

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Shannon ZAHRN, Catherine Zahrn,
Alexius Augustine, and Andrew
Simpson, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

Rick PERRY, in his official capacity
as Governor of Texas; Greg Abbott,
in his official capacity as Attorney
General of Texas; and Dana
DeBeauvoir, in her official capacity
as County Clerk of Travis County,
Texas,

Defendants.

Civil Action No. 1:13-cv-00955

**Complaint for Declaratory
and Injunctive Relief**

Class Action

Plaintiffs Shannon Zahrn, Catherine Zahrn, Alexius Augustine, and Andrew Simpson, on behalf of themselves and all others similarly situated, bring this Complaint for Declaratory and Injunctive Relief under 42 U.S.C. § 1983:

Introduction

1. More than four decades ago, the Supreme Court of the United States recognized marriage as “one of the ‘basic civil rights of man.’” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). And just a few months ago, the Supreme Court rightly held that the federal government’s restriction of marriage to opposite-

sex couples, in the Defense of Marriage Act (DOMA), violated the principles of due process and equal protection under the Fifth Amendment, because its purpose was “to impose inequality” on individuals who are homosexual. *United States v. Windsor*, 570 U.S. ---, 133 S. Ct. 2675, 2694 (June 26, 2013).

2. In striking down the federal ban on same-sex marriage in *Windsor*, the Supreme Court also went out of its way to note that the Fourteenth Amendment, which protects an individual’s rights of due process and equal protection against state action, makes these rights “all the more specific and all the better understood and preserved.” 133 S. Ct. at 2695. Thus, the logic of *Windsor* is as follows: just as DOMA’s denial of marriage to same-sex couples was unconstitutional under the Fifth Amendment, a state’s denial of marriage to same-sex couples is unconstitutional under the Fourteenth Amendment.

3. At least fourteen states, plus the District of Columbia, currently provide marriage equality to individuals who are homosexual. And more states, such as Hawaii and Oregon, are moving in that direction.

4. Meanwhile, lawsuits seeking to enforce marriage rights—relying in part on *Windsor*—are now pending in other states, including Arizona, Arkansas, Illinois, Kentucky, Louisiana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and West Virginia.

5. And courts in Michigan, New Jersey, New Mexico, and Ohio have already relied in part on *Windsor* to rule against state laws that refuse to recognize same-sex marriages.

6. The State of Texas, through Article I, section 32 of the Texas Constitution and sections 2.001 and 6.204 of the Texas Family Code, imposes inequality on gays and lesbians in exactly the same way that DOMA did—by

denying them the basic right to marry.

7. Plaintiffs therefore ask this Court, pursuant to 42 U.S.C. § 1983, to protect and enforce their rights and the rights of the Plaintiff Class under the United States Constitution, by declaring Article I, section 32 and sections 2.001 and 6.204 unconstitutional, and by enjoining permanently the enforcement of these and any other provisions of Texas law that would seek to deny same-sex couples equal access to civil marriage in Texas.

Jurisdiction and Venue

8. Plaintiffs bring this action on behalf of themselves and the Plaintiff Class under 42 U.S.C. § 1983 and the Constitution of the United States; therefore, this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because all Defendants reside in this district, and because a substantial part of the events giving rise to the claim occurred in this district.

10. This Court has authority to enter a declaratory judgment and to provide injunctive relief pursuant to Federal Rules of Civil Procedure 57 and 65, and to 28 U.S.C. §§ 2201 and 2202.

11. This Court has personal jurisdiction over Defendants because they are domiciled in the State of Texas.

The Parties

12. Plaintiff Shannon Zahrn is a Texas resident in Travis County, Texas.

13. Plaintiff Catherine Zahrn is a Texas resident in Travis County, Texas.

14. Plaintiff Alexius Augustine is a Texas resident in Travis County, Texas.

15. Plaintiff Andrew Simpson is a Texas resident in Travis County, Texas.

16. Defendant Rick Perry is the Governor of the State of Texas. In his official capacity he is the chief executive officer of the State of Texas. The Governor's office is located in the Austin Division of this Judicial District.

17. Defendant Greg Abbott is the Attorney General of the State of Texas. In his official capacity he is the chief legal officer of the State of Texas, and it is his duty to see that the State's laws are uniformly and adequately enforced. The Attorney General's office is located in the Austin Division of this Judicial District.

18. Defendant Dana DeBeauvoir is the County Clerk of Travis County, Texas. In her official capacity she is responsible for maintaining marriage records, issuing marriage licenses, and performing civil marriages. The County Clerk's office is located in the Austin Division of this Judicial District.

19. Defendants and those subject to their supervision, direction, and control are responsible for the enforcement of sections 2.001 and 6.204 of the Texas Family Code and Article I, section 32 of the Texas Constitution, and any other Texas law that denies same-sex couples the right to civil marriage in Texas. The relief requested in this action is sought against each Defendant as well as against each Defendant's officers, employees, and agents, and against all persons acting in cooperation with Defendant(s), under their supervision, at their direction, or under their control.

Facts

20. Individuals who are homosexual have suffered a long history of discrimination and unequal treatment in the United States and in Texas.

21. Laws against homosexual sex, for example, date back to before the nation was founded. Texas passed its first codified anti-sodomy law in 1860 (imposing a penalty of up to 15 years in prison), and updated its law to single out homosexual sex for criminalization in 1973. In some states, homosexual sex was at one time punishable by death.

22. More recently, in 1992, the voters in the State of Colorado amended their state constitution to *prevent* cities and municipalities from outlawing discrimination against homosexuals. In other words, the amendment was designed to *enable* discrimination against gays and lesbians, in contexts such as housing, employment, education, health services, and public accommodations.

23. In 1996, the federal government enacted the Defense of Marriage Act (DOMA), codifying a federal ban against same-sex marriage. Section 3 of DOMA stated that, for the purposes of federal law, “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.” 1 U.S.C. § 7. And section 2 of DOMA says that no state shall be required to “give effect” to same-sex marriages created in other states. 1 U.S.C. § 1738C.

24. One year after DOMA was enacted, in 1997, the State of Texas enacted its own laws against same-sex marriage, adding section 2.001 to the Texas

Family Code, which states: “A license may not be issued for the marriage of persons of the same sex.” Tex. Fam. Code § 2.001(b).

25. In 2003, Texas added its own version of DOMA, in section 6.204 of the Family Code, which states: “A marriage between persons of the same sex . . . is contrary to the public policy of this state and is void in this state. The state or an agency or political subdivision of the state may not give effect to a public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex . . . in this state or in any other jurisdiction.” Tex. Fam. Code § 6.204(b)–(c).

26. And in 2005, for added measure, the Texas Constitution was amended to declare: “Marriage in this state shall consist only of the union of one man and one woman.” Tex. Const. art. I, § 32(a).

27. But these various efforts to impose inequality on individuals who are homosexual have not gone unanswered.

28. The United States Supreme Court struck down the voter-approved Colorado constitutional amendment that enabled widespread discrimination against homosexuals, because the Court found it was motivated by “animus” and held that “a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” The Court therefore determined that the Colorado law could not survive even the most deferential review under the Fourteenth Amendment’s Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 632–634 (1996) (internal quotations omitted).

29. Just a few years later, the Supreme Court struck down the Texas laws that criminalized adult, consensual, homosexual sex because, according to the Court, the Fourteenth Amendment’s Due Process Clause “gives substantial

protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). In fact, the Court declared that the Due Process Clause broadly protects “the autonomy of the person,” including “personal decisions relating to **marriage**, procreation, contraception, family relationships, child rearing, and education.” *Id.* at 573–574 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (emphasis added). *Lawrence* stemmed from the criminal prosecution of two gay men in Houston who had been arrested in their bedroom.

30. And this past summer, the Supreme Court determined that the federal government’s restriction of marriage to only opposite-sex couples, through DOMA, was—like the Colorado law—motivated by “animus,” and that its “principal purpose” was “to impose inequality” on same-sex couples. Citing both *Romer* and *Lawrence*, the Court declared that DOMA’s restrictive definition of marriage as “only a legal union between one man and one woman” violated the principles of due process and equal protection, and was therefore unconstitutional. *Windsor*, 133 S. Ct. at 2695–2696.

31. In the face of these rulings, the State of Texas continues to discriminate against gays and lesbians by doing exactly what the federal government sought to do through DOMA—namely, to deny same-sex couples equal access to the rights, benefits, and protections of civil marriage.

32. Sections 2.001 and 6.204 of the Texas Family Code were inspired by DOMA’s passage in 1996. In fact, section 6.204 is likewise titled the “Defense of Marriage Act,” and the official website for the Office of the Governor—Defendant Perry’s office—states explicitly that section 6.204 “mirrors” the

federal DOMA.

33. Moreover, the text of Article I, section 32 of the Texas Constitution, which restricts marriage to only “the union of one man and one woman,” mimics the very text in section 3 of DOMA that was stricken as unconstitutional by the Supreme Court in *Windsor*.

34. These laws discriminate against same-sex couples on their face, and the State of Texas has even judicially admitted, in other proceedings, that the purpose of these laws is to “favor” opposite-sex couples. This is merely the inverse of saying that the purpose of these laws is to single out homosexuals for disfavored treatment. Or, in other words, the purpose of these Texas laws is “to impose inequality.” *Cf. Windsor*, 133 S. Ct. at 2694.

Shannon & Catherine

35. Plaintiffs Shannon Zahrn and Catherine Zahrn have suffered harm as a result of the State’s enforcement of Texas law.

36. Shannon and Catherine have known each other for nearly twenty years. They first met and became friends while at school in Virginia, in 1995, and they reconnected and started dating while living in Georgia, in 2002.

37. In 2005 the couple wanted to get married, but state laws denied them the right to do so. To nevertheless demonstrate their love for and commitment to one another, they invited friends and family to a commitment ceremony, which they performed on September 17, in South Carolina. They have celebrated that date every year since then, as their “anniversary.”

38. That same year, Shannon also legally changed her last name to match

Catherine's, to outwardly demonstrate her commitment to the relationship.

39. In 2006, the couple moved to Austin, Texas, for Shannon's job.

40. Catherine gave birth to a baby girl in 2011. Shannon legally adopted the child as a "second parent" a few months later, and the Zahrns legally became a family. But they still could not legally get married.

41. Shannon's sister became very ill, and passed away in December, 2011. Shannon's father also passed away shortly thereafter, in April, 2012.

42. As a result, Shannon's niece came to live with Shannon and Catherine in 2012, because they could provide her with a stable and loving home environment. Shannon and Catherine became legal conservators of Shannon's niece in 2013.

43. In short, Shannon and Catherine have been together for over ten years and are the loving parents of two children.

44. The Zahrns are like any other typical Texan family, and deserve the same rights, privileges, protections, and responsibilities enjoyed by other Texan families. They own and share a home together; they have joint bank accounts; they are parents and have children together. They have a life together. They love each other. Like thousands of other similarly situated couples in Texas and the United States, they desire to formalize their relationship through civil marriage.

45. Shannon and Catherine wanted to get married nearly eight years ago, on September 17, 2005, but state laws deprived them of that right. They have wanted to get married since moving to Texas in 2006, but Texas state law has prevented them from doing so.

46. On July 12, 2013—two weeks after the Supreme Court declared that DOMA’s restriction of marriage to only opposite-sex couples was unconstitutional—Shannon and Catherine went to the Travis County Clerk's Office at 5501 Airport Blvd., Austin, Texas, to apply for a marriage license.

47. But the couple was not permitted to even apply for a Texas marriage license. Instead, when they asked for an application they were given the runaround, told they were a “special case,” and then made to wait for a manager to assist them. The manager then gave Shannon and Catherine a printed copy of section 2.001 of the Family Code (stating “A license may not be issued for the marriage of persons of the same sex.”), and told them that she was not allowed even to give them an application for a license. When asked, the manager also said that, for opposite-sex couples, the application can be completed onsite, and the license can be issued immediately.

48. Shannon and Catherine’s inability to have their relationship formalized by the State, and recognized legally with the same dignity and respect accorded to married opposite-sex couples, has caused them significant hardship—including but not limited to the deprivation of rights guaranteed by the Fourteenth Amendment, and stigma.

49. Shannon and Catherine have wanted to marry for as long as they have lived in Texas (over seven years), and each day that they are denied the freedom to marry they suffer irreparable harm as a direct result of Defendants’ enforcement of Texas state law.

50. If sections 2.001 and 6.204 of the Texas Family Code, and article I, section 32 of the Texas Constitution—and all other Texas laws that prevent or prohibit same-sex marriage in Texas—are not enjoined, Defendants will

continue to enforce them and thereby continue to deprive Shannon and Catherine, and others who are similarly situated, of their constitutional rights.

51. For these reasons, Shannon and Catherine, as Plaintiffs, bring this action on behalf of themselves and others similarly situated.

Alex & Andy

52. Plaintiffs Alexius Augustine and Andrew Simpson have suffered harm as a result of the State's enforcement of Texas law.

53. Alex and Andy have known each other for ten years. They first met in 2003, when Alex was a university student in Malaysia and Andy was working for a computer company. They hit it off, Alex legally immigrated to the United States, and the couple bought a house together in Austin. They have been living together since January 2004.

54. In 2005 the couple wanted to get married, but Texas law denied them the right to do so. To demonstrate their commitment to each other, that year they executed wills and estate-planning documents together, naming each other as beneficiaries.

55. In 2006 Alex graduated with a degree in International Relations from St. Edwards University. He later earned a masters degree in Global Issues, and he works as a student admissions advisor and program coordinator. Andy holds an MBA from St. Edwards and continues to work in the computer industry.

56. The couple has had joint bank accounts since 2004. They officially proposed to each other in 2012. And they have discussed having children and

plan to adopt in the near future.

57. In short, Alex and Andy have been together for ten years and are deeply committed to each other. They are like any other typical American couple, and they deserve the same rights, privileges, protections, and responsibilities enjoyed by other American couples. They have a life together. They love each other. Like thousands of other similarly situated couples in Texas and the United States, they wanted to formalize their relationship through civil marriage. So they did.

58. A few weeks after the U.S. Supreme Court issued its decision in *Windsor*, Alex and Andy traveled to York, Maine, where they were legally married by a judge, on a mountainside, on July 17, 2013.

59. But Texas law, on its face, refuses to recognize the validity of a same-sex marriage legally created in another state. Tex. Fam. Code § 6.204. And State officials, including Defendant Greg Abbott, have officially declared (and judicially admitted) that the State will not “give effect” to Alex and Andy’s marriage. In other words, though Alex and Andy have formalized their relationship by legally marrying under the laws of another state, the State of Texas seeks to deprive them of their marital status—and of their right to be married.

60. The State’s refusal to recognize Alex and Andy’s marriage—and particularly its refusal to accord their legal out-of-state marriage with the same dignity and respect accorded to opposite-sex couples who are legally married in another state, constitutes a harm and a hardship to Alex and Andy, which includes but is not limited to the deprivation of their rights guaranteed by the U.S. Constitution, and stigma.

61. The State's refusal to recognize the validity of Alex and Andy's out-of-state marriage also harms them by denying them the rights, benefits, and protections associated with marriage, such as hospital visitation rights, the right to make medical decisions for one's spouse, spousal survivorship rights, the right not to testify against one's spouse, the right to loss-of-consortium damages in civil lawsuits, and so on.

62. Alex and Andy have wanted to be married for almost as long as they have lived in Texas (roughly nine years). They celebrated their marriage in Maine just a few months ago—but the State of Texas refuses to recognize its validity or to “give effect” to that marriage. And each day that they are deprived of their right to be recognized as legally married they suffer irreparable harm as a direct result of Defendants' enforcement of Texas law.

63. If sections 2.001 and 6.204 of the Texas Family Code, and article I, section 32 of the Texas Constitution—and all other Texas laws that prevent or prohibit the recognition of same-sex marriages legally created in other states—are not enjoined, Defendants will continue to enforce them and thereby continue to deprive Alex and Andy, and others who are similarly situated, of their constitutional rights.

64. For these reasons, Alex and Andy, as Plaintiffs, bring this action on behalf of themselves and others similarly situated.

The Plaintiff Class

65. The Plaintiff Class consists of all individuals who, like Shannon and Catherine, reside in the State of Texas and otherwise meet the legal requirements to marry in Texas, but wish to marry someone of the same sex,

and for that reason are denied the right to marry by Texas law. The Plaintiff Class also includes all individuals who, like Alex and Andy, reside in the State of Texas and have been legally married under the laws of another state, but to someone of the same sex, and whose marriage for that reason is not recognized as valid under Texas law.

66. The declaratory and injunctive relief sought by the Named Plaintiffs, on behalf of themselves and of the Plaintiff Class, will remedy their harm as follows:

(1) by requiring county clerks in Texas, such as Defendant DeBeauvoir, to issue a marriage license to Plaintiffs Shannon Zahn and Catherine Zahn (and to others similarly situated), so that they can be legally married under Texas law; and

(2) by requiring Defendants Perry and Abbott, in their official capacities as Governor and Attorney General of Texas, respectively, to recognize the out-of-state marriage of Alex and Andy (and of others similarly situated), as legally valid in Texas.

By the relief sought, the Named Plaintiffs and the Plaintiff Class will become equally privy to all the rights, benefits, and protections of civil marriage in Texas.

Claim One: Equal Protection

67. Plaintiffs incorporate by reference paragraphs 1–66, above, as if fully set forth herein.

68. The Equal Protection Clause of the Fourteenth Amendment requires

consideration of whether the classifications drawn by a state law constitute “an arbitrary and invidious discrimination.” *Loving*, 388 U.S. at 10. A state law that singles out individuals who are homosexual for disfavored treatment, and imposes on them inequality, violates the principle of equal protection under the law. *Windsor*, 133 S. Ct. at 2694–2696.

69. Sections 2.001 and 6.204, and article I, section 32, restrict access to civil marriage to only opposite-sex couples, thereby denying individuals who are homosexual the right and freedom to marry the person of their choosing. These laws treat similarly situated persons differently—or, in other words, they impose inequality—by providing the status, dignity, rights, benefits, and protections of civil marriage to heterosexual couples but not to homosexual couples. Put another way, these Texas laws single out individuals who are homosexual for disfavored treatment.

70. Defendants and other state officials have openly expressed the animus held toward homosexuals that motivates these laws. In a 2011 campaign ad, Defendant Perry, speaking as the Governor of Texas while running for the GOP presidential nomination, said “something’s wrong in this country when gays can serve openly in the military.” Perry, who signed section 6.204 into law, has repeatedly stated that he believes God disapproves of same-sex relationships. And at a rally held earlier this year—on the same day that oral arguments were heard in *Windsor*—Perry said he found the push for equal marriage rights “unsettling.”

71. On the day that *Windsor* was decided, Todd Staples—a state legislator and co-author of article I, section 32 (the Texas Marriage Amendment)—criticized the Supreme Court’s recognition of marriage equality as “the

definition of absurdity.”

72. And perhaps most notably, Defendant Abbott has, as Texas Attorney General, judicially admitted that the unequal treatment of same-sex couples is “precisely the point” of these Texas laws against same-sex marriage.

73. Sections 2.001 and 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution, both on their face and as applied to Plaintiffs and the Plaintiff Class, single out individuals who are homosexual for disfavored treatment, stigmatizing them as “second class” and denying them the same status, dignity, rights, benefits, and protections of marriage that are provided by law to individuals who are heterosexual. Therefore, these Texas laws violate the Equal Protection Clause of the Fourteenth Amendment.

Claim Two: Due Process

74. Plaintiffs incorporate by reference paragraphs 1–73, above, as if fully set forth herein.

75. The Due Process Clause of the Fourteenth Amendment protects individuals against the deprivation of their rights or liberty without due process of law. “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom . . . is surely to deprive all the State’s citizens of liberty without the due process of law.” *Loving*, 388 U.S. at 12.

76. Sections 2.001 and 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution, both on their face and as applied to Plaintiffs, deprive individuals who are homosexual of their freedom to marry—or, if they have already married in another state, deprive them of their rightful legally-

married status. Therefore, these Texas laws violate the Due Process Clause of the Fourteenth Amendment.

Claim Three: Right to Travel

77. Plaintiffs incorporate by reference paragraphs 1–76, above, as if fully set forth herein.

78. The right and freedom “to enter and abide in any State in the Union” has been recognized as “a basic right under the Constitution.” *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901–902 (1986). When a state law serves to “penalize” individuals for their migration to that state, that law impinges on the right to travel. *Id.* at 903.

79. Section 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution, both on their face and as applied to Plaintiffs Augustine and Simpson, and to the Plaintiff Class, refuse to recognize the validity of a same-sex marriage that was legally entered into in another state. Or, in other words, these laws serve to penalize same-sex couples who are legally married in another state and then migrate to Texas, by depriving them of their legally-married status. Therefore, these Texas laws violate the constitutional right to travel.

Claim Four: Full Faith and Credit

80. Plaintiffs incorporate by reference paragraphs 1–79, above, as if fully set forth herein.

81. The U.S. Constitution 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. Thus, just as Texas gives full faith and credit to the legal out-of-state marriage of an opposite-sex couple, it must—under the Full Faith and Credit Clause—give full faith and credit to the legal out-of-state marriage of a same-sex couple.

82. But section 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution, both on their face and as applied to Plaintiffs Augustine and Simpson, and to the Plaintiff Class, refuse to recognize the validity of same-sex marriages that are legally created in another state. Therefore, these Texas laws violate the Full Faith and Credit Clause.

83. Article IV does provide that “Congress may by general laws prescribe the manner in which [the public acts of other states] shall be proved, and the effect thereof.” U.S. Const. art. IV, § 1. And section 2 of DOMA exploits this provision to declare that “[n]o state . . . shall be required to give effect to any public act” by another state that creates a same-sex marriage. 28 U.S.C. § 1738C.

84. But it is a fundamental principle of American law that a statute cannot undo, overrule, or otherwise supersede a constitutional provision. If a statute and a constitutional provision are in conflict, the statute must bow to the supremacy of the Constitution.

85. Article IV requires each state to give “full faith and credit” to the public acts of another state. And Article IV also permits Congress to “prescribe the **manner** in which such Acts . . . shall be proved, and the Effect thereof.” But Article IV does **not** allow Congress to simply undo the Full Faith and Credit Clause altogether.

86. Therefore, to the extent section 2 of DOMA purports to wholly

circumvent or supersede the Full Faith and Credit Clause, by authorizing states to give **no** effect to same-sex marriages created by another state, section 2 of DOMA exceeds the power granted to Congress under Article IV, and is therefore unconstitutional.

87. In short, the Texas laws refusing to “give effect” to out-of-state same-sex marriages violate the Full Faith and Credit Clause—and these state laws cannot seek cover under section 2 of DOMA, because section 2 of DOMA is itself an unconstitutional overreach of congressional authority.

Claim Five: Violation of 42 U.S.C. § 1983

88. Plaintiffs incorporate by reference paragraphs 1–87, above, as if fully set forth herein.

89. By enforcing sections 2.001 and 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution to deny Plaintiffs equal access to civil marriage in Texas, or to refuse to recognize the validity of Plaintiffs’ civil marriage from another state, Defendants, under color of Texas state law, are depriving and will continue to deprive Plaintiffs and the Plaintiff Class of rights secured by the U.S. Constitution. This violates 42 U.S.C. § 1983.

Irreparable Injury

90. Plaintiffs incorporate by reference paragraphs 1–89, above, as if fully set forth herein.

91. Because Defendants have been and are currently enforcing sections 2.001 and 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution to the detriment of Plaintiffs and the Plaintiff Class, an actual

and judicially cognizable controversy exists between Plaintiffs and Defendants, over whether these provisions of Texas law are unconstitutional.

92. Plaintiffs and the Plaintiff Class have been and are now severely and irreparably injured by sections 2.001 and 6.204 of the Texas Family Code, and by article I, section 32 of the Texas Constitution. This injury includes, but is not limited to, the deprivation of rights guaranteed by the U.S. Constitution and stigma caused by the State's refusal to allow Plaintiffs and each member of the Plaintiff Class to marry the person he or she loves, or by the State's refusal to recognize the validity of same-sex marriages created in other states. Marriage is a highly valued legal and social status, and married couples are often treated differently from unmarried couples. Being married reflects and expresses a couple's commitment to one another—it represents the significance and value that the couple (and society) has placed on or invested in the relationship. By denying Plaintiffs and each member of the Plaintiff Class the right to marry in Texas, or to have their out-of-state marriage recognized in Texas, the State publicly and officially devalues each Plaintiff's respective relationship. By the operation and enforcement of the laws at issue, Plaintiffs and the members of the Plaintiff Class are denied access to the same status, respect, and dignity, and to the same rights, benefits, and protections that are provided to opposite-sex couples.

93. Moreover, this public and official devaluing of same-sex relationships sends a public and official message to the children of same-sex couples, telling them their parents are in a relationship that is "less worthy" than the relationships of others. *Cf. Windsor*, 133 S. Ct. at 2696. Put another way, the State's legal "differentiation" between opposite-sex relationships and same-sex relationships, and its provision of marriage to one and not the other,

“demeans” same-sex relationships and thereby “humiliates” the children of the Named Plaintiffs and of the members of the Plaintiff Class. *Cf. id.* at 2694.

94. By denying Plaintiffs and the Plaintiff Class the right to marry, or to have their marriage recognized, the State also denies Plaintiffs and the Plaintiff Class access to numerous state-law benefits and protections. For example, Plaintiffs cannot claim intestacy rights, *see* Tex. Probate Code §§ 38, 45; a Plaintiff cannot file a wrongful death suit if his or her partner is killed, *see* Tex. Prac. & Rem. Code § 71.004; Plaintiffs cannot claim the spousal privilege to avoid testifying against one another, *see* Tex. R. Evid. 504; and a Plaintiff cannot, without a written agreement, make health care or burial decisions pertaining to the care of his or her partner.

95. Furthermore, Plaintiffs Augustine and Simpson, and members of the Plaintiff Class, are irreparably injured by section 2 of DOMA, to the extent that it authorizes the State of Texas to refuse to recognize or give effect to a same-sex marriage legally created in another state—and to thereby stigmatize Plaintiffs and deny them equal status and equal access to the benefits and protections listed above.

96. In short, Defendants’ enforcement of the laws at issue has caused and continues to cause Plaintiffs and the Plaintiff Class irreparable harm, by denying them their constitutional rights, by stigmatizing them, by humiliating their children, and by denying them access to numerous state-law benefits and protections.

97. These injuries can be redressed only if this Court

(1) declares unconstitutional sections 2.001 and 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution—and

any other Texas law that bars or refuses to recognize same-sex marriage; and

(2) enjoins Defendants in their official capacities from enforcing these laws.

Class Allegations

98. Plaintiffs incorporate by reference paragraphs 1–97, above, as if fully set forth herein.

99. Plaintiffs Shannon Zahn, Catherine Zahn, Alex Augustine, and Andy Simpson bring this action on behalf of themselves and, pursuant to Federal Rule of Civil Procedure 23, all others who are similarly situated.

100. The Plaintiff Class, as proposed, consists of

(a) all individuals who, like Shannon and Catherine, reside in the State of Texas and otherwise meet the legal requirements to marry in Texas, but wish to marry someone of the same sex, and for that reason are denied the right to marry by Texas law; and

(b) all individuals who, like Alex and Andy, reside in the State of Texas and have been legally married under the laws of another state, but to someone of the same sex, and whose marriage for that reason is not recognized as valid under Texas law.

101. The Class is so numerous that joinder of all members is impracticable. According to one study, based on the 2010 U.S. Census, there are 46,401 same-sex couples residing in Texas. An estimated 6,000 of those couples have been legally married in another state. And upon information and belief many of the

remaining Texas couples would marry here in Texas, if Texas law permitted them to do so.

102. There are questions of law and fact common to the members of the Class. Factually, all members of the Class are either already legally married under the laws of another state or desire to be married in Texas, but they cannot get married—or their out-of-state marriage is not recognized—due to Texas law and Defendants’ enforcement thereof. The legal questions common to the Class include, but are not limited to, (a) whether Texas laws against same-sex marriage violate the Equal Protection Clause; (b) whether these laws violate the Due Process Clause; (c) whether these laws violate the constitutional right to travel; (d) whether they violate the Full Faith and Credit Clause; and (e) whether the State’s deprivation of these rights violates 42 U.S.C. § 1983. Defendants are expected to raise common defenses to these claims.

103. These common questions of law and fact predominate over any individual questions that might exist, because there are not likely to be *any* individual issues material to Plaintiffs’ claims.

104. The claims of the Named Plaintiffs are typical of those of the Plaintiff Class, as they all arise from the enforcement of Texas laws against allowing or recognizing same-sex marriage in Texas.

105. The Named Plaintiffs are capable of fairly and adequately protecting the interests of the Plaintiff Class because they have no interests antagonistic to the Class, and because they are represented by counsel experienced in complex class action litigation—and in litigation involving constitutional claims and same-sex marriage rights in Texas.

106. This action is maintainable as a class action under Federal Rule of Civil Procedure 23(b)(1) because prosecution of separate actions would create a risk of inconsistent and varying adjudications, resulting in some Texas couples having access to marriage or recognition of their out-of-state marriage, and others not.

107. This action is also maintainable as a class action under Federal Rule of Civil Procedure 23(b)(2) because Defendants' enforcement of Texas law applies generally to the Class, by precluding all members from marrying or from having their legal out-of-state marriage recognized in Texas. Thus the declaratory and injunctive relief sought by Plaintiffs is appropriate as to the Class as a whole.

Prayer

Wherefore, Plaintiffs pray for judgment as follows:

108. Plaintiffs respectfully ask this Court to declare that this suit is maintainable as a class action pursuant to Rule 23.

109. Plaintiffs respectfully ask this Court, pursuant to 28 U.S.C. § 2201, to construe sections 2.001 and 6.204 of the Texas Family Code and article I, section 32 of the Texas Constitution, and to enter a declaratory judgment stating that these laws—and all other Texas laws that bar or that refuse to recognize or give effect to same-sex marriage—violate the U.S. Constitution and 42 U.S.C. § 1983.

110. Plaintiffs respectfully ask this Court also to construe section 2 of DOMA, and to enter a declaratory judgment stating that, to the extent section 2 purports to circumvent or supersede the Full Faith and Credit

Clause—or to the extent that it purports to permit a state such as Texas to avoid its obligation to give full faith and credit to a same-sex marriage legally created by another state—section 2 exceeds the authority granted to Congress under Article IV, and is therefore unconstitutional.

111. Plaintiffs respectfully ask this Court to enter a preliminary and a permanent injunction enjoining enforcement or application of all Texas laws that bar same-sex marriage, or that refuse to recognize or “give effect” to same-sex marriages legally created in another state.

112. Plaintiffs respectfully ask that the declaratory and injunctive relief requested be granted against each Defendant in his or her official capacity; against each Defendant’s officers, employees, and agents; and against all persons acting in concert or participation with any Defendant, or under any Defendant’s supervision, direction, or control.

113. Plaintiffs respectfully ask this Court to award to Plaintiffs all costs, expenses, and reasonable attorney fees, pursuant to 42 U.S.C. § 1988, as well as any further relief to which the Court determines Plaintiffs may be justly entitled.

Dated: 10 / 31 / 2013

By: /s/ Jason P. Steed

Jason P. Steed, SBN 24070671
BELL NUNNALLY & MARTIN, LLP
3232 McKinney Ave., Suite 1400
Dallas, TX 75204
Phone: (214) 740-1411, Fax: (214) 740-5711
jasons@bellnunnally.com

James J. Scheske, SBN 17745443
JAMES J. SCHESKE PLLC
5501-A Balcones #109
Austin, TX 78731
Phone: (512) 371-1790, Fax: (512) 323-2260
jscheske@austin.rr.com

S. Leigh Jorgeson, SBN 24070026
(*pro hac vice* application pending)
Ian Pittman, SBN 24064131
(*pro hac vice* application pending)
JORGESON PITTMAN LLP
4505 Spicewood Springs Road, Suite 335
Austin, Texas 78759
Phone: (512) 320-0999, Fax: (512) 320-0025
leigh@jptexaslaw.com

Attorneys for Plaintiffs
Shannon Zahn, Catherine Zahn,
Alexius Augustine, and Andrew Simpson