

## Essay

# Equal Justice for Same-Sex Married Couples: Reflections by a Tennessee Lawyer Who Helped Achieve National Marriage Equality

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### I. INTRODUCTION

Listening to Justice Kennedy read his majority decision summary in *Obergefell v. Hodges*<sup>1</sup> is an experience and feeling housed in that mind-space preserved for life-time achievements and life-changing moments. It is June 26, 2015, and sitting next to me in the courtroom of the Supreme Court of the United States (“Supreme Court” or “Court”) is another attorney on the case,

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\* A civil rights, employment lawyer who focuses on problem-solving law, known as holistic law. She served as the first Senior Judicial Law Clerk to the Hon. Jon P. McCalla from 1992–95 having previously worked as a judicial law clerk to four Vermont courts (twelve judges). She owns Holland & Associates, PC. See <http://www.hollandattorney.com/>.

1. 135 S. Ct. 2584 (2015).

Douglas Hallward-Driemeier.<sup>2</sup> I am in the first row (middle left, facing the bench) of seats reserved for Supreme Court attorneys associated with the case. Partially in front of me and slightly left is another row with seats, closest is attorney Mary Bonauto.<sup>3</sup> Justice Kennedy with great eloquence begins and a hush and stillness takes over the courtroom. We already know a significant decision has been made and was to be read when retired Justice John Paul Stevens<sup>4</sup> entered the Courtroom a few minutes before the nine justices and took a seat in the dignitary section, a row of reserved seats on the right side of the courtroom facing the lawyers and the bench.<sup>5</sup> Excitement mixed with trepidation fills the air, and we are held at attention as Justice Kennedy reads for the majority.<sup>6</sup> At

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2. Hallward-Driemeier was the oralist for Question 2—“Does the Fourteenth Amendment require a state [like Tennessee] to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?” See *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (mem.), cert. granted sub nom. *Obergefell*, 135 S. Ct. 2584 (“The cases are consolidated and petition for writ of certiorari . . . [are] granted limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?”).

3. Bonauto was the oralist for Question 1—“Does the Fourteenth Amendment require a state [like Tennessee] to license a marriage between two people of the same sex?” See *Tanco*, 135 S. Ct. at 1040.

4. Justice Stevens retired on June 29, 2010. *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last updated Oct. 31, 2015). Justice Stevens dissented along with Justices Blackmun, Brennan, and Marshall in *Bowers v. Hardwick*, a 5-4 decision holding that a Georgia statute which criminalized sodomy was constitutional and that there was no fundamental right to “engage in homosexual sodomy.” 478 U.S. 186, 199 (1986). Justice Stevens was in the majority when *Bowers* was overruled in 2003, by another June 26 decision, *Lawrence v. Texas*. See *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence* the U.S. Supreme Court held 6-3 that anti-sodomy laws were unconstitutional and consensual sexual conduct was a liberty interest protected by the due process clause of the Fourteenth Amendment. *Id.* at 558.

5. *The Supreme Court Building*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/courtbuilding.aspx> (last visited Oct. 31, 2015) (“The black chairs in front of [the red] benches are for the officers of the Court and visiting dignitaries.”).

6. The Justice with the most seniority (most years as a Supreme Court Justice) in the majority reads from the bench in open court.

first those present are not sure the expanse of this decision, but soon it is evident the ruling is landmark. Justice Kennedy reads with deliberate clarity and a tempo reminiscent of poetry; lawyers begin to cry—quietly, but audibly—as the fight for equality has found acceptance and protection in the Constitution.

My experiences as one of the Tennessee attorneys on this monumental case joins other personal memories in that special memory-space for life-changing events: the sight and sounds of my children when they entered my life; my first trip to Paris when I walked out of the subway station to the iconic Eiffel Tower; standing on the front steps of my first house viewing the sunset over the small lake; and hearing my wife say all five of my names during our wedding vows on a boat in Lake Champlain.<sup>7</sup> Thereto are professional accomplishments carefully preserved in my memory: walking across the stage to receive my law school diploma;<sup>8</sup> my work as Chair of the Labor & Employment Law Section of the Memphis Bar Association and President of the local chapter of the Federal Bar Association; being interviewed for numerous publications including the American Bar Association Journal<sup>9</sup> about practicing law in a problem-solving style known as holistic law;<sup>10</sup> and on a lighter note, being the focus of the center article in the Memphis Health and Fitness magazine sporting my tattoo of the scales of justice (a proud moment given my then 51 years of age).<sup>11</sup>

These professional events are now a distant second to what has become my life over the past two years. Now at the forefront

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7. My full name is Maureen Adonica Snowdy Truax Holland and all five names appear on my law licenses and my U.S. Supreme Court Admission Certificate.

8. Juris Doctor, Vermont Law School, *cum laude*, 1989.

9. Jenny B. Davis, *What I Like About My Lawyer*, 89 A.B.A. J. 33, 35–36 (Jan. 2003) (“My first impression of [Holland] was that she was a very clear thinker . . . she was hearing what I was saying as well as listening. In doing that, she was able to direct my thinking along lines I hadn’t considered. She showed me a different way to think about the case.”).

10. Rebekah Hearn, *Holland Uses Holistic Law to Solve Problems Peacefully*, THE DAILY NEWS, May 8, 2008, <http://www.memphisdailynews.com/editorial/Article.aspx?id=36981>.

11. *Weekend Warriors, Maureen Truax Holland*, MEM. HEALTH AND FITNESS, Sept. 2013, at 32, [http://issuu.com/memhealthandfitness/docs/hf\\_sept\\_2013-web](http://issuu.com/memhealthandfitness/docs/hf_sept_2013-web).

of my professional accomplishments is my time working on the Supreme Court case that created opportunity and recognition for all same-sex couples married in the United States: the opportunity and constitutionally protected right for same-sex couples to marry in any of the fifty states and the requirement under the Fourteenth Amendment that each state recognize same-sex marriages for those couples previously married in other states. That case, *Obergefell v. Hodges*,<sup>12</sup> began in Tennessee as *Tanco v. Haslam*;<sup>13</sup> and that is the story I want to share.

## II. BACKGROUND & *UNITED STATES V. WINDSOR*

There is no difference between same- and opposite-sex couples with respect to this principle [that marriage is fundamental], yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.<sup>14</sup>

On June 26, 2013, exactly two years prior to *Obergefell*, the United States Supreme Court issued its decision in *United States v. Windsor*.<sup>15</sup> The Court had taken two cases relating to the rights of same-sex married couples: *Windsor*, addressing the right to have their marriages recognized for purposes of federal benefits<sup>16</sup> and *Hollingsworth v. Perry*, addressing the right to have equal constitutional protection against state voter attacks seeking to

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12. 135 S. Ct. 2584 (2015).

13. 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell*, 135 S. Ct. 2584.

14. *Obergefell*, 135 S. Ct. at 2590.

15. 133 S. Ct. 2675 (2013).

16. *Id.* By a 5-4 opinion, the Supreme Court held that the Petitioners did not have standing and did not reach the merits of the case as to whether or not Proposition 8, which amended the California Constitution and directed that the only valid marriages in California were between a man and a woman, violated of the Fourteenth Amendment equal protection clause. *Id.*

limit marriage to a man and a woman.<sup>17</sup> Finding a lack of standing in *Hollingsworth*, the Supreme Court never reached, and arguably sidestepped the issues of federal constitutional protections for marriage equality at the state level.<sup>18</sup> But with *Windsor*, the Court struck down the Defense of Marriage Act (“DOMA”) section 3,<sup>19</sup> unlocking the vast majority of federal benefits for same-sex married couples.<sup>20</sup> Justice Kennedy, writing for the majority in *Windsor*, put a stop to the injurious withholding of federal benefits from same-sex married couples and their families.<sup>21</sup> Although voiding section 3 of DOMA, *Windsor* did not reach the constitutionality of section 2 of DOMA,<sup>22</sup> which statutorily allowed states such as Tennessee to refuse to recognize the marriages of same-sex couples performed in others states.<sup>23</sup> Justice Scalia, in his dissent in

17. 133 S. Ct. 2652, 2659. *Hollingsworth* was a challenge to Proposition 8, a California State amendment providing “[o]nly marriage between a man and a woman is valid or recognized in California.” *Id.* (quoting CAL. CONST. art. I, § 7.5).

18. *See id.* at 2668.

19. The Defense of Marriage Act (“DOMA”) provided that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. No. 104-199, § 3(a) (1996) (codified by 1 U.S.C. § 7 (1996)) (invalidated by *Windsor*, 133 S. Ct. 2675).

20. The Court in *Windsor* recognized “over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.” *Windsor*, 133 S. Ct. at 2683. Shortly following *Windsor*, the Internal Revenue Service (“IRS”) announced that legally married same-sex couples would have recognition of their marriages. Rev. Rul. 2013-17, 2013-2 C.B. 201.

21. DOMA [section 3] instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

*Windsor*, 133 S. Ct. at 2696.

22. Pub. L. No. 104-199, § 2(a) (1996) (codified by 28 U.S.C. § 1738C).

23. *Id.*

*Windsor*, envisioned with tangible disapproval that state laws “excluding same-sex marriage” would be the next battleground where the “state-law shoe [would] be dropped.”<sup>24</sup> Justice Scalia went so far as to take sections from the majority opinion and re-write them in his dissent to demonstrate the (“inevitable”) likelihood that state laws denying same-sex couples their marital status would fall in the same way federal laws had.<sup>25</sup> His disagreement aside, the fact that state-established DOMA-equivalents would be challenged was correct. As explained in our merit brief in *Tanco*, “The injustices effected by Tennessee’s Non-Recognition Laws are similar to those inflicted by section 3 of DOMA, which this [Supreme] Court struck down in *United States v. Windsor*. The same outcome is appropriate here.”<sup>26</sup> The *Obergefell* Court would later agree, especially with respect to the impact on children:

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stig-

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No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

*Id.*

24. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

25. *Id.* at 2709–10.

~~DOMA’s~~ *This state law’s* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities.

*Id.* (alterations in original).

26. Brief for Petitioner at \*17, *Obergefell*, 135 S. Ct. 2584 (2015) (No. 14-562), 2015 WL 860739.

ma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.<sup>27</sup>

*Windsor* was the latest and perhaps sturdiest legal building block of Supreme Court cases of marriage as a fundamental right, deserving of equal access and protection for same-sex couples. The *Obergefell* Court relied on *Windsor* and a series of other vital cases<sup>28</sup> in reaching its “analysis [that] compels the conclusion that same-sex couples may exercise the [fundamental] right to marry.”<sup>29</sup> These legal building block cases include *Loving*, *Zablocki*, *Turner*, *Griswold*, *Romer*, and *Lawrence*. In *Loving v. Virginia*<sup>30</sup> the Supreme Court “invalidated bans on interracial unions” and held that “marriage is ‘one of the vital personal rights essential to the orderly pursuit of happiness by free men.’”<sup>31</sup> In *Zablocki v. Redhail*,<sup>32</sup> the Court held “the right to marry was burdened by a law prohibiting fathers who were behind on child support from

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27. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015) (citing *Windsor*, 133 S. Ct. at 2694–95).

28. In acknowledgement of the importance of *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), which was the first time any state highest court had ruled in favor of marriage equality for same-sex couples, the *Obergefell* Court quotes from the *Goodridge* decision:

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”

*Obergefell*, 135 S. Ct. at 2599 (quoting *Goodridge*, 798 N.E.2d at 955). The author of the *Goodridge* opinion, Chief Justice Margaret Marshall, was in attendance at the oral argument in *Obergefell*, and the *Obergefell* oralist for question 1, Mary Bonato, argued the case for the *Goodridge* Plaintiffs.

29. *Obergefell*, 135 S. Ct. at 2589.

30. 388 U.S. 1 (1967).

31. *Obergefell*, 135 S. Ct. at 2598 (quoting *Loving*, 388 U.S. at 12).

32. 434 U.S. 374 (1978).

marrying.”<sup>33</sup> In *Turner v. Safley*,<sup>34</sup> the Court found that regulations preventing prison inmates from marrying “abridged” the fundamental right to marry.<sup>35</sup> The Court held in *Griswold v. Connecticut*<sup>36</sup> that married couples had a Constitutional protection in the use of contraceptives.<sup>37</sup> *Romer v. Evans*<sup>38</sup> “invalidated” Colorado’s Constitutional Amendment that stopped any political branch or subdivision in Colorado from “protecting persons against discrimination based on sexual orientation.”<sup>39</sup> On June 26, 2003, Justice Kennedy again wrote for the majority in *Lawrence v. Texas*,<sup>40</sup> where the Court overruled its previous decision in *Bowers v. Hardwick*,<sup>41</sup> and held that laws which made same-sex intimacy a crime “‘demea[n] the lives of homosexual persons.’”<sup>42</sup>

*Windsor*, because of the wide-sweeping nature of the language striking down section 3 of DOMA, set in motion a rush to the Supreme Court to change history by challenging state non-recognition laws for same-sex marriages (mini-DOMAs); but which case would rise and would remain was an unanswered question. In the Sixth Circuit, a case in Michigan filed in district court in 2012 had been on hold pending the outcome of *Windsor*.<sup>43</sup> Like

33. *Obergefell*, 135 S. Ct. at 2598 (citing *Zablocki*, 434 U.S. at 384).

34. 482 U.S. 78 (1987).

35. *Obergefell*, 135 S. Ct. at 2584 (citing *Turner*, 482 U.S. at 95).

36. 381 U.S. 479 (1965).

37. *Obergefell*, 135 S. Ct. at 2589 (citing *Griswold*, 381 U.S. at 485). “[M]arriage is a right ‘older than the Bill of Rights . . . a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.’” *Id.* at 2599 (quoting *Griswold*, 381 U.S. at 486).

38. 517 U.S. 620 (1996).

39. *Obergefell*, 135 S. Ct. at 2596 (citing *Romer*, 517 U.S. 620).

40. 539 U.S. 558 (2003).

41. 478 U.S. 186 (1986). The Court in *Bowers* had upheld a Georgia law criminalizing certain same-sex intimate acts. *Id.* at 196.

42. *Obergefell*, 135 S. Ct. at 2596 (quoting *Lawrence*, 539 U.S. at 575) (alteration in original).

43. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584. *DeBoer* initially challenged Michigan’s ban on adoption; but in September 2012 the case was amended adding a challenge to same-sex marriage bans. *Id.* Following *Windsor*, the case went to trial in February and March 2014 with a decision in favor of the Plaintiffs. *Id.* at 775. The State of Michigan appealed to the Sixth Circuit in March 2014. See *DeBoer*, 772 F.3d 388, *rev’d sub nom. Obergefell*, 135 S. Ct. 2584.



in the Michigan case, these State or mini DOMAs<sup>44</sup> became the focus around the country with lawyers and plaintiffs joining force to challenge state bans. By July 2013, Tennessee began to assemble a legal team.

### III. MARRIAGE EQUALITY IN TENNESSEE

In July 2013, I began a discussion about *Windsor* with a friend of mine, Abby Rubenfeld, a civil rights and family law attorney in Nashville. She and an attorney friend of hers, Regina Lambert in Knoxville, supported by the National Center for Lesbian Rights (“NCLR”)<sup>45</sup> had started to form a legal team to challenge marriage equality in Tennessee. Abby had worked with NCLR in the past, especially Shannon Minter.<sup>46</sup> Shannon, along with his support team of attorneys at NCLR, David Codell, Chris Stoll, Amy Whelan, Asaf Orr, and Jamie Huling Delaye, would play a vital role on our team. I would then join Abby and Regina supported by NCLR, and together we would assemble a team to challenge the State of Tennessee’s Constitution<sup>47</sup> and statutes<sup>48</sup> that

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44. “State or mini DOMAs” refers to state constitutions and/or statutes limiting legally recognized marriages to those between a man and a woman, including that these laws did not allow for states to recognize same-sex marriages validly performed in another state that allowed for same-sex marriage.

45. NCLR, located in San Francisco, California, is a “national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy and public education.” *Mission & History*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/about-us/mission-history/> (last visited Nov. 1, 2015). Kate Kendell, Esq. is the Executive Director. *NCLR Staff, Board & Councils*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/about-us/staff/> (last visited Nov. 1, 2015).

46. Shannon Price Minter, Esq. is the Legal Director of NCLR. *NCLR Staff, Board & Councils*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/about-us/staff/> (last visited Nov. 1, 2015). He was also appointed in June 2015 by President Obama to the President’s Commission on White House Fellowships. *President Obama Announces More Key Administration Posts*, THE WHITE HOUSE (June 8, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/08/president-obama-announces-more-key-administration-posts>.

47. TENN. CONST. art. XI, § 18.

The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only

limited marriage to be between a man and a woman. Missing though was a Tennessee law firm<sup>49</sup> that could add resources and additional depth to the legal team. Soon William (“Bill”) L. Harbison,<sup>50</sup> a Nashville attorney, along with three other members of his firm Sherrard & Roe, PLC would join our legal team and provide invaluable support. These three members are Scott Hickman, Phil Cramer, and John Farringer.

*A. Finding Plaintiffs and Filing in District Court*

The addition of plaintiffs to the case was more or less an organic process with potential plaintiffs contacting known LGBT advocacy groups and lawyers,<sup>51</sup> and members of these advocacy groups and lawyers asking friends or acquaintances. The lawyers prepared questionnaires for potential plaintiff couples, spoke with prospective clients, and began finding plaintiffs who would advance the personal side of litigation—couples married in other jurisdictions whose presence in Tennessee, and desire for recognition of their marriage, would resonate with Tennesseans and, hopefully, the Court. More than just joining a lawsuit, we were asking these potential plaintiffs to open their lives and their homes to the public

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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.

*Id.*

48. TENN. CODE ANN. § 36-3-113 (2014 & Supp. 2015) (“Marriage between one man and one woman only legally recognized marital contract.”).

49. We had an interested attorney from a medium-sized Tennessee law firm who, due to opposition from the members of the firm worried about the attitude of their clients, would not allow the attorney to participate in the case. So we looked for another.

50. Bill’s father, William J. Harbison, was a Tennessee Supreme Court Special Justice, then elected Justice and Chief Justice from 1966–1990.

51. I would be remiss if I did not mention the important grassroots work of Tennessee Equality Project, [www.tnequalityproject.org](http://www.tnequalityproject.org), and the numerous Tennessee LGBT centers and organizations, including the Memphis Gay and Lesbian Community Center, [www.mglcc.org](http://www.mglcc.org).

through court filings and press interviews. In 2013 there were a lot of unknowns—how long would it take, whether we would have to go through a full trial, and whether there would be negative reaction that might be worrisome for a family with children. Within a few weeks we had our Plaintiffs: Dr. Valeria Tanco and Dr. Sophy Jesty; Sergeant First Class Ijpe DeKoe and Thomas Kostura; Kellie Miller and Vanessa Devillez;<sup>52</sup> and Johno Espejo and Matthew Mansell. Each was a “married same-sex couple[] who moved to Tennessee to pursue their livelihoods and make new homes for themselves and their families after they legally married in another state.”<sup>53</sup>

*Tanco v. Haslam* began the Tennessee fight for marriage equality, contesting the state’s non-recognition of married same-sex couples. On October 21, 2013, seven Tennessee lawyers and the NCLR filed suit after weeks of drafts, redrafts, edits, conversations, strategy meetings and the like, on behalf of several same-sex married couples to challenge the Tennessee Constitutional Provision article XI, section 18 and section 36-3-113 of the Tennessee Code Annotated, both which limited marriage and marriage recognition to marriages between “one man and one woman.”<sup>54</sup> Although we dreamed and talked as if our case would make it to the Supreme Court, we were well aware that the reality was far less likely. Each step in the Tennessee case was careful, thought out, and collaborative. At points in time I found myself holding together my small Memphis law firm and also working what felt like a second full-time job on *Tanco*.<sup>55</sup> Each of the Tennessee Attorneys and NCLR worked tirelessly to find consensus.

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52. By Stipulation of Dismissal, Plaintiffs Kellie Miller and Vanessa Devillez withdrew on March 10, 2014. See Stipulation of Dismissal of Plaintiffs Kellie Miller and Vanessa Devillez and Defendant Bill Gibbons at 1, *Tanco v. Haslam*, No. 3:13-cv-01159 (M.D. Tenn. Mar. 10, 2014), <http://attorneygeneral.tn.gov/cases/tanco/tancostipulation-3-10-2014.pdf>.

53. Complaint for Declaratory and Injunctive Relief at 2, *Tanco v. Haslam*, No. 3:13-cv-01159 (M.D. Tenn. Oct. 21, 2013), <http://attorneygeneral.tn.gov/cases/tanco/tancocomplaint.pdf>.

54. TENN. CONST. art. XI, § 18; TENN. CODE ANN. § 36-3-113 (2014 & Supp. 2015).

55. I could not have done this though without the ongoing support of my associate attorney and daughter Yvette G. Holland, a graduate of the University of Memphis Law School, who managed the office when I was away; and Tara

Together we would think through and find that consensus at each turn and with each strategic step, including the broader concepts to the finer details, like for each and every paragraph of the Complaint. We formed a bond and quickly become a cohesive legal team dedicated to the same purpose, and we had only just begun. The Complaint for Declaratory and Injunctive Relief asserted that same-sex married couples had protected interests under the U.S. Constitution's Fourteenth Amendment due process and equal protection clauses.<sup>56</sup> It further set out that prohibitions against the recognition of valid out-of-state marriages of same-sex couples were in direct contravention of "Tennessee's long-standing rule that 'a marriage valid where celebrated is valid everywhere.'"<sup>57</sup> This was not the same legal case some states' advocates had taken on behalf of same-sex couples trying to marry. This was a same-sex marriage *recognition* case. Undoubtedly, recognition of the fundamental right to marry would be an essential argument and a key component, but our primary focus was in having the State of Tennessee recognize the validity of marriages for same-sex couples who had married out-of-state, as the State has traditionally provided for "common law marriages entered into in another state and valid under the law of that state, even though Tennessee law does not provide for couples to enter into common law marriages within the state."<sup>58</sup> Suit was filed in Federal Court—the United States District Court for the Middle District of Tennessee, in Nashville, the capital of Tennessee.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted

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Brown, my paralegal and a current student at the University of Memphis Law School.

56. Complaint, *supra* note 53.

57. *Id.* at 1–2 (quoting *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009)).

58. *Id.* at 8 (quoting *Shelby County v. Williams*, 510 S.W.2d 73,74 (Tenn. 1974); *In re Estate of Glover*, 882 S.W.2d 789, 789–90 (Tenn. Ct. App. 1994); *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966)).

for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.<sup>59</sup>

As soon as the case was filed, our journey in the press also began. Because I was the only attorney in the Western part of Tennessee, and given that one of our Plaintiff couples lived in Memphis, part of my role involved attendance at and preparation for press interviews of the local couple. My press liaison work<sup>60</sup> was extensive<sup>61</sup> as it became usual for each press interview to take approximately an hour and a half. On one of these press interviews I had the pleasure of meeting a famous civil rights photographer, Richard Copley.<sup>62</sup> Copley, known for his “I am a Man”<sup>63</sup>

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59. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

60. NCLR coordinated the press interviews for the case with the guidance of NCLR’s Erik Olvera, Director of Communications, and Alberto R. Lammers, Assistant Director of Communications.

61. Ijpe Dekoe and Thom Kostura were in multiple news articles over the course of the suit. *See, e.g.*, Bianca Phillips, *Seeking Recognition*, MEM. FLYER (Oct. 31, 2013), <http://www.memphisflyer.com/memphis/seeking-recognition/Content?oid=3537303>; David Waters, *David Waters: Memphis Gay Couple Married in U.S., Not Tennessee*, THE COM. APPEAL (May 13, 2014), <http://www.commercialappeal.com/news/david-waters-memphis-gay-couple-married-in-us-not-tennessee-ep-457570284-328960231.html>; Katie Fretland, *Memphis Couple, Attorney Take Marriage Equality Case to U.S. Supreme Court*, THE COM. APPEAL (Nov. 29, 2014), [http://www.commercialappeal.com/news/local-news/memphis-couple-attorney-take-marriage-equality-case-to-us-supreme-court\\_07251752](http://www.commercialappeal.com/news/local-news/memphis-couple-attorney-take-marriage-equality-case-to-us-supreme-court_07251752).

62. As a first-time paid “rookie photographer,” Copley found himself in the midst of civil rights history taking photos at Mason Temple in Memphis, Tennessee, where the Rev. Martin Luther King, Jr. would rally sanitation workers in his “Mountaintop” speech. Christina Caron, *MLK and Me: How a Rookie Photographer Captured History*, NBC NEWS (Apr. 4, 2013 5:19 PM), [http://photoblog.nbcnews.com/\\_news/2013/04/04/17603354-mlk-and-me-how-rookie-photographer-captured-history?lite](http://photoblog.nbcnews.com/_news/2013/04/04/17603354-mlk-and-me-how-rookie-photographer-captured-history?lite).

sanitation strike photos in Memphis, Tennessee, in 1968, was the freelance photographer for Thom and Ijpe's NBC interview in Memphis.<sup>64</sup> We discussed his excitement at memorializing these momentous civil rights moments, from photos of Rev. Martin Luther King, Jr. to video of Thom and Ijpe on the precipice of helping attain marriage equality. He adjusted his video camera so I could see the interview, both standing behind the camera looking at Thom and Ijpe, and looking directly and literally into the lens of history.

Knowing that the case might take a year or more to work its way to a trial, and knowing that our Plaintiffs were suffering harm each day the case was delayed, we moved the legal process into high gear by shifting focus to a Motion for Preliminary Injunction to address the "severe and irreparable constitutional and practical harms on Plaintiffs and their children,"<sup>65</sup> including those mentioned in *Windsor*, "dignity" harms that "demean[] the couple[s]" and "humiliates . . . children now being raised by same-sex couples."<sup>66</sup> At the time of filing, Knoxville Plaintiffs Dr. Valeria ("Val") Tanco and Dr. Sophy Jesty were expecting their first child in the Spring of 2014, and part of the request was that both parents would be legally recognized and that both parents would be able to make medical decisions for their child—a benefit denied to them at the time, as only the birth mother would have recognition as the legal parent.<sup>67</sup> The Motion for Preliminary Injunction spoke to many other denied benefits, including, health care and coverage, drivers' licenses recognizing married name changes, ownership of marital property, allowed inheritance for married couples without

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63. Louis Gogans, "I Am a Man" Exhibit Brings People Back to 1968, MEM. FLYER (July 25, 2014), <http://www.memphisflyer.com/CallingtheBluff/archives/2014/07/25/i-am-a-man-exhibit-brings-people-back-to-1968>.

64. See Photo of NBC interview team: Ron, David, & Richard Copley, with Ijpe Dekoe, Thomas Kostura, and Maureen T. Holland. @MaureenTHolland, TWITTER (Apr. 8, 2015, 5:17 PM), <https://twitter.com/maureentholland/status/585959649452630016>.

65. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction at 2, *Tanco v. Haslam*, 3:13-cv-01159 (M.D. Tenn., Nov. 19, 2013), <http://attorneygeneral.tn.gov/cases/tanco/tancomemoinsupport.pdf>.

66. *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

67. *Id.* at 8.

taxation, status as second-class citizens, and the denial of dignity, stability, and respect for their marriages.<sup>68</sup>

To prevail, the Plaintiffs had to meet the standard for a Preliminary Injunction<sup>69</sup>—and did. The *Obergefell* Court would later acknowledge the importance of marital benefits for same-sex couples and their families.

Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>70</sup>

Judge Trauger from the Middle District of Tennessee agreed with the Plaintiffs, issuing a Preliminary Injunction on March 14, 2014, with a Memorandum decision examining each of the arguments by the parties and setting forth her analysis of the law.<sup>71</sup>

In granting the relief to Plaintiffs, Judge Trauger foretold a hopeful prospect:

At some point in the future, likely with the benefit of additional precedent from circuit courts and, perhaps, the Supreme Court, the court will be asked to make a final ruling on the plaintiffs’ claims. At this

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68. *See id.* at 4–5.

69. The Motion for Preliminary Injunction explained in detail how Plaintiffs met each of the four factors for granting a Preliminary Injunction: “(1) whether Plaintiffs are likely to succeed on the merits, (2) whether they are likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in their favor, and (4) whether an injunction is in the public interest.” *Id.* (citing *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998)).

70. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (citing *Windsor*, 133 S. Ct. at 2694).

71. *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584.

point, all signs indicate that, in the eyes of the United States Constitution, the plaintiffs' marriages will be placed on an equal footing with those of heterosexual couples and that proscriptions against same-sex marriage will soon become a footnote in the annals of American history.<sup>72</sup>

Despite the State of Tennessee's objection, the marriages of these Plaintiff couples were recognized pursuant to court order from March 14, 2014, until April 25, 2014, when the Sixth Circuit Court of Appeals issued a stay pending an expedited consideration on the merits.<sup>73</sup> For these weeks, and for the first time in Tennessee history, the Plaintiffs were married; hope glimmered in small celebrations. During these critical days, Val gave birth to a baby girl, Emilia, and Sophy and Val's names were both placed on their newborn daughter's birth certificate.<sup>74</sup> Mother and Mother had parental rights, but what would the Sixth Circuit decide?

### *B. The Sixth Circuit*

As the excitement around the case grew, so did requests for attorneys to explain the process and for the Plaintiffs and their families to be more visible as the uncertainty at the Sixth Circuit loomed.<sup>75</sup> We hastened to get our brief filed at the Sixth Circuit, and although ours was not the first case at the Sixth Circuit, the Court of Appeals consolidated the pending cases from Ohio,<sup>76</sup>

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72. *Id.* at 19.

73. *Tanco v. Haslam*, No. 14-5297, 2014 U.S. App. LEXIS 22051 (6th Cir. Apr. 25, 2014) (per curiam).

74. Emilia was born March 27 during the period where Sophy and Val's marriage was recognized by Judge Trauger's Order. See Joan Biskupic, *Valeria Tanco and Sophy Jesty, Tennessee Lesbian Moms, Become a Legal First for Gay Marriage*, HUFFINGTON POST (Apr. 9, 2014, 7:00 AM), [http://www.huffingtonpost.com/2014/04/09/tennessee-lesbian-moms-case\\_n\\_5116823.html](http://www.huffingtonpost.com/2014/04/09/tennessee-lesbian-moms-case_n_5116823.html).

75. See, e.g., James Grady, *Legal Limbo: Inside Tennessee's Marriage Equality Lawsuit*, OUT AND ABOUT NASHVILLE (May 27, 2014), <https://www.outandaboutnashville.com/story/legal-limbo-inside-tennessee-s-marriage>.

76. *Obergefell v. Wymyslo* was filed in July 2013 by two men who had married in Maryland and sought to have the state of Ohio recognize their marriage on death certificates. 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell*, 135 S. Ct. 2584. The Southern District of Ohio granted a temporary re-



Michigan,<sup>77</sup> Kentucky,<sup>78</sup> and Tennessee for oral argument on August 6, 2014.<sup>79</sup> On July 21, 2014, the Sixth Circuit announced that

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straining order to prevent Ohio from recording any death certificate in connection to the couple unless it recorded the deceased as being married at the time of death (one was suffering a terminal illness). *Id.* at 997–98. This case was later amended to add additional plaintiffs including a funeral director. *Id.* Following a ruling for Plaintiffs in December 2013, this case was appealed and consolidated by the Sixth Circuit with *Henry v. Hodges*, a suit brought by four couples and the adopted child of one of the couples seeking to be listed on their children’s birth certificates. *See DeBoer*, 772 F.3d at 398–99, *rev’d sub nom. Obergefell*, 135 S. Ct. 2584. These cases were advocated by private lawyers, the American Civil Liberties Union (“ACLU”) of Ohio, and Lambda Legal. It was consolidated with *Tanco v. Haslam* by the Sixth Circuit and later by the Supreme Court. *Id.*; *see Obergefell*, 135 S. Ct. 2584; Joint Petition for a Writ of Certiorari, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2014 WL 5907570 (Ohio).

77. *DeBoer v. Snyder* was filed in January 2012 by a lesbian couple, on behalf of themselves and their three children, to challenge Michigan’s ban against them jointly adopting their children, and by amendment in September 2012 to also challenge Michigan’s ban against same-sex couples marrying. 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev’d* 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584. *DeBoer* was put on hold pending the rulings in *Windsor* and *Hollingsworth*. *Id.* at 760. Following a trial in February and March 2014 with a ruling in favor of Plaintiffs, the case was appealed to the Sixth Circuit in March 2014 and became the lead case at the Sixth Circuit as it was the first case appealed at that level. This case was consolidated with *Tanco* by the Sixth Circuit and later by the Supreme Court. *See DeBoer*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584. Advocates for the Plaintiffs included private lawyers, the ACLU of Michigan, and Gay & Lesbian Advocates and Defenders (“GLAD”). *See* Petition for Writ of Certiorari, *Obergefell*, 135 S. Ct. 2584 (No. 14-571), 2014 WL 6449712 (Michigan). *Official DeBoer v Snyder Legal Case Website*, NAT’L MARRIAGE CHALLENGE, <http://nationalmarriagechallenge.com/> (last visited Nov. 1, 2015).

78. *Bourke v. Beshear* was filed in July 2013 by four same-sex couple who were legally married in other jurisdictions and who sought marriage recognition in Kentucky. 996 F. Supp. 2d 542 (WD. Ky. 2014). The trial court issued a summary judgment decision for plaintiffs in February 2014. *See* Petition for a Writ of Certiorari at \*9, *Obergefell*, 135 S. Ct. 2584 (No. 14-574), 2014 WL 8731960 (Kentucky). Following the decision, two same-sex couples seeking to marry intervened and the trial court entered an order granting the intervening plaintiffs summary judgment. *Id.* This case was appealed to the Sixth Circuit and consolidated with *Tanco* by the Sixth Circuit and later by the Supreme Court. *See DeBoer*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584. Advocates included private attorneys and the ACLU of Kentucky. *See* Petition for a Writ of Certiorari, *supra* note 78.

Judges Sutton, Cook, and Daughtrey would be on the panel.<sup>80</sup> A public notice was issued regarding media at the oral argument.<sup>81</sup> We had no idea whether consolidation would mean one or multiple decisions.

On August 6, 2014, nearly all of the Plaintiffs from each of the consolidated cases and attorneys for both sides entered the Sixth Circuit Court of Appeals. By Order of the Sixth Circuit we were to remain in the courtroom throughout the arguments, or be prevented from reentry. No exceptions. As was our ongoing course of action, the Tennessee attorneys came to consensus that Bill Harbison would argue for us. He had experience as an appellate attorney and an affable style of persuasion that would provide confidence and clarity to our arguments. Extra chairs lined the courtroom. Just before the panel of Judges entered, as many members of the press that could be compressed into the remaining seats were allowed into the room. Two over-flow courtrooms had been set up with live audio streaming of the oral arguments. Sitting as still as we could manage, we listened and watched the panel challenge each other through questions posed to the oralists.<sup>82</sup>

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79. Steve Delchin, *Sixth Circuit Gearing Up to Hear Same-Sex Marriage Appeals on August 6, 2014*, SQUIRE PATTON BOGGS: SIXTH CIR. APP. BLOG (July 21, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-gearing-up-to-hear-same-sex-marriage-appeals-on-august-6-2014/>.

80. *Id.*

81. *Id.*; see also Steve Delchin, *Sixth Circuit Same-Sex Marriage Appeals Generating National Interest; Media Turning to Sixth Circuit Appellate Blog for Insight and Analysis*, SQUIRE PATTON BOGGS: SIXTH CIR. APP. BLOG (August 5, 2014), <http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-same-sex-marriage-appeals-generating-national-interest-media-turning-to-sixth-circuit-appellate-blog-for-insight-and-analysis/>.

82. See Adam Polaski, *Listen: Oral Arguments at the 6th Circuit Court of Appeals*, FREEDOM TO MARRY (Aug. 6, 2014 2:00 PM), <http://www.freedomtomarry.org/blog/entry/listen-oral-arguments-at-the-6th-circuit-court-of-appeals> (making publicly available the oral arguments given to the three-judge panel at the United States Court of Appeals for the Sixth Circuit); see also *Courtroom Audio*, U.S. CT. OF APPEALS FOR THE SIXTH CIR., [http://www.ca6.uscourts.gov/internet/court\\_audio/aud2.php?link=http://www.ca6.uscourts.gov/internet/court\\_audio/audio/08-06-2014%20-%20Wednesday/14-3057%2014%203464%20Obergefell%20and%20Henry%20v%20Himes.mp3&name=14-3057%2014%203464%20Obergefell%20and%20Henry%20v%20Himes](http://www.ca6.uscourts.gov/internet/court_audio/aud2.php?link=http://www.ca6.uscourts.gov/internet/court_audio/audio/08-06-2014%20-%20Wednesday/14-3057%2014%203464%20Obergefell%20and%20Henry%20v%20Himes.mp3&name=14-3057%2014%203464%20Obergefell%20and%20Henry%20v%20Himes) (last visited Nov. 1, 2015).

National attention had grown exponentially. When oral argument was over, we ventured outside where the press was waiting for interviews and photos. I had the good fortune of making one of the main photos.<sup>83</sup> Outside the courthouse in downtown Cincinnati, on a paid advertisement flagpole located nearest one of the entryways to the courthouse, was a rainbow or gay pride flag advertising Kroger. I had noticed it the day prior when I was mapping the route from my hotel to the courthouse. It was less an omen and more a sign of the times with cities and counties like Cincinnati providing anti-LGBT discrimination ordinances, despite the opposition from the State of Ohio in recognizing or allowing same-sex marriages.<sup>84</sup> Such contradictions of acceptance and protections were true of Tennessee with Memphis,<sup>85</sup> Shelby County,<sup>86</sup> and Knoxville<sup>87</sup> having anti-LGBT discrimination ordinances or

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83. See Photo, *Tennessee: Tanco v. Haslam, FREEDOM TO MARRY* (Aug. 6, 2014, 2:00 PM), <http://www.freedomtomarry.org/blog/entry/listen-oral-arguments-at-the-6th-circuit-court-of-appeals>.

84. CINCINNATI, OHIO, CODE § 914-1-D1 (1992) (“Discriminate’ shall mean to unlawfully segregate, separate or treat individuals differently based on race, gender, age, color, religion, disability status, marital status, sexual orientation or transgender status, or ethnic, national or Appalachian regional origin”).

85. MEMPHIS, TENN., CODE, § 3-8-6 (2012) (“There shall be no discrimination in city employment of personnel because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, sexual orientation, gender identity or other non-merit factors, nor shall there be any discrimination in the promotion or demotion of city employees because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, sexual orientation, gender identity or other non-merit factors. Gender identity means the actual or perceived gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”).

86. Jerry Jones, *Shelby County Passes Non-discrimination Resolution*, OUT AND ABOUT NASHVILLE (June 2, 2009), <http://www.outandaboutnashville.com/story/shelby-county-passes-non-discrimination#.VfNy0Z3BwXA>.

87. KNOXVILLE, TENN., CODE § 15-57 (1962) (“It shall be an unlawful employment practice for the city to discriminate against a qualified individual on the basis of non-merit factors such as race, ethnic origin, color, national origin, gender, gender identity, genetic information, sexual orientation, age except as otherwise specifically provided in this part, religion, creed, or disability in admission to, access to, or operations of its programs, services, or activities. Discrimination against any qualified individual in recruitment, examination,

resolutions while the State of Tennessee contested the recognition of same-sex marriages.

Yet by virtue of their exclusion from that institution [of marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.<sup>88</sup>

During the argument at the Sixth Circuit Court of Appeals, it became apparent from the questions by Judge Sutton and Judge Cook that state's rights was the rubric they were following. Judge Daughtrey unabashedly challenged the attorneys for the states to explain how the state's justification to prevent recognition of same-sex married couples or allow their marriage stopped or interfered with the goal of the states to support what the state had called "responsible procreation" and what had become known as the "irresponsible procreation theory" whereby opposite sex couples have "unintended offspring."<sup>89</sup>

August 2014 melted away, September breezed by, October fell to the wayside, and still the Sixth Circuit had not issued any decision on the pending marriage equality cases. Tension, speculation, and anxiety ran high as the Supreme Court declined to accept yet another writ. Justice Ginsburg spoke at the University of Minnesota Law School and responded to a question about whether the Court would take a case on same-sex marriage by saying:

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appointment, training, promotion, demotion, retention, discipline, or any other employment practices because of non-merit factors shall be prohibited.”).

88. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

89. *See DeBoer v. Snyder*, 772 F.3d 388, 422 (6th Cir. 2014) (Daughtrey, J. dissenting) (“[T]he defendants in each of these cases . . . spent virtually their entire oral arguments professing what has come to be known as the ‘irresponsible procreation’ theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for ‘unintended offspring’ by channeling their biological procreators into the bonds of matrimony.”), *rev’d sub nom. Obergefell*, 135 S. Ct. 2584; *see also* Joint Petition for a Writ of Certiorari, *supra* note 76.

There is a case presenting the question still pending before the Court of Appeals for the Sixth Circuit. If that court should disagree with the others, there will be greater cause for the Supreme Court to take up the question. But when all of the Courts of Appeals are in agreement, there's no similarly urgent need to decide the matter at once. It remains to be seen what the Sixth Circuit will rule and when it will rule. Sooner or later, yes, the question will come to the Supreme Court.<sup>90</sup>

The answer arrived on November 6, 2014, when the Sixth Circuit issued its consolidated decision, reversing the rulings by the trial courts and declaring that the states were justified in denying marriage recognition to same-sex couples and in limiting marriage to a man and a woman.<sup>91</sup> A gauntlet was thrown. Not knowing the priorities of the Supreme Court, each Plaintiff group filed a separate writ of certiorari.<sup>92</sup> We filed two hours after Ohio, with Kentucky and Michigan filing third and fourth.

### *C. Supreme Court*

For filing the writ, we wanted additional Supreme Court depth and knowledge, so one of our team members at NCLR reached out to his law school colleague Douglas Hallward-Driemeier at Ropes & Gray, LLP, in its Washington, D.C., office to join the team. Doug, along with his team, Christopher Thomas Brown, Paul Kellogg, Samira Omerovic, Joshua Goldstein, John Dey, and Emerson A. Siegle, quickly accepted our offer of invitation. He had argued fourteen cases at the Supreme Court and had extensive appellate experience. We also began the complex task of not only working on our own writ of certiorari, but also reaching

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90. Justice Ruth Bader Ginsburg & Robert A. Stein, *The Stein Lecture: A Conversation Between Justice Ruth Bader Ginsburg and Professor Robert A. Stein*, 99 MINN. L. REV. 1, 18 (2014).

91. *DeBoer*, 772 F.3d 388.

92. Petition for Writ of Certiorari, *supra* note 76; Petition for Writ of Certiorari, *Obergefell*, 135 S. Ct. 2584 (No. 14-562), 2014 WL 6334259 (Tennessee); Petition for Writ of Certiorari, *supra* note 77; Petition for Writ of Certiorari, *supra* note 78.

out to the other teams as we loosely began a coordinated effort to reach the Supreme Court.

By January all teams' writs of certiorari were ready for consideration at the Supreme Court Justices' weekly conferences. The Justices would meet on January 9, 2015, and possibly January 16, 2015, to make a decision as to whether to take one, some, or all of the pending cases.<sup>93</sup> On January 16, 2015, the Supreme Court accepted each of the writs, consolidating the cases using the Ohio name of *Obergefell* as they had filed their writ first.<sup>94</sup> Case names are like going to dinner—she who arrives first gets her name on the reservation. As set forth *infra*, two questions that had to be answered by the parties: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? Or, what I refer to as, “Can we get married?” and (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? Or, what I refer to as, “Are we still married?”

According to the Supreme Court, “approximately 10,000 petitions for a writ of certiorari [are filed] each year” and the

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93. Lyle Denniston, *Same-sex Marriage Cases Ready, Scheduled (UPDATED)*, SCOTUSBLOG (Dec. 23, 2014, 3:43 PM), <http://www.scotusblog.com/2014/12/same-sex-marriage-cases-ready-scheduled/#more-223139>.

94. *See* *Tanco v. Haslam*, SCOTUSBLOG (Jan. 16, 2015), <http://www.scotusblog.com/case-files/cases/tanco-v-haslam/> (“Petition GRANTED The petitions for writs of certiorari in No. 14-556, No. 14-571, and No. 14-574 are granted. The cases are consolidated and the petitions for writs of certiorari are granted limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? A total of ninety minutes is allotted for oral argument on Question 1. A total of one hour is allotted for oral argument on Question 2. The parties are limited to filing briefs on the merits and presenting oral argument on the questions presented in their respective petitions. The briefs of petitioners are to be filed on or before 2 p.m., Friday, February 27, 2015. The briefs of respondents are to be filed on or before 2 p.m., Friday, March 27, 2015. The reply briefs are to be filed on or before 2 p.m., Friday, April 17, 2015. VIDED.”).

“Court grants and hears oral argument in about 75–80.”<sup>95</sup> That would mean that less than approximately eight percent of writs are granted. The Supreme Court took all of the Sixth Circuit cases, and we were elated.

### 1. Preparing for the Supreme Court

The expedited briefing schedule<sup>96</sup> meant our team would work late many nights to meet the deadlines. We also had many more meetings, conferences, and emails as we coordinated with the other teams through the process of writing and submitting the briefs. Many edits, tremendous work on the appendix, and continued press conferences filled my days. Not only did we have to learn a process about which many of us were less familiar, but we had to coordinate that process with legal teams and Plaintiffs whom we did not know very well. This substantially increased our time on the case as we were engaged in preparing briefs and a joint appendix with many emails, phone conferences, joint meetings, and subgroup conferences. There are perhaps few things as motivating and encouraging as a common purpose. Each of the teams and all those involved truly wanted to change the landscape and stop the destructive force of denial of marriage and denial of recognition for same-sex married couples and their families. This common purpose created a momentum and a desire to work later, harder and with an eye toward collaboration.

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclu-

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95. *Frequently Asked Questions (FAQ)*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/faq.aspx#faqqi9> (last visited Nov. 1, 2015).

96. An expedited briefing schedule means that the parties have a shorter than usual time to file their briefs to have the briefs filed in time for oral argument. *See, e.g.*, S. CT. R. 25; *Supreme Court Procedure*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> (last visited Nov. 1, 2015).

sion that soon demeans or stigmatizes those whose own liberty is then denied.<sup>97</sup>

Choosing of oralists was an especially challenging proposition. There were approximately forty-eight lawyers all capable of arguing, but only two positions. We had hoped that the Court might consider four oralists given that there were four cases, but that was not to be an available solution. So after frequent and copious conversations a plan emerged—we would choose our oralists by an organic process of moots or practice arguments, and discussion. Although it sounds fairly simple, the process was not. In the end though, two were chosen: Doug Hallward-Driemeier and Mary Bonauto.<sup>98</sup> They were a perfect choice of diversity and complimentary arguing styles. They were, in the words of Shannon Minter, our “dream team.”<sup>99</sup> Doug had argued fourteen cases before the Court, and would argue another prior to the *Obergefell* oral argument, making *Obergefell* his sweet sixteenth argument. Mary, although not having argued at the Supreme Court before had argued at the appellate level in other forums, including the landmark case of *Goodridge*.<sup>100</sup>

National press coverage was at a new level with national organizations interviewing Plaintiffs<sup>101</sup> and pundits predicting the

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97. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

98. Hallward-Driemeier is a partner at Ropes & Gray, LLP. *Douglas Hallward-Driemeier*, ROPES & GRAY, <https://www.ropesgray.com/douglas-hallward-driemeier/> (last visited Nov. 1, 2015). Bonauto is the Civil Rights Project Director at GLAD. *Mary L. Bonauto*, GAY & LESBIAN ADVOC. & DEFENDERS, <https://www.glad.org/about/staff/mary-bonauto> (last visited Nov. 1, 2015).

99. Ariane de Vogue, *Meet the Lawyers Who Will Argue the Gay Marriage Case*, CNN (Apr. 27, 2015, 4:22 PM), <http://www.cnn.com/2015/04/24/politics/supreme-court-gay-marriage-lawyers/>.

100. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); see also *supra* note 28.

101. See, e.g., Samantha Masunaga, *From Traffic Ticket to Supreme Court: A Gay Couple's Legal Odyssey*, L.A. TIMES (Jan. 18, 2015, 9:00 AM), <http://www.latimes.com/nation/la-na-same-sex-marriage-plaintiffs-20150117-story.html>; Erik Ortiz, *Supreme Court Gay Marriage Debate Puts Ohio Man Jim Obergefell in Center*, NBC NEWS (Apr. 26, 2015, 6:15 PM), <http://www.nbcnews.com/politics/supreme-court/supreme-courts-gay-marriage-debate-puts-ohio-man-jim-obergefell-n347836>.



outcome of the cases. Surpassing *Windsor*, which had ninety-six amicus briefs filed, *Obergefell* would have 147 by the time of oral argument, with 77 briefs in support of plaintiffs and sixty-six in support of respondents.<sup>102</sup> Timelines approached quickly and soon the case was briefed and ready for argument. To prepare, a series of moots were held. We held a moot for the Tennessee team in Nashville, and then we traveled to Washington, D.C., for moots at Georgetown University Law Center and Howard University School of Law.<sup>103</sup> Both Georgetown and Howard have moot programs where the school brings together the legal teams (one side of each argument, which for our case meant a moot for the Plaintiffs) and a panel of faculty and experienced Supreme Court oralists or “advocates.” Students are allowed to attend but precautions are taken to ensure the confidentiality of the process.<sup>104</sup>

Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.<sup>105</sup>

## 2. Oral Argument

The days were long leading to oral argument. On the day of the argument, I left my in-laws’ condo with my wife, arriving at a hotel near the Court to meet the Attorneys and Plaintiffs. Together we took a bus to Court, found my place in line, which had

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102. See Ruthann Robson, *Guide to the Amicus Brief in Obergefell v. Hodges: The Same-Sex Marriage Cases*, CONST. L. PROFESSOR BLOG (Apr. 16, 2015), <http://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html>.

103. See *The Marriage Equality Supreme Court Moot*, Part 1-10, HOW. U. SCH. OF L. (Apr. 22, 2015), <http://www.law.howard.edu/1904>.

104. See *Moot Court Program*, SUP. CT. INSTITUTE: GEO. U. L. CTR., <https://www.law.georgetown.edu/academics/centers-institutes/supreme-court-institute/moot-court-program/index.cfm> (last visited Nov. 1, 2015).

105. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

been preserved by a line-stander,<sup>106</sup> and slowly got through security inside the courtroom. As we had limited tickets, many of the lawyers like myself had given up their seat tickets to ensure that the Plaintiffs would all get an opportunity to sit through oral argument Question 1 or 2. Sitting to my immediate left was the attorney oralist for the Plaintiff in *Lawrence*, and a few seats to my right was the attorney oralist for the Plaintiff in *Windsor*. The courtroom was filled with lawyers, law professors, Supreme Court advocates, press, Plaintiffs, guests, and members of the public. The Marshal announced the entry of the Justices into the courtroom and soon oral argument began. While Mary and Doug fielded questions from the Justices and advocated for equality,<sup>107</sup> outside was a rally.<sup>108</sup> During the argument there would be an outburst and the man yelling “abomination” and “hell” would be carried out by at least 5 courtroom officers.<sup>109</sup> This outburst did not disturb the Solicitor General who paused and nearly walked away from the podium during the commotion, but decided better and began his argument. This case was the first time the U.S. Government had taken a position in favor of same-sex marriage equality.<sup>110</sup> The Solicitor General argued fifteen of the allocated ninety minutes dedicated to “whether the Fourteenth Amendment requires

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106. Beginning the October Term 2015, line-standers are no longer allowed for attorneys in the bar line, “only Bar members who actually intend to attend argument will be allowed in the line for the Bar section. See Lyle Dennison, *No Subs For Lawyers in Court Lines*, SCOTUSBLOG (Oct. 5, 2015, 3:57 PM), <http://www.scotusblog.com/2015/10/no-subs-for-lawyers-in-court-lines/>.

107. When recounting this day Ijpe would remark that hearing Doug share each of the Plaintiff couples’ stories “chilled” him. See *infra* note 109.

108. My wife, Taylor Williams, older daughter Margot Chapman, son-in-law Clay Chapman, daughter Yvette Holland, and her boyfriend Trey Kirk waited outside with megaphones blaring. My best friend from high school, Kasey Wilson, was outside taking photos for a video and photo album she would create for me.

109. Bianca Phillips, *Q&A with Memphis Couple in Supreme Court Same-Sex Marriage Case*, MEM. FLYER (June 28, 2015, 4:43 PM), <http://www.memphisflyer.com/MemphisGaydar/archives/2015/04/28/qanda-with-memphis-couple-in-supreme-court-same-sex-marriage-case>.

110. Brief for the United States as Amicus Curiae Supporting Petitioners at \*2, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004710.

states to license a marriage between two people of the same sex?”<sup>111</sup>

Leaving the Courtroom and walking down the stairs of the Supreme Court felt overwhelming and exciting at once. Photos abound of this day.<sup>112</sup> Now the real wait began.

## VI. DECISION

We knew the Court would likely rule in June and most predictably by the end of the term. There was a lot of speculation that the decision would come out on June 29, but not being much of a gambler, I opted to arrive early, on the evening of June 25th and stay in Washington, D.C., through June 29th or 30th. By June 25, 2015, word reached us that a decision would be issued on a day other than Monday or Thursday, the days generally for announcements in June. It seemed all too coincidental that June 26 was the day *Lawrence* and *Windsor* decisions had been issued.<sup>113</sup> Would that hold true for this case?

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for

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111. Oral Argument at 27:58, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), [http://www.supremecourt.gov/oral\\_arguments/audio/2014/14-556-q1](http://www.supremecourt.gov/oral_arguments/audio/2014/14-556-q1).

112. Ijpe Dekoe, *Gay-Marriage Plaintiff: Our Names Are Now Part of the History of Marriage Equality*, TIME MAG. (May 1, 2015), <http://time.com/author/ijpe-dekoe/>.

113. See cases cited *supra* notes 4, 15.

equal dignity in the eyes of the law. The Constitution grants them that right.<sup>114</sup>

So early on the morning of June 26, 2015, I again left my in-laws' condo in Washington, D.C., with my wife and made my way into the courtroom. This time I'm sitting next to Doug. Over the sounds of lawyers crying for joy, Kennedy continues to read:<sup>115</sup>

The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.<sup>116</sup>

Doug is holding my hand firmly, as one would an armchair and I place my hand over his. We won. . . . *It is so ordered.*<sup>117</sup>

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114. *Obergefell*, 135 S. Ct. at 2608.

115. Opinion Announcement, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), <https://www.oyez.org/cases/2014/14-556>.

116. *Obergefell*, 135 S. Ct. at 2607–08.

117. *Id.* at 2608.