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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, ET AL.,

Plaintiff,

Case No. 12-10285

-v-

RICHARD SNYDER, ET AL.,

Defendant.

/ VOLUME 5 - PART B

BENCH TRIAL

BEFORE THE HONORABLE **BERNARD A. FRIEDMAN**
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
March 3, 2014

APPEARANCES:

FOR THE
PLAINTIFFS:

Carole M. Stanyar, Esq.
Dana M. Nessel, Esq.
Kenneth Mogill, Esq.
Robert Sedler, Esq.
Vicki L. Henry, Esq.
Leslie Cooper, Esq.

FOR THE
DEFENDANTS:
Richard Snyder
Bill Schuette

Kristin M. Heyse, Esq.
Joseph E. Potchen, Esq.
Michelle Brya, Esq.
Tonya C. Jeter, Esq.

Lisa Brown

Andrea J. Johnson, Esq.
Beth M. Rivers, Esq.
Michael L. Pitt, Esq.

To Obtain a Certified Transcript Contact:

Christin E. Russell
RMR, FCRR, CRR, CSR - (248) 420-2720
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1 Detroit, Michigan

2 March 3, 2014

3 10:07 a.m.

4 * * *

5 THE CLERK: All rise.

6 THE COURT: Thank you. You may be seated. And you're
7 all set?

8 MR. POTCHEN: Yes, we are, your Honor.

9 THE COURT: This is our witness. Good morning. You
10 can stand right there, please. Raise your right hand.

11 (Witness is sworn.)

12 THE COURT: Please have a seat. And when you've had
13 an opportunity to be seated, would you be kind enough to give
14 us your full name and spell your last name, please.

15 THE WITNESS: Sure. My full name is Sherif Girgis.
16 My last name is spelled G-I-R-G-I-S.

17 THE COURT: Okay. Thank you.

18 MR. POTCHEN: Your Honor, I have a copy of the Power
19 Point that we've been using as demonstrative exhibits.

20 THE COURT: Yes. Thank you. I appreciate it. If you
21 have two? Or just one? One is fine.

22 MR. POTCHEN: Just one.

23 THE COURT: We'll make copies. We have that exhibit
24 to make copies of also.

25 MR. POTCHEN: Yes. The defendant's exhibit book.

1 THE COURT: No. I mean the one that --

2 THE CLERK: The e-mail.

3 THE COURT: The Brown Exhibit A.

4 MS. HEYSE: Oh, I'm sorry.

5 THE COURT: We won't make it now. We'll make it over
6 the break, but at least we better have it just in case we need
7 it.

8 MS. HEYSE: Thank you, your Honor.

9 THE COURT: Thank you.

10 Okay. You may proceed, Counsel.

11 MR. POTCHEN: Thank you.

12 THE COURT: Thank you.

13 SHERIF GIRGIS

14 called as a witness at 10:07 a.m., testified as follows:

15 DIRECT EXAMINATION

16 BY MR. POTCHEN:

17 Q. Mr. Girgis, can you give the Court a little bit of
18 background about your education?

19 A. Sure. I obtained my Bachelor's degree in philosophy from
20 Princeton in 2008, graduating Phi Beta Kappa and summa cum
21 laude. And from there, I went on to a Master's degree called
22 the BPhil in philosophy at Oxford University on a Rhodes
23 Scholarship. And the concentration of the BPhil was in moral,
24 political and legal philosophy and in the philosophy of
25 Aristotle.

1 And since then, I have been working on a Ph.D. in
2 philosophy at Princeton, and a law degree at Yale Law School.

3 Q. You had mentioned from Princeton, you graduated Phi Beta
4 Kappa. What does that mean?

5 A. Yes. In the case of Princeton it means, it's an honors
6 society, and it means graduation in the top 10 percent of the
7 class.

8 Q. And what does summa cum laude mean?

9 A. Again, in Princeton's particular case, summa cum laude is
10 an honor, it's the highest honor possible based on a GPA within
11 your major, so philosophy in my case.

12 Q. For a Rhodes scholar, why are such scholarships given?

13 A. They are given to fund two or three years of graduate study
14 at the University of Oxford, which includes tuition and
15 stipends.

16 It's meant to be an honor that's based on a couple
17 different criteria, including academic achievement, kind of the
18 bottom line or the first kind of condition of it, but also
19 virtues of character and integrity, athletic achievement, which
20 they've loosened somewhat, and literary achievement.

21 Q. Did you have particularly literature achievement that made
22 you one of the candidates?

23 A. When I was an undergraduate, I was the editor-in-chief of a
24 campus paper. And I had also contributed to several of the
25 campus papers about issues in philosophy and public affairs.

1 Q. Now, you indicated that you're currently at Yale Law
2 School?

3 A. I am.

4 Q. And are you on any journals or anything like that?

5 A. Yes. I'm an editor of the Yale Law Journal at the law
6 school.

7 Q. And have you worked, or I guess can you give the Court an
8 overview of some of the classes that you've had at Yale Law
9 School?

10 A. Sure. Well, I've taken some of the standard black letter
11 classes, constitutional law, in torts, criminal law, contracts.

12 I've also taken some courses, sort of related to this
13 cluster of issues. So a reading course on marriage law and a
14 course on reading the Constitution with Professor Akhil Amar,
15 which is a kind of, sort of second semester or kind of advanced
16 course in constitutional theory; and a course in
17 anti-discrimination law with Professor Riva Siegel.

18 Q. Can you tell us a little more about that reading group on
19 marriage law?

20 A. Sure. It was actually, so the way that reading groups at
21 Yale work is that, it's typically the way they work, is that a
22 group of students will get together, decide on a topic and an
23 area of interest, develop a syllabus in consultation with a
24 faculty member, have that syllabus approved both by the faculty
25 member and by the registrar's office, and then the faculty

1 member serves as an advisor to the group.

2 And in this case, three of my small group members and
3 I -- and so small group is the semester -- is the small seminar
4 that you're in your first semester at Yale Law School.

5 Ours was on torts, but we had the, the four of us had
6 a common interest in these issues, because of our backgrounds
7 and our experiences, and our differing perspectives on it.

8 So one, in the e-mail I think that we sent out to the
9 law school advertising the course, one person identified as a
10 Mormon mom of two. One person identified as a lesbian mom
11 married to a woman in the state of Connecticut, I believe,
12 raising a child together. One of us identified as a sex
13 positive queer activist, who works on LGBT issues, but also on
14 the rights of sex workers, and then there was me.

15 Q. So do you all coordinate and develop a schedule of readings
16 and such?

17 A. We did. We worked together to look at a bunch of issues in
18 marriage law, and its implications for torts, for criminal law,
19 the constitutional theory, some philosophical considerations in
20 the background about what the competing visions of marriage
21 play in the law and policy today are. Anti-discrimination law,
22 I believe, was on there, most likely because we had as our
23 mentor and advisor Professor Riva Siegel, whose work is
24 primarily in equality jurisprudence, or it's at least one of
25 her major areas to which she's contributed a great deal in

1 defense of rights to abortion, but also on the marriage issue
2 and on affirmative action and things like that. So I'm sure
3 that was on the syllabus as well.

4 And then we co-led the discussion group. So each of
5 us would be primarily responsible for each week, but obviously,
6 it was a very active discussion throughout.

7 Q. And you had indicated that you're on course to get a Ph.D.
8 in philosophy; is that correct?

9 A. That's right.

10 Q. And have you taken additional philosophy courses since
11 getting your degree from Oxford?

12 A. Yes. So my work at Oxford in the first year of the
13 course-like work, more of a tutorial format, was in political
14 and legal philosophy one term, and moral philosophy and then
15 the philosophy of Aristotle. But at Princeton, I have to
16 effectively start from scratch.

17 I can use maybe three, I think, papers from before and
18 revise them for the purposes of the Princeton degree, but
19 overall you need ten unit requirements to move on to generals
20 and then dissertation.

21 So I've been taking courses in political philosophy,
22 legal philosophy. And I'm doing work in metaphysics, and
23 ethics, and other areas.

24 Q. Your degree from Oxford, the Rhodes Scholar, how many
25 Rhodes scholars are there?

1 A. There are 32 Rhodes scholars from the U.S. each year.

2 Q. Have you won any prizes or awards?

3 A. Yes. So as an undergrad, I won two prizes for my senior
4 thesis in the philosophy department. So the McCosh prize for
5 the best undergraduate thesis in philosophy generally, and the
6 1879 prize for the best thesis in ethics in particular.

7 I won, also while I was an undergrad, the, the
8 National Dante prize of the Dante Society of America, which is
9 a prize that recognizes the best undergraduate essay on Dante
10 or one of his works in the U.S. or Canada.

11 And I suppose -- and at Yale Law School I've won the
12 Felix S. Cohen prize for the best paper in legal philosophy.

13 Q. What was the criteria for the Cohen prize?

14 A. Well, it's just the general description of best paper in
15 legal philosophy. But the way that it gets selected is that
16 the end of the year, anyone is able, anyone at the law school
17 from all three years is able to submit their papers for
18 consideration. And then I think they are blind -- they are
19 anonymously graded by a panel of faculty members who presumably
20 have some kind of expertise in legal philosophy or legal
21 theory. And then one is selected, and of course the name is
22 matched to it and, and it's rewarded.

23 Q. Do you have any publications?

24 A. I do. The ones most relevant in this case are an article
25 in, I think December of 2010 in the Harvard Journal of Law and

1 Public Policy that was co-authored with Robert George, who is
2 the McCormick Professor of Jurisprudence at Princeton
3 University and Ryan Anderson, who is a -- the William E. Simon
4 Fellow in, I believe in religion and public life at The
5 Heritage Foundation.

6 That article drew a lot of critical engagement and a
7 lot of attention within the legal and other communities. And
8 so we incorporated a lot of our exchanges on the basis of it,
9 and expanded and revamped its points into a book called, "What
10 is Marriage? Man and Woman: A Defense." That was released in
11 December of 2012.

12 Q. I'm going to hand you a copy and ask you to describe, is
13 that a book?

14 A. Yes. So you're going to ask me to describe it, you said?

15 Q. Not yet. Do you have any other publications?

16 A. I do. So I have a couple publications upon invitation of
17 some kind. So in, I have a forthcoming piece in the Case
18 Western Reserve Law Review on Justice Kennedy, Justice Alito
19 and the equal protection argument in *Windsor*. And that is
20 based on a presentation I was asked to give on a panel on the
21 constitutional reasoning in the marriage cases at Case Western
22 Reserve Law School. A panel on which I think I was joined by
23 Professor Andy Koppelman who is a professor of Constitutional
24 Law at Northwestern Law School.

25 I have another publication in a volume produced by

1 Wylie Blackwell in Oxford called the, I think it's Contemporary
2 Debates and Applied Ethics. And that is a point/counterpoint
3 with Professor John Corvino, who is the Chairman of the
4 Philosophy Department at Wayne State University. And there,
5 we're focusing on competing conceptions, competing
6 philosophical conceptions of what marriage is.

7 And there's another one that is a contribution to a
8 book collection of essays, also forthcoming from Professor Mike
9 Sweeney at Xavier University. And that one, the general
10 collection is on justice and diversity. And what I was asked
11 to contribute was an essay discussing the merits of a diversity
12 -- diversity-based case for the legal recognition of same-sex
13 relationships as marriages.

14 And I also have a piece in the Harvard Journal of Law
15 and Public Policy about intellectual diversity in the legal
16 academy. And that was based on a keynote address I was asked
17 to give at a conference sponsored by the Federalist Society at
18 Harvard Law School on that general question. So there were
19 several panels discussing whether there is a problem, what to
20 do about it if so, and why it matters, from a question of
21 intellectual diversity in the legal academy. And then my, my
22 keynote is the piece on the Harvard Journal.

23 Q. Have you published in the Yale Law Journal?

24 A. I have. I have a note in the Yale Law Journal on the
25 mental state requirement, the *mens rea* requirement of

1 accomplice liability.

2 Q. And have you been published in or been asked to write for
3 the Cambridge Companion on philosophy of law?

4 A. Yes. I have a forthcoming piece there, a co-authored piece
5 on -- so it's the Cambridge Companion Philosophy of Law. It's
6 John Tasioulas is the editor. And I think he's at University
7 College London. And the specific essay I'm going to be
8 contributing is on civil rights and liberties from a philosophy
9 of law perspective.

10 Q. You've indicated that you've been invited to write. Is
11 that different than being peer-reviewed?

12 A. It is. So peer review is a, it's a situation in which you
13 blind submit, normally, your work to a journal. And the
14 journal sends it out to referees to comment on it and decide
15 whether to publish it in the journal.

16 So it's different in that, in the respect that this is
17 a case where an editor is putting together some kind of
18 academic collection of essays and is soliciting the pieces in
19 that way. I think the respect in which they are similar
20 perhaps is that they, in the volumes that I've mentioned, one
21 edited by Professor Sweeney, the one edited, the Cambridge
22 Companion on philosophy of law by Professor Tasioulas and in
23 the one that's already out, the Contemporary Debates in Applied
24 Ethics volume, which is co-edited by two philosophers.

25 In all of those cases, the majority, the vast majority

1 of the contributors, as far as I can remember, are themselves
2 full faculty members, full professors in philosophy or law, or
3 a related discipline.

4 So in that respect, I guess it represents a kind of
5 recognition by the academic community or some member of it, of
6 a certain kind of achievement on a particular issue, because
7 they typically try to, it's natural to suppose that they would
8 be looking for the best essay from that perspective on that
9 particular topic for their volumes.

10 The Cambridge Companion and the volume in applied
11 ethics are both often used as college text books, for example,
12 in classes on law or philosophy.

13 Q. And those individuals in those texts have actually sought
14 you out and asked to you contribute to those publications?

15 MR. MOGILL: Leading.

16 THE WITNESS: Yes, I --

17 THE COURT: Overruled.

18 THE WITNESS: Sorry.

19 THE COURT: Go on.

20 BY MR. POTCHEN:

21 Q. Now, turning to the book that you have in front of you, can
22 you give -- well, first of all, how did you come up with the
23 title?

24 A. Sure. Well, the title is "What is Marriage?" The subtitle
25 is long, but the title is, "What is Marriage?" And the reason

1 we picked it, both for the article and for the book is that we
2 think it's really emphasizing or highlighting what was a really
3 under-looked aspect of this debate at an intellectual level.

4 So a primary motive of writing was to try to clarify
5 the debate and try to really refine the best case on both
6 sides, and then talk about the competing merits from a
7 perspective.

8 And we really thought that in particular, the, the
9 move from, kind of immediate move from the principle of
10 equality to the conclusion, the normative conclusion that the
11 state should recognize same-sex relationships as marriages went
12 through, glossed over a missing step. And the missing step was
13 that it was assuming a substantive view of what marriage is and
14 of why marriage is relevant to policy.

15 And it was only with that background view in mind,
16 with that background answer to that central question that the
17 argument from equality could go through, or so we thought. And
18 that's why we wanted to put focus on that question in the title
19 of both pieces.

20 Q. And so what does the book cover?

21 A. The book covers -- well, first, it tries to give the most
22 sympathetic and most kind of philosophically sophisticated
23 account of the two competing -- of two very major contenders
24 for the answer to that central question in this debate. One
25 that we call the conjugal view of marriage, which is sometimes

1 called a traditional view of marriage, and another that we call
2 the revisionist view of marriage in the sense that it's
3 proposing to revise what it sees as an unjust standard.

4 We talk about the philosophical implications of these
5 two views of marriage, what they assume and what they would
6 entail about what else is or isn't a marriage or about what
7 makes marriage valuable to the state. We argue that those
8 implications and assumptions show one view to be more cogent
9 than the other, the conjugal view.

10 And then we discuss how any of that might be related
11 to the policy interests that get the state involved in marriage
12 in the first place.

13 Q. Have any of your publications been cited in any legal
14 opinions?

15 A. Yes. So the book, "What is Marriage" was cited in Justice
16 Alito's opinion or dissent in the *Windsor* decision which was
17 joined by Justice Thomas.

18 Q. Are you aware of how often your publications have been
19 downloaded?

20 A. Just in the case of the article, "What is Marriage," and
21 the reason we are, is that we posted it on SSRN, the Social
22 Science Research Network, which is a collection and database
23 for academic articles in a really wide variety of disciplines
24 in the law, in law and the social sciences.

25 It was actually just at the suggestion of a friend

1 that I put it up there. I wasn't planning to. As soon as we
2 got the PDF, I had no plans to. But when we did, that site
3 does record both the number of times that the page has been
4 visited and the abstract viewed, and the number of times that
5 it's been downloaded.

6 And I think within the first few weeks of being
7 posted, maybe three weeks of being posted, it had become one of
8 the top 10 downloaded in the previous year out of, I think at
9 the time, it was somewhere around 300,000 articles on the
10 website. And then today, I think it still remains one of the
11 top ten of, of the lifetime of the database, which I think now
12 has many more articles. But the number is probably somewhere
13 around 69,000, at the last time that I saw it.

14 Q. Did you work on filing an amicus brief in the *Windsor* case?

15 A. I did. My co-authors and I filed an amicus brief at the
16 request of some of the attorneys in that case, and it was also
17 filed in the *Perry* case.

18 Q. Have you given any talks, engaged in any debates or given
19 any guest lectures?

20 A. Yes, all of the above. I've given talks -- so the
21 background is that when the article was posted on SSRN and did
22 well and, and got a number of critical responses, I think one
23 of the first was from Professor Kenji Yoshino at NYU Law
24 School, who is a major sort of legal scholar on gay rights
25 issues.

1 When it got a lot of attention from that, we engaged
2 with the critics in online venues. And then that
3 back-and-forth with Professor Yoshino, later with Professor
4 Koppelman from Northwestern Law School, the constitutional law
5 professor there, and others, gave rise to a bunch of
6 invitations to come either debate or speak on the issue in
7 person.

8 So at law schools, universities, undergraduate
9 audiences in some cases, general ones in others, panel
10 discussions and, and guest lectures in seminars and courses.

11 Q. Let me ask you this: Have you engaged in any debates or
12 discussions at Harvard Law School?

13 A. Yes. So I, I did the intellectual diversity talk, which
14 was, you know, indirectly related to this at the, at the
15 conference. But more pertinent to this, I did a debate with
16 Professor Andy Koppelman, which was moderated by a Harvard Law
17 Professor Richard Fallon in January, I believe, of 2012.

18 Q. Have you given any debates or had discussions or given a
19 presentation at Notre Dame?

20 A. Yes. I was asked to do a keynote event at Notre Dame Law
21 School for -- no. Sorry. Actually, it's Notre Dame University
22 itself for a conference, a several-day conference hosted by its
23 Center in Ethics and Culture.

24 Q. Have you given any presentations at Michigan Law School?

25 A. Yes. I recently had a debate with Professor John Corvino,

1 the Chairman of the Philosophy Department as I mentioned
2 earlier at Wayne State University, at Michigan Law School,
3 hosted by the Federalist Society.

4 Q. Let's talk about foreign governments. Have you given any
5 briefs to foreign governments?

6 A. I have. I've been invited on a couple occasions to give
7 talks to all kinds of audiences. In one case, in Australia,
8 and in another case in Chile. And in both contexts, my hosts
9 also asked me to, if I would be willing to have meetings with
10 some government officials in each case, and brief them on
11 different aspects of the marriage issue in the U.S.

12 And so in Australia, that was with some members of the
13 Australian Parliament. And in Chile, that was with an officer,
14 whose title is the Secretary Minister General of the
15 Presidency, and whose function is, as I understand it, or
16 understood it then, to be a kind of liaison between the
17 president and the National Congress of Chile on legislative
18 issues in particular.

19 Q. So why, why were you in Chile in the first place? What was
20 the context of that trip?

21 A. There were two kind of civic associations there that
22 invited me to come down and give talks on, on this cluster of
23 issues. In some cases, a kind of historical overview of
24 certain developments in marriage law in the U.S., in some
25 cases, more a philosophy-oriented discussion on the -- of the

1 sort that we have in the first part of the book. And so it was
2 in the context of the -- those were the reasons I was invited.

3 Q. And why were you in Australia, the context for that trip?

4 A. It was precisely the same sort of thing. So half of it was
5 to do those sorts of talks, and then I also added some time for
6 personal visits to friends.

7 Q. Have you given any lectures at Princeton?

8 A. Yes. So I've done guest lectures in a couple different
9 contexts. One was a constitutional interpretation course at
10 Princeton. One was for an ethics in public policy course
11 taught by Professor Steve Macedo, who is one of the more
12 eloquent and prominent critics of this kind of view of marriage
13 discussed in the book.

14 Another, in a philosophy seminar, on the philosophy of
15 sex and marriage that was co-taught by two other critics,
16 Professor Gideon Rosen and Professor Liz Harman. And I think
17 those are, I think those are it.

18 Q. Have we covered all the courses that you've given lectures
19 on at Harvard Law School?

20 A. I think so, yes.

21 Q. Okay. How about Hillsdale College?

22 A. Hillsdale College and I think Eastern University is another
23 place where I've also given these kinds of guest lectures in
24 seminars or led seminars at the request of the professor
25 teaching them.

1 Q. Have you given any guest lectures at Michigan State
2 University?

3 A. In that case, actually, I did a debate with Professor
4 Candeub on, on the marriage law question.

5 Q. Have you given any lectures at Oxford or presentations?

6 A. I gave a presentation to the jurisprudence or philosophy of
7 law discussion group at Oxford on the -- on certain legal -- on
8 certain theories in 20th century legal philosophy. I think in
9 particular, in that case it was on legal positivism and the
10 question of whether there can be moral criteria for, for legal
11 validity.

12 Q. Have you given any lectures at Stanford University?

13 A. Yes. I've given, I can't remember now if it's one or two
14 lectures on the more philosophical aspect of marriage.

15 Q. Have you given any lectures at Case Western?

16 A. Yes. So that was the panel discussion on the
17 constitutional reasoning of the DOMA, and Prop 8 cases with
18 Professor Andy Koppelman and several others on other panels out
19 of which the article grew.

20 Q. Have you given any lecture, I'm sorry, any lectures at
21 Oxford?

22 A. Yes. So the -- well, I gave -- there was a, there was a
23 conference. So besides the discussion group presentation on
24 legal, that the issue on I mentioned in legal philosophy, I
25 gave a presentation at a conference organized by several

1 academics at Oxford, but held at Lincoln's Inn college in
2 London. I'm sorry, Lincoln's Inn, it's not a college, in
3 London on, that was on the different philosophical conceptions
4 of the principle of political equality.

5 So it was not on the same-sex marriage debate in
6 particular, or any other particular policy debate, but just
7 different ways of understandings -- of understanding what the
8 content of the principle moral or political principle of
9 equality is, and how, how to apply it in practice. There's a
10 kind of long and recent, recently live debate within philosophy
11 and philosophy of law question.

12 Q. During your graduate work, have you taught any philosophy
13 or law courses?

14 A. As an assistant instructor. So there were two courses, two
15 and a half, one is in progress of which that's true.

16 So while I was at Yale Law School, I was an assistant
17 instructor in Professor Akhil Amar's constitutional law course
18 for the undergrads, which is a close resemblance of his course
19 for one Ls.

20 So that was a case in which I would -- he would
21 lecture twice a week, and then I would meet once a week with a
22 discussion group, or the smaller seminar version of a couple
23 members of the lecture, and we would discuss the materials.
24 And then I would grade their essays and their exams and helped
25 design the exams with Professor Amar.

1 The same structure of assistant instruction carried
2 over to a course I did last semester with Professor Peter
3 Singer called Practical Ethics for the Philosophy Department in
4 the Center for Human Values.

5 Q. I'm going to have you turn to that big book right in front
6 of you. Yes, and just look at Exhibit 1.

7 A. Okay. Okay.

8 Q. And that's a copy of your CV, correct?

9 A. Yes.

10 Q. And is everything true and accurate on that CV?

11 A. Yes. As far as I can see, it's accurate as far as it goes.
12 I think there are some things that I mentioned that happened
13 after that, after this version was written so they are not on
14 there, I think.

15 In particular the, so the Cambridge Companion piece is
16 not listed. The, I don't see the debate that was the most
17 recent which was at the University of Michigan with Professor
18 Corvino. And those are the two things that come to mind.

19 MR. POTCHEN: Your Honor, we'd like to move to admit
20 exhibit -- Defendants' Exhibit 1.

21 MR. MOGILL: No objection.

22 THE COURT: Received.

23 (State's Exhibit 1 received, 10:37 a.m.)

24 BY MR. POTCHEN:

25 Q. Mr. Girgis, for the purposes of your testimony today, what

1 do you plan to offer opinions on? And I think --

2 A. Sure. The Power Point will help here. Two main points
3 that I want to offer opinions on.

4 The first is various considerations meant to show that
5 there are good reasons that it is reasonable to think that
6 changing marriage law to include same-sex relationships would
7 change the social meaning of marriage in ways that might
8 undermine the public purposes that get the state involved in
9 marriage in the first place.

10 And the second general point is that there are very
11 good reasons from intellectual history, in other words, reasons
12 from the development of the ideas that find expression in our
13 philosophical and legal traditions, very good reasons based on
14 that history to think that there are reasons for that view --
15 for the view that their special value to male/female
16 relationships in particular which can't be attributed simply to
17 animus against a group or to any particular religion, in
18 particular Judaism or Christianity.

19 Q. Mr. Girgis, what methods did you use to arrive at the
20 opinions that you plan to talk about today?

21 A. Sure. Well, these opinions have been developed over the
22 course of my -- well, really beginning with my philosophy and
23 legal training before I began writing for the article or the
24 book or anything like that.

25 So it will draw on my training in philosophy and legal

1 theory in general. It will draw on a lot of the material on
2 this issue, in particular, that I read in the course of doing
3 that.

4 So, you know, on the, the first point is related to
5 possible implications. Logical implications at the first level
6 of different conceptions of marriage and of -- and then the
7 practical implications that might be -- that might follow when
8 people absorb and live by those conceptions of marriage.

9 So on, on those conceptual relationships and the
10 different connections and competing merits of philosophical
11 accounts of marriage, I've read a great deal over the years in
12 philosophy and in legal theory, and including just to pick out
13 a few folks, Professor Joseph Raz, who is a, I guess at this
14 point emeritus at the University of Oxford, possibly also NYU
15 or Columbia, who is himself a proponent of the recognition of
16 same-sex relationships as marriages; professor Judith Stacey, a
17 legal scholar, Professor Elizabeth Brake, a scholar in
18 philosophy and ethics, in particular, and others.

19 The second thing is that on my own claims for those,
20 for some of the those implications and conceptual relationships
21 and likely cultural affects of absorbing the different views of
22 marriage, I have put them to the same test that any kind of
23 philosophy work can be put to, which is debate and discussion
24 in academic seminars with opponents, in writing and written
25 exchanges with folks like Professor Kenji Yoshino, Professor

1 Koppelman, Professor Corvino in philosophy, and others.

2 And I've also been, in a very close way for this last
3 several years, for as long as I've been doing this, very
4 closely observing, as well as participating in the development
5 of the debate on the recognition of same-sex relationships as
6 marriages.

7 So looking at the evolution, because I had to keep up
8 with it in order to, to be able to continue to contribute on
9 this issue, looking at the evolution of the arguments for the
10 competing conclusions on this policy question, looking at the
11 evolution of their implications and of the progression of the
12 policy proposals that people are advancing on the, roughly the
13 other side of the issue, on the question of those who favor
14 recognizing same-sex relationships as marriages.

15 So looking at the logic of their arguments and the
16 progression of their policy proposals concretely over time,
17 looking at shifts in what goes from being outré to being
18 acceptable or even encouraged or even embraced in the debate by
19 different -- by people in different sides of it. And for that,
20 I'm looking at academic figures like some of the ones I
21 mentioned, like, you know, the evolution of people's work like
22 John Corvino and so on, but also at the progression of the
23 popular and advocacy side. So with folks like Andrew Sullivan
24 or Dan Savage, and other kind of central figures in the
25 national conversation on these issues.

1 Q. Do you look at primary text as well?

2 A. I do. So that's, that's all related really to the first
3 point.

4 And to the second point, you know, the base, the
5 general basis for the second point is the idea that the
6 conception of marriage is involving a special value to a
7 male/female relationship in particular, was not just cooked up
8 recently to oppose any particular group, but grew out of a long
9 philosophical tradition that began before we had any concept of
10 sexual orientation like the one we have today, and in context
11 that had no possibility of influence by Judaism or
12 Christianity.

13 And for that purpose, I'm looking at what I see as the
14 originators, or at least some of the earliest figures in
15 philosophy on -- within this tradition.

16 So I'm looking at the work of Aristotle, of Plato, of
17 Musonius Rufus of Plutarch, the figures like that, classical
18 thinkers in Greece and Rome who are the beginnings of this
19 tradition.

20 And I'm looking at secondary sources. So the kind of
21 authoritative interpreters of these thinkers at places like
22 Oxford, Kenneth Dover, the late Kenneth Dover of Oxford and
23 Saint Andrews; Gregory Vlastos, I believe of Princeton but
24 before my time there; and Anthony Price of the University of
25 London. So looking at the primary text of the thinkers who are

1 beginning this tradition that I say provides reasons to think
2 it can't just have originated in religion animus and in their
3 secondary sources, interpreters.

4 MR. POTCHEN: Your Honor, at this point we'd request
5 the Court to designate Mr. Girgis as a legal philosophy expert,
6 more specifically in the philosophical, culture and legal
7 conceptions of marriage.

8 THE COURT: Plaintiff, any objections?

9 MR. MOGILL: Yes. I'd like to voir dire, please.

10 THE COURT: You may.

11 VOIR DIRE

12 BY MR. MOGILL:

13 Q. Good morning, Mr. Girgis.

14 A. Good morning.

15 Q. How are you doing today?

16 A. Very well.

17 Q. You are a prolific writer, are you not?

18 A. Thank you.

19 Q. And a frequent speaker?

20 A. Yes.

21 Q. On a broad range of aspects of a philosophical question, as
22 you described it just now to Mr. Potchen, right?

23 A. Yes. In part, a philosophical question.

24 Q. The fact is you're still a student, both at Yale Law School
25 and at Princeton, correct?

1 A. Yes.

2 Q. At Yale Law School, someone else is still grading your
3 papers; isn't that correct?

4 A. Insofar as there is grading at Yale, yes, that's true, at
5 least of my final exams.

6 Q. Unless somebody says you took a test and passed it, you
7 don't get a degree?

8 A. That's right.

9 Q. And at Princeton, in your graduate work, unless somebody
10 else approves what you do, you will not get a degree?

11 A. Yes. So my work in the graduate programs in particular,
12 that is true of.

13 Q. All right. Now, it's also true you've never been an expert
14 witness before, had never been accepted as an expert witness
15 testifying in a court; is that correct?

16 A. I was hired by the State of New Jersey to do it, and did
17 the -- and began outlining and working on a report. But it was
18 not -- the case ended before that became relevant, so I was not
19 certified.

20 Q. Okay. So my, the answer to my question is you have never
21 been accepted as an expert witness in court; is that correct?

22 A. I've never been accepted in court, that's right.

23 Q. You're not the member -- a member of the bar of any state?

24 A. No. I haven't completed a degree in law, so I haven't been
25 accepted to a bar either.

1 Q. Would it be possible to answer that one with a yes or no?

2 A. Mh-hm. Yep. No.

3 Q. If it's not, if it's not fair to answer the question yes or
4 no, I certainly don't want to cut you off.

5 A. Thanks.

6 Q. So you're not the member -- a member of the bar of any
7 state, correct?

8 A. That's right.

9 Q. You're not eligible to become a member of the bar of any
10 state at this time, correct?

11 A. That's right.

12 Q. All these writings that you've done, none of them have been
13 peer reviewed; isn't that correct?

14 A. That's right.

15 Q. The Harvard Journal of Law and Public Policy that you
16 referred to is a student-run journal, isn't it?

17 A. Yes, as most law journals are.

18 Q. And the Yale Law Journal?

19 A. Yes.

20 Q. Where you published a note, that's also a student-run
21 journal; is that not correct?

22 A. Yes. Now, I do think it's fair to note in this context
23 that publications in law journals like this, especially the
24 Yale Law Journal make a huge difference to the hiring and
25 promotion of law faculty. So it's --

1 Q. Mr. Girgis, did I ask you that question?

2 A. I, I did think in that case it was relevant to the question
3 that you did ask.

4 Q. It's a student-run --

5 THE COURT: He did tell him --

6 MR. MOGILL: I'm sorry?

7 THE COURT: He did tell him to --

8 MR. MOGILL: That's fair enough.

9 THE COURT: Go on.

10 BY MR. MOGILL:

11 Q. The question only called for whether it's a student-run
12 journal, correct?

13 A. Yes.

14 Q. Okay. Now, the fact is you're not a historian?

15 A. That's right.

16 Q. You're not a psychologist?

17 A. No.

18 Q. You're not a sociologist?

19 A. No.

20 Q. You're not an expert in child development?

21 A. No.

22 Q. You're not an expert on Michigan law regarding marriage or
23 anything else?

24 A. No.

25 Q. In fact, in terms of Michigan law regarding the issues in

1 this case, you've only read the complaint in the case; is that
2 correct?

3 A. I've read the complaint and the, the relevant statutory and
4 constitutional provisions.

5 Q. Okay. You haven't even taken a course in family law, have
6 you?

7 A. No, just the marriage reading law. The marriage law
8 reading group.

9 Q. As you've already described.

10 Now, you have repeatedly described your participation
11 in this debate that is going on nationally as presentation of,
12 and I use your own words, philosophical defense, philosophical
13 arguments, philosophical account, philosophical view, correct?

14 A. Yes. That's a key part of it.

15 Q. And you're not here to testify about what you think
16 Michigan law says; isn't that correct?

17 A. No.

18 Q. Do you have -- is it your assertion that you have expertise
19 on Michigan law?

20 A. Not on Michigan law.

21 Q. You are here to testify, if the Court permits it, as to
22 what you identify as a conjugal theory of marriage, a view of
23 marriage that in your own words is, "marked by sexual union in
24 coitus"; is that correct?

25 A. That is part of it. And, and in particular -- but it's not

1 just that that's not the only part of the philosophical claims
2 that I'm here to make. But it's, the other part is, the part
3 of what I want to say is that it's not just philosophical
4 claims.

5 So in particular, there are also claims which you
6 might call intellectual history, of the history of ideas which
7 might then support a philosophical conclusion but are just
8 limited to the claim about what certain thinkers said in
9 context where it's impossible to attribute their views, for
10 historical reasons, and not for philosophical reasons, it's
11 impossible to attribute their views to religion or to animus.

12 So that is a kind of history of ideas claim, describe
13 it however you'd like. That's not simply a matter of
14 philosophical merits and demerits of a view.

15 Q. Okay. So philosophical supported in your view by
16 intellectual history, supporting what you claim is the conjugal
17 or, as you said, traditional view of marriage, correct?

18 A. Yes. Except that the way you phrased it suggests that the
19 only relevance of intellectual history is if it supports my
20 particular philosophical readings, which I --

21 Q. I wasn't meaning to suggest that.

22 A. Okay.

23 Q. All right.

24 A. So it has its independent weight.

25 Q. And again, you don't even hold yourself out as having

1 expertise in Michigan law with respect to marriage?

2 A. That's right.

3 MR. MOGILL: All right. I have no further questions
4 at this point.

5 THE COURT: Any objection?

6 MR. MOGILL: Yes.

7 THE COURT: Tell me your objection.

8 MR. MOGILL: Okay. If it please the Court, if I were
9 looking to set up a debate in general about the issues around
10 marriage in this country and wanted to have competing views, I
11 would be very strongly inclined to invite Mr. Girgis to be a
12 participant in that debate. But that's not what we're here
13 about. What we're here about, of course, is the law.

14 The State is proposing to call him, to have Mr. Girgis
15 testify with respect to supporting a claim that there's a
16 rational basis for the Michigan -- for Michigan's law as it
17 currently exists.

18 If Michigan's law regarding marriage as it currently
19 exists required a conjugal relationship, which is the lynchpin
20 of the opinions he would like to offer, if Michigan law
21 required a conjugal relationship, then Mr. Girgis's opinion
22 would be relevant. But because Michigan law does not, and in
23 fact, neither Michigan law nor any state's law constitutionally
24 could require a conjugal relationship, then with respect to the
25 issues in this case, there is no bearing whatever on the

1 philosophical roots, the intellectual history, the primary and
2 secondary sources, all that is all well and good as part of a
3 different debate. But it would only be relevant to showing
4 rational basis if the law required a conjugal relationship.
5 And the law neither does, nor could.

6 Also, with respect to meeting the requirements of 702,
7 the testimony is only admissible if it can be helpful to the
8 Court to determine a fact in issue. And again, there's no fact
9 in issue about a conjugal relationship. There can't be as a
10 matter of constitutional law.

11 These are very interesting personal philosophical
12 intellectual history opinions about which people debate. That
13 doesn't make them the subject of expert testimony because they
14 are subjective, they are not testable for reliability, they
15 have not been subjected to peer review.

16 Frankly, these views are not generally accepted in the
17 scientific community or other community. They are a matter of
18 intense debate. And so they don't meet the standard of
19 *Daubert*. And these factors apply even with respect to proposed
20 expert testimony that is not scientific, as the Supreme Court
21 said six years after *Daubert* in *Kumho Tire*.

22 So for all of these reasons, while it might be very
23 interesting to have -- to parry back and forth and have a
24 debate about competing conceptions of the philosophy or
25 intellectual history of marriage, it's not on the table in this

1 case. And for those reasons, Mr. Girgis's proposed testimony
2 does not meet the standard of 702, or the standard of 401.

3 THE COURT: Thank you.

4 Counsel, any argument?

5 MR. POTCHEN: Yes, your Honor. We believe that --

6 THE COURT: You have to go to the microphone. You
7 were at a microphone, but --

8 MR. POTCHEN: Thank you.

9 Your Honor, we believe that Mr. Girgis's testimony is
10 directly related to the issues that your Honor has to decide.
11 We are talking about the State's rational basis for the
12 marriage amendment.

13 He does cover a lot of the areas, most of all, why we
14 would ever define, the State of Michigan ever defined marriage
15 as between a man and a woman. He can outline the State's
16 justifications for doing so. And based on, for example, I'm
17 looking here, this is your Honor's order I'm reading from,
18 forestalling the unintended consequences that would result from
19 the redefinition of marriage; three, tradition and morality;
20 promoting the transition of naturally procreated relationships
21 into stable unions. These are all articulated reasons and he
22 directly addresses those points in his testimony.

23 THE COURT: Okay. Thank you.

24 In determining whether a witness should testify in a
25 case, the Rules of Evidence require the Court to do two tests:

1 Number one, the qualifications of the person to testify; and
2 number two, whether or not that testimony that is offered will
3 help the Court determine the evidence or help me determine the
4 facts in this particular matter.

5 The witness is very articulate. I think he's, he's
6 very well educated and on his way to more education, and that
7 he has done a lot of things. However, the Court does not
8 believe that his qualifications to testify in the areas that he
9 wishes to are such that it would meet the level or the standard
10 that is required, not only in *Daubert*, but also in the
11 companion cases.

12 He has participated in a debate in an issue that, of
13 course, is very important to many. He has participated in
14 group sessions. He has taken classes. He has been a guest
15 lecturer in classes. He's done a lot of things. He's done
16 some writing and he's got a lot of forthcoming writings, things
17 that he is working on and so forth.

18 But I think that based upon his experience and his,
19 his writing and his discussions, it's more of an area that is
20 in debating and talking about the issue and causing others to
21 talk about the issue, and is not the kind of testimony that
22 will lead this Court -- does not have the background. And he's
23 mentioned some professors, all of which I have not heard of.
24 But had they come into court and testified what they were
25 teaching him, would probably be very relevant and probably be

1 the kind of testimony that we're looking for.

2 But I think he's very eloquent and I think that some
3 day he's going to be an expert witness, both in terms of his
4 delivery, as well as his content. But right now, all he is
5 offering to us is mainly his opinions. And he's indicated that
6 he's read a great deal, and that he has opinions on certain
7 things and opinions in terms of his philosophy and so forth.

8 But the Court does not believe that based upon what
9 has been offered that he's going to testify to, or his
10 qualifications, that both under the court rules and under the
11 case law in this matter, that he should be allowed to testify.
12 Therefore, the Court will not allow him to testify.

13 MR. POTCHEN: Thank you, your Honor.

14 THE COURT: That is no implication. I think some day
15 you're going to be a great witness. I've heard a couple very
16 good professors testifying, probably, you know, and I've heard
17 many, many years, and I think you're going to be one of those
18 some day. And you will be in a position that, because of your
19 teachings and because of your research and all the kind of
20 things that it takes to be an expert, that you'll be in that
21 position, but not quite yet. Okay.

22 MR. POTCHEN: Thank you.

23 (Witness excused, 10:57 a.m.)

24 THE COURT: Next witness, please?

25 MS. HEYSE: Your Honor, given this development, we

1 will need a few minutes to get Dr. Regnerus here.

2 THE COURT: Do you want another --

3 MS. HEYSE: Yeah. We need to get Dr. Regnerus here in
4 the building.

5 THE COURT: Oh, no problem. Let me ask you -- oh,
6 he's not in building?

7 MS. HEYSE: He's not.

8 THE COURT: How much time? I mean --

9 MR. POTCHEN: Your Honor, I had anticipated a couple
10 hours with Mr. Girgis. And we --

11 THE COURT: Okay. Well, tell me how much time you
12 need, because I don't want you to rush. We've got nothing but
13 time, and as I told you, it's an important case. Do you want a
14 couple hours? Do you want a couple minutes? Do you want --
15 you know, I don't want, I don't want you to rush him.

16 MR. POTCHEN: If we could start after, after lunch?

17 MS. HEYSE: After our lunch break?

18 THE COURT: That's fine. I don't have any problems
19 with that. It's eleven o'clock now. How about 12:30, one, one
20 o'clock?

21 MR. POTCHEN: One o'clock would be fair.

22 THE COURT: One o'clock? Okay. As I say, we're
23 moving faster than we ever thought. And as I say, there's a
24 motion made on this witness, and I didn't grant it at that time
25 because I had to listen to it, so it's nobody's fault. So

1 we'll see everybody at one o'clock and we'll go from there.

2 THE CLERK: All rise.

3 THE COURT: Thank you.

4 (Recess taken, 10:58 a.m.)

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CERTIFICATE OF REPORTER

As an official court reporter for the United States District Court, appointed pursuant to provisions of Title 28, United States Code, Section 753, I do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

s/ Christin E. Russell

CHRISTIN E. RUSSELL, RMR, CRR, FCRR, CSR
Federal Official Court Reporter