunctive relief. (RE 35, at 4-24). The district court, however, granted the motion on March 14, 2014, and preliminarily enjoined respondents from enforcing Tennessee's Marriage Laws as to the petitioners. Pet. Apx. 104a. Respondents appealed, but the district court denied their motion for a stay. (RE 78). On April 25, 2014, though, the Sixth Circuit granted a stay pending appeal. Pet. Apx. 103a.

On November 6, 2014, the Sixth Circuit reversed, in a split panel opinion issued in related cases from all four states of the circuit. Pet. Apx. 1a.[3] The majority rejected all of petitioners' arguments for sustaining the district-court injunction, concluding that neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment requires a State to expand its definition of marriage to include same-sex couples. Determining that state laws codifying the traditional definition of marriage do not burden a fundamental right and do not involve a suspect classification, Pet. Apx. 44a-49a, 49a-55a, the court found that such laws have a rational basis. First, "awareness of the biological reality that couples of the same sex do not have children in the same way as couples of the opposite sexes and that couples of the same sex do not run the risk of unintended offspring . . . suffices to allow the States to retain authority over an issue they

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to some degree petitioners' suggestion that this case offers a good vehicle for "finally resolving the critical constitutional questions." Pet. 36.

[3] The several cases were not formally consolidated but were all scheduled for argument on the same day.

have regulated from the beginning." Pet. Apx. 34a. Second, "a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. Apx. 34a. *See also* Pet. Apx. 56a ("States must enjoy some latitude in matters of timing, for reasonable people can disagree about just when public norms have evolved enough to require a democratic response. Today's case captures the point.").

The court thus concluded that the Constitution does not prohibit a State from denying recognition to same-sex marriages conducted in other States. "If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries." Pet. Apx. 60a. In response to petitioners' significant reliance on this Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), for its due-process and equal-protection arguments, the court not only distinguished *Windsor* but found that it supported the court's holding. Pet. Apx. 24a, 40a, 50a, 59a; *see* Pet. Apx. 62a ("Far from undermining these points, *Windsor* reinforces them."). The court also held that Tennessee's Marriage Laws do not violate the prohibitions that protect the right to travel. Pet. Apx. 64a.

The dissent took issue both with the merits and the approach of the majority opinion; it rejected "the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for 'proceeding with caution.'" Pet. Apx. 67a.

Petitioners now seek this Court's review.

REASONS FOR DENYING REVIEW

THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS, AND THE CONFLICT BETWEEN THE SIXTH CIRCUIT AND OTHER CIRCUITS DOES NOT COMPEL THIS COURT'S REVIEW.

In *United States v. Windsor*, 133 S.Ct. 2675 (2013), this Court observed that until recent years, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." 133 S.Ct. at 2689. The Court went on to recognize, however, "the beginnings of a new perspective," by which "*some* States concluded that same-sex marriage *ought* to be given recognition and validity in the law." *Id.* (emphasis added). "And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage." *Id.*

This was the background for the Court's determination in *Windsor* that Section 3 of the federal Defense of Marriage Act (DOMA), which defined "marriage" only as a legal union between one man and one woman, "[sought] to injure the very class New York seeks to protect" and the Court's consequent holding that "[b]y doing so [DOMA] violates basic due process and equal protection principles." *Id.* at 2693. The State's power in defining the marital relation was of "central relevance" to this holding. *Id.* at 2692. *See id.* at 2689-90 ("By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate

States."); *id.* at 2691 ("The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; . . . ."). Indeed, it was precisely because of the actions by New York "first to recognize and then to allow same-sex marriage" and the "federal intrusion on state power" occasioned by DOMA that this Court held as it did. *Id.* at 2692.

> When the State used its *historic and essential authority to define the marital relation* in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this *history and tradition of reliance on state law to define marriage*.

Id. (emphasis added).

Contrary to petitioners' assertions, Pet. 16, 26, the Sixth Circuit decision here does not at all conflict with *Windsor*. The Sixth Circuit recognized that "*Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations." Pet. Apx. 24a. "What we have here is something entirely different. It is the States doing exactly what every State has been doing for hundreds of years: defining marriage as they see it." Pet. Apx. 52a. The decision of the Sixth Circuit thus upholds and affirms Tennessee's "historic and essential authority to define the marital relation." *Windsor*, 133 S.Ct. at 2692. *See* Pet. Apx. 28a ("Not one of the plaintiffs' theories . . . makes the case for constitutionalizing the definition of marriage and for removing the issue from

the place it has been since the founding: in the hands of state voters.").

Just as New York's (and California's) decision to expand its definition of marriage to include same-sex couples was "without doubt a proper exercise of its sovereign authority within our federal system," *Windsor*, 133 S.Ct. at 2692, so too was Tennessee's decision to embrace and maintain the traditional definition of marriage a proper exercise of *its own* sovereign authority within our federal system. The issue is one of state public policy, and as this Court recently observed in *Schuette v. BAMN*, 134 S.Ct. 1623, 1637 (2014), "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."[4]

Nor does the Sixth Circuit decision conflict with this Court's precedents in any other respect. Pet. 14-18, 27. *Loving v. Virginia*, 388 U.S. 1 (1967), "addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage." Pet. Apx. 46a. "When *Loving* and its progeny [i.e., *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Turner v. Safley*, 482 U.S. 78 (1987)] used the word marriage, they did not redefine the term but accepted its traditional meaning." Pet. Apx. 47a. *See Kitchen v. Herbert*, 755 F.3d 1193, 1234 (10th Cir. 2014) (Kelly, J., dissenting) ("[N]othing suggests that the term 'marriage' as used in [*Loving*, *Zablocki*, and

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[4] Tennessee's constitutional amendment was passed in every one of the State's 95 counties and by a statewide majority of 81% of the voters. (RE 37-1).

Turner] had any meaning other than what was commonly understood for centuries."), *cert. denied*, 135 S.Ct. 265 (2014). As the Sixth Circuit observed, "[h]ad *Loving* meant something more . . . , how could the Court hold in *Baker* [*v. Nelson*, 409 U.S. 810 (1972),] five years later that gay marriage does not even raise a substantial federal question?" Pet. Apx. 46a.

Lawrence v. Texas, 539 U.S. 558 (2003), "invalidates a State's criminal antisodomy law and explains that the case 'does not involve . . . formal recognition' of same-sex relationships." Pet. Apx. 26a (quoting *Lawrence*, 539 U.S. at 578). *See Kitchen*, 755 F.3d at 1235 (Kelly, J., dissenting) (noting that in *Lawrence* "the Court expressly disclaimed entering the same-gender union fray"). *Romer v. Evans*, 517 U.S. 620 (1996), "invalidates a 'sweeping' and 'unprecedented' state law" that "denied gays, and gays alone, access to the protection of the State's existing antidiscrimination laws," Pet. Apx. 26a, 39a, while the Tennessee laws at issue here "codified a long-existing, widely held social norm already reflected in state law," Pet. Apx. 40a. "Tennessee has always defined marriage in traditional terms," Pet. Apx. 29a, and the Sixth Circuit rightly concluded that a State is not prevented from applying its own legitimate public policy to couples who move from one State to another, Pet. Apx. 61a (citing *Nevada v. Hall*, 440 U.S. 410, 422 (1979)).[5] This latter point

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[5] Tennessee Code Ann. § 36-3-113(d) provides that "[i]f another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, *any such marriage* shall be void and unenforceable in this state" (emphasis added). *See, e.g., id.* §§ 36-3-101 (prohibiting marriages between lineal ancestors or descendants). Petitioners are wrong to say that

also serves to refute petitioners' assertion that the Sixth Circuit decision conflicts with this Court's right-to-travel jurisprudence. Pet. 20. Under Tennessee's Marriage Laws, new permanent residents are "treated like other citizens of that State," *Saenz v. Roe*, 526 U.S. 489, 500 (1999); the laws make no distinction between or among Tennessee citizens based upon the length of their citizenship or residency in Tennessee. *See* Pet. Apx. 64a-65a.[6]

Respondents cannot deny that recent decisions of the Fourth, Seventh, Ninth, and Tenth Circuits conflict with that of the Sixth Circuit.[7] This Court denied certiorari in the Fourth, Seventh, and Tenth Circuit cases just two months ago, on October 6, 2014. *See, e.g.*, *Herbert v. Kitchen*, 135 S.Ct. 265 (2014). The decision of the Ninth Circuit was rendered the following day,[8] and there are cases involving the constitutionality of state marriage laws currently pending in the First,

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Tennessee "singles out marriages of same-sex couples for nullification." Pet. 2; *see* Pet. 6, 18, 22. "The laws challenged here involve routine rather than anomalous uses of state power." Pet. Apx. 63a.

[6] While petitioners acknowledge that the Sixth Circuit did not address their equal-protection argument claiming discrimination on the basis of gender, they assert that the decision is nonetheless inconsistent with this Court's precedent. Pet. 28. It is not; Tennessee's Marriage Laws do not impose a gender-based classification.

[7] There is no conflict, however, on the right-to-travel question presented by the petition, which no other circuit has considered.

[8] *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *petition for reh'g filed* (Nos. 14-35420, -35421).

Fifth, Eighth, and Eleventh Circuits.[9] Petitioners insist that the conflict engendered by the Sixth Circuit decision now calls for this Court's intervention. Pet. 23, 34. The Court is not so compelled; certiorari is regularly denied in cases presenting a conflict of decision. *See Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from the denial of certiorari). It is for this Court to decide whether it should now intervene by granting review of the Sixth Circuit decision. Respondents maintain, for the reasons discussed above, that it should not.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[9] *Lopez-Aviles v. Rius-Armendariz*, No. 14-2184 (1st Cir.); *Robicheaux v. Caldwell*, No. 14-31037 (5th Cir.); *DeLeon v. Perry*, No. 14-50196 (5th Cir.); *Campaign for S. Equal. v. Bryant*, No. 14-60837 (5th Cir.); *Lawson v. Missouri*, No. 14-3779 (8th Cir.); *Brenner v. Armstrong*, No. 14-14061 (11th Cir.); *Grimsley v. Armstrong*, No. 14-14066 (11th Cir.).

Respectfully submitted,

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