UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, ET. AL.,

Plaintiffs,

-v- **Case Number: 12-10285**

RICHARD SNYDER, ET. AL.,

Defendants.
_____/ **VOLUME 9**

BENCH TRIAL
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
100 U. S. Courthouse & Federal Building
231 West Lafayette Boulevard West
Detroit, Michigan 48226
FRIDAY, MARCH 7TH, 2014

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I N D E X

PAGE:

CLOSING ARGUMENT

On behalf of Plaintiffs
by Mr. Mogill 4

On behalf of Defendant Lisa Brown
by Mr. Pitt 29

On behalf of the Defendants
by Ms. Heyse

Statements by the Court 62

Detroit, Michigan

Friday, March 7th, 2014

(At or about 10:00 a.m.)

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THE COURT: You may be seated.

Good morning.

Okay, plaintiff.

Do you have a preliminary matter?

MS. STANYAR: A preliminary matter. We had filed Daubert motions before. We just renew them now, you know, our challenges --

THE COURT: Wait. Hold on. You've got to get close to the microphone.

Now that we have those that aren't afraid to let us know, we appreciate it.

Go on.

MS. STANYAR: One ministerial matter, we had filed previously Daubert motions and they would remain as to Professors Allen, Price and Regnerus. We renew those, and we rest of the briefs, but we do -- there are challenges both to admissibility and to weight, and we would ask the Court to consider those.

THE COURT: Okay. I think based upon what happened at the trial, and the Court having heard testimony from some of those and not heard testimony from one that they

are fairly moot, but certainly I think the record is clear that you have made the motions, the Court has ruled on the motions at this point, and they are preserved for purposes of appeal.

Anything defense has before we --

MS. HEYSE: Just with that said, your Honor, State defendants would also just renew their motions in limine was well with regard to the second partner adoption issue -- Sankaran and the remaining witnesses for the reasons stated in our briefs, your Honor.

THE COURT: Good. For the same reasons, the Court will rule on yours.

Have you submitted -- numbered the expert reports?

MS. STANYAR: We have them all. We just need exhibit tags.

THE COURT: Okay. Good. Before you leave today if you could leave them, I would appreciate it.

Okay. Plaintiff.

CLOSING ARGUMENT

MR. MOGILL: Good morning, Judge.

THE COURT: Good morning.

MR. MOGILL: I'd like to reserve five minutes for Rebuttal.

THE COURT: Okay.

MR. MOGILL: And I would like to start by thanking the Court and your staff for all the courtesies shown to plaintiffs' team, and obviously to defense team as well during the course of this trial.

The promise of equality is the promise of America. Not just in the Equal Protection Clause of the Fourteenth Amendment, but in who we strive to be hopefully as a people. For gay and lesbian Americans, for April and Jayne, for the approximately 15,000 other Michigan same-sex couples of whom approximately 2600 couples are raising over 5300 children under the age of 18, that promise has not been kept.

As documented both in Professor Chauncey's report and in the Michigan Department of Civil Rights' report to be gay has far too long meant to be the victim of pervasive institutional and societal discrimination. Being gay was classified as a mental disease or defect. Consensual intimate behavior was criminalized. Positive images of gays and lesbians was censored in all media. People could get fired from their jobs, barred from federal governmental employment, stereo-typed in multiple hateful, hurtful ways.

Both in the law and in society there have been many changes in recent times, but that legacy of discrimination remains. Equality before the law does not yet exists. For same-sex couples like April and Jayne the

door is barred from entry into one of life's most cherished institutions, marriage because they love the wrong kind of person.

While ending discrimination with the respect to the right to marry won't fully erase the legacy of discrimination or its existence in other areas of life it would be a major step forward, a step I respectfully submit the law is ready to take.

The evidence you have heard the past two weeks has largely centered on the question on whether children raised by same-sex couples turn out as well as children raised by opposite sex couples. This was understandable in the context of the framing of the issues and I'm going to discuss the evidence in a bit. For two reasons though I respectfully submit that the Court should rule for plaintiffs even if it never gets to consideration of that evidence.

First, the right to marry is a fundamental right that should apply regardless of sexual orientation, and denial of that right as a denial of due process.

Second, no other group in society is required to establish its parenting competence before being entitled to the right to marry. And so to impose this condition on gays and lesbians is a denial of equal protection.

Let's talk first about marriage. Marriage in our

law is a civil contract. It is so defined at MCLA 551.2. It is an institution based on mutual consent of the parties. There is no obligation to procreate or attempt to procreate or adopt. No obligation to engage in sexual intimacy or even to live together. In fact, we know that the Supreme Court in Turner v Safley unanimously held that even a prisoner who will never be able to have physical contact with their spouse is entitled to marry.

When a religious official officiates at a wedding he or she is doing so as an agent of civilian authority. No religious authority has the right to impose conditions beyond those imposed by the law as conditions of marriage. Religious authorities do have the right to impose additional conditions or restrictions before they are willing to accredit or bless a marriage within the denomination, but that is only with respect to within the denomination. The civil law does not speak to that authority, just as the civil law bars religious authorities for intruding on its authority. As it stands today the institution of marriage is gender neutral in how rights and obligations within marriage are apportioned.

The right of an adult to marry the person they love without regard to race, fertility, parenting skills or gender roles is part of an individual's right to due process of law protected by the Fourteenth Amendment.

Language from two Supreme Court cases helps illustrate why this is.

In Griswold v Connecticut in 1965, the Supreme Court said,

"Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred."

In 2003, in Lawrence v Texas the Court said,

"Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education."

And then skipping some language,

"Persons in a homosexual relationship may seek autonomy for these purposes just as heterosexual persons do."

While the right to marry a person of the same sex has yet to be explicitly recognized by the Supreme Court, the crumbling of the jurisdictional basis for the ban on marriage equality was astutely and somewhat ironically recognized by Justice Scalia in his dissent in Lawrence when he said,

"Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions insofar as

formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct has no legitimate state interest for purposes of proscribing that conduct..." and then skipping a little, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution. Surely not the encouragement of procreation since the sterile and the elderly are allowed to marry."

Those were pathetic words, and they indicate in conjunction with what we've previously briefed and the illustrative quotes from Griswold and the Lawrence majority why the right to marry the person of one's choice without regard to sexual orientation is a right that should be recognized as part of due process.

Relief should also be granted to plaintiffs because as I indicated no other group in society is required to establish its parenting competency in order to marry, and it is constitutionally discriminatory to impose such a burden on gay and lesbian individuals.

Again, this especially follows not because there is no legal obligation to procreate, or attempt to procreate, or adopt as a condition of marriage, but also because groups whose children have been documented to have poor outcomes in life, those who are economically less fortunate, those who are less educated, those who have

previously been married are neither barred from marrying, nor required to establish parenting competency as a condition of marrying.

And as Professor Rosenfeld pointed out during his testimony,

"If the right to marry were limited to individuals and groups most likely to produce children without optimal outcomes, the right would be limited to wealthy, highly-educated, suburban Asian Americans."

And that, of course, is not the law, nor could it be.

Since we have spent about eight days eliciting testimony it would be a shame not to discuss the evidence even though for the reasons I've just indicated I don't think we need to get that far. But even if you don't decide that plaintiffs are entitled to relief on the grounds already discussed the record made also establishes that there is utterly no rational basis for Michigan's ban on same-sex marriage.

The witnesses we offered are all at the top of their fields. They are all absolute authorities. They are all straightforward. They are all candid. They all know what they're talking about, and don't try to put a spin on it. They are top authorities in sociology, psychology, history of discrimination, demography of gays and lesbians,

and the history of marriage.

State defendants' witnesses were not. The testimony showed that, especially to Professor Regnerus and Professor Allen, their witnesses are part of a fringe that is fighting desperately for inequality. They are a desperate fringe.

Both plaintiffs and the State defendants' experts --

THE COURT: You've got to speak into the microphone.

MR. MOGILL: Both plaintiffs and State defendants' experts agree that there is a strong consensus in the social science communities that children raised in same-sex families have outcomes comparable to those of children raised in opposite sex families. The State defendants' witnesses disagree with this consensus, but no one disputes its existence.

The consensus exists for very valid reasons. It is a product of decades of research not just -- and clinical experience. Not just about children being raised in same-sex families, but research into the family as a structure in its many, many forms, intact heterosexual married families, step-families, families with adopted children, families with foster children, families that have experienced divorce.

The small scale studies, convenient studies, as Professor Brodzinsky testified, the bread and butter of psychology research, have been attacked by defendants' experts who are not psychologists, and who do a different kind of research. And it is clear that there are strengths and weaknesses to all different kind of studies.

For economists who are used to working with large data sets and numbers, a small sample may seem an odd way to go, but it does allow you to go deeper to get to know the people, and to get different information. We now have over a 150 studies on same-sex parenting alone and you couldn't even count the number on family structures and dynamics in general.

It is well established that what correlates with good child outcomes, what makes for good parenting, and what best predicts positive development in children has nothing to do with the sexual orientation of the parents. What counts as testified to by Professor Brodzinksy and, again, the State defendants presented no psychologists, the quality of the relationship between the parents, the quality of the parent-child relationship, parenting characteristics, warmth, empathy, sensitivity to child's needs, educational opportunities for the child, resources, support available to the family, good mental health of the parents. Sexual orientation of the parents is utterly

unrelated to any of these qualities.

While there is a popular belief in some corners that kids need a mom and a dad to thrive, Professor Brodzinsky's testimony is clear that children do equally as well with well-qualified parents regardless whether it's a mom and a dad, two moms, or two dads. And regardless of family type, there are broad variations across families and sometimes over time within families, and parental roles and styles. There is no single, correct parenting model and certainly not the Ozzie and Harriet model that the State defendants would have this Court conclude as a rational basis for inequality.

In response to the plaintiffs' evidence, the State defendants' witnesses, two economists, a family studies professor whose contribution to the case was a study about -- a review, excuse me, of studies of same-sex parenting that ended in 2005, or stops at 2005, and one utterly discredited sociologist, these witnesses for the State assert that the studies showing a no difference outcome are insufficient and inadequate, that research in this area is, quote, preliminary, quote, in its infancy, that we need to hit the pause button, and to meet a very high research threshold for another 25 years or so. And Professor Marks also claimed that the consensus is the product of liberal group think.

They're wrong on all three counts. Small sample, convenient studies are not just the bread and butter of psychology and as already mentioned they look in different ways at what they are examining than the large data set.

It is correct that an individual small scale study doesn't prove a whole lot. No one from our side has said that it does. What counts, what matters, is when you have a number of different studies, different times, different locations, different subjects coming to the same conclusion. This replication validates what would be insufficient to be valid in a single study or just a couple of studies and we have that in spades.

It's as if the State defendants are looking at a brick home and they're only willing to see individual bricks, and not how they connect with one another and are bound together.

Professor Marks' claim of a liberal group think because the American Psychological Association Policy Statement in 2005, was adopted by a vote of a 157 to zero is particularly curious. It's an entirely subjective opinion. But the same psychologists who he would label as liberal and for some reason apparently predisposed not to recognize differences in outcomes of children raised in same-sex households, may also be presumed to oppose racial discrimination. And yet you heard from the testimony here

today that outcomes have been found to vary by these same folks on the basis of race which I think utterly belies Professor Marks' claim.

Also, it's not just the American Psychological Association that's in this consensus, it also includes the American Medical Association, and the American Academy of Pediatrics neither of which organization I think anyone would put any particular political label on.

Ultimately with respect to the evidence the questions raised and the claims made by the State defendants' witnesses go not to the quality of parenting by same-sex couple parents, but to the impact on children of prior family breakups and other transitions since everybody agrees that the vast bulk of the children who historically and this is obviously changing as marriage equality is coming into more and more states, and more and more planned same-sex families are raising children from birth, but the vast bulk of the children being raised in same-sex families historically were originally part of an opposite sex family that broke up.

The State defendants' witnesses' testimony -- excuse me, the consensus of the "no difference" outcome is further confirmed by Professor Rosenfeld's high-quality study published in "Demography" in 2010, based on the 2000 United States Census. That was a fully reliable study.

You have seen and heard Professor Rosenfeld testify. You have seen and heard Professor Allen and Professor Price, two of the three authors of the critique testify.

I ask the Court to consider the testimony, consider the credibility, consider the open-mindedness or bigotry associated with any witness. And read carefully Professor Rosenfeld's study and his reply. Read carefully the critique and see which one adds up and which doesn't because you will find that Professor Rosenfeld's processes, his logic, his explanation are clear and straightforward. You will find when you read the critique that is an exercise in obscuration and double speak, and had zero credibility.

Ironically, the "no difference outcome" -- "no difference consensus" is also corroborated by Professor Allen to some degree, by Professor Allen's 2013 study based on the 2006 Canada Census.

Professor Allen testified that he assessed graduation rates of 17 to 22 year olds in Canada based on the 2006 Canadian Census. He posited that there was a 35 percent difference approximately in graduation rates of kids raised in opposite sex married households and kids raised -- excuse me, kids living in opposite sex married households, and kids living in same-sex households.

Professor Price came in and said that Professor Allen's study shows the effect of being raised in a same-sex household. When pushed, Professor Allen conceded that his study was just a snapshot of who was living in a home in 2006, that the figures he touted purporting to show this 35 percent difference were based only on who was living where as to kids who had been born between 1979, and 1984, and as to whom he had zero information as to where they were living, or who they were living with, or what they went through before they were at the earliest 12 for the 17 year olds, at the earliest 17 for the 22 year olds.

It turns out that there was even a concession about this limitation at Footnote 9 in Professor Allen's study which states in its entirety,

"The census is not a panel and provides only a snapshot of the population. As a result, this paper does not study the effect of growing up in a same-sex household, but rather examines the association of school performance for those children who lived with same-sex parents in 2006."

Now, if you recall, one of the strengths of Professor Rosenfeld's study is that it controlled for residential stability for five years which is a measure available in both the U.S. Census of 2000, and the Canadian Census that Professor Allen used from 2006.

While Professor Allen's paper discusses only who was living where in 2006, it turns out that he had also run a five-year stability check. He doesn't discuss it in this paper. He buries it in an appendix with one terse reference in a footnote. And what do his own results show when you control for parental education and marital stability and five years of residential stability, ta-da, no statistically significant difference in outcomes.

Even more "fraudulent" and I use that term intentionally than Professor Allen's presentation was Professor Regnerus' approach. I think it would be impossible to find a more reviled, rejected social science study in the past several decades than Professor Regnerus' "New Family Structure" study.

Even that study when properly analyzed as it was because the data were okay, is what's Professor Regnerus did with the data that wasn't. When the data are properly analyzed as they were by Professor Rosenfeld they, too, confirm it's not the sexually orientation of the parents that matters, it's the instability and transitions that kids go through that correlates with outcome differences.

We learned some startling things about Professor Regnerus' study. He invited anti-marriage quality activists, Luis Tellez and Maggie Gallagher to provide, quote, feedback, and quote, optimal time lines, and quote,

their hopes for what emerges from this project while he was designing the study. He then constructed a study design that defined as a parent someone had never lived with the child and may not even have met the child. That is a study designed to produce skewed results. When the very small number of apples-to-apples comparisons available from his study comparing the two subjects who had, in fact, been raised from birth to 18 in a same-sex household with children raised in stable opposite sex households the results were, again -- they turned out just fine.

Also curious is the fact that the study was rushed to conclusion. He submitted his article before the data collection was fully complete.

Interestingly, Professor Regnerus asked both plaintiffs' witness Professor Gates and plaintiffs' witness Professor Rosenfeld to consult with him on the study. Both declined and for very good reasons.

On the same day he was testifying here in this courtroom the Chair of his own Sociology Department at the University of Texas at Austin issued a press statement that he commented -- he was asked to comment on and he did. That statement made clear that his views do not represent the views of the University of Texas at Austin Sociology Department, and are his own views, and that the Department views his study as having been fundamentally flawed

conceptually and methodologically.

His own consultant, Professor Amato, also later strongly criticized him. And, of course, we know that the American Sociological Association comprised of approximately 14000 Ph.D.'s in sociology around the country made clear its criticism of his study, its utter rejection of his study in an amicus brief filed in the United States Court in the Perry and Windsor cases, a decision made by the elected council of the ASA unanimously.

One more point about Professor Regnerus. He referred to the question before this Court as, quote, a scientific question, unquote. And I think that reflects a large part of what the State defendants' argument has been. They want to try to cast this matter as a social science experiment: Should there be same-sex families? Should there be children being raised by same-sex parents?

Life is not an experiment, it's reality. In fact, this case is not about experimental this or that. It's about real people's lives, real children's lives, and vulnerabilities and needs.

Lesbian and gay couples exist and the question of whether they are entitled to the same rights as opposite sex families and children goes much deeper than any social science experiment. Gay and lesbian families are going to continue to exist. They're going to continue to choose

either to have children or not have children. Where they have children, these children will continue to need the additional security, support, stability, and status that will come from their two moms or their two dads being able to marry. These children will continue to be harmed by the inability of their parents to provide them with those extra benefits if the law does not change.

The lives of these families will not in any way discourage heterosexual couples from marrying; discourage heterosexual couples from deciding whether or not to have children or adopt children, or whether or not to divorce. There is absolutely no evidence that gay and lesbian couples' freedom to marry will in any way harm opposite sex couples marriages in any way. And the State's arguments to the contrary are irrational.

This Court properly framed the legal question at page 5 of it's opinion denying the cross-motions for summary judgment. Whereas, here plaintiffs are part of a group that has endured historic patterns of disadvantage. The rational basis calculus gives less deference to the State. The rational basis, quote, must be rooted 'in the realities of the subject being addressed', unquote. And the Court was quoting, of course, from Heller v Doe.

Judged in light of this standard the State defendants' claim of a rational basis for protecting the

interest of children by providing them with biologically related role models of both genders and promoting the transition of utterly -- excuse me, of naturally procreative relations into stable unions does not come close to passing muster.

It is not rooted in reality. It is, in fact, not just unrealistic, it is harmful and a series of non sequitors.

We have the burden of proof in this matter, but we've met it. The Michigan Marriage Amendment violates equal protection for all of these reasons I've just discussed.

I've got a couple more points about the State defendants' rationales. The State defendants consistently argued to the Court the regulation of marriage is a matter for the states and by and large that's true as we all know. But what they consistently overlook and defendant Lisa Brown does not overlook is that right to regulate marriage is subject to constitutional limitations, and that's why we're here.

As to the State defendants' argument that this Court should not invalidate a constitutional provision enacted by the voters, the Supreme Court has provided a ready answer to that as well.

"Fundamental rights may not be submitted to vote.

They depend on the outcome of no election."

The Supreme Court said that in West Virginia Board of Education v Barnett in 1943. It was applied in terms of this case. In the 1990s, in the Romer v Evans decision.

I want to talk briefly about adoption, the second parent adoption claim. As Professor Sankaran, a clinical professor at the University of Michigan Law School, and a wonderful expert on the foster care system, as he testified,

"In the absence of an opportunity for the second parent to adopt, the non-legal parent is continuously vulnerable even if nothing untoward happens to the legal parent. There is no equivalent legal mechanism or set of mechanisms that can match the right that follow from parenthood.

"The state and children in foster care would benefit substantially from expanding the pool of potential adoptive parents who can provide children in foster care with what they need most: loving, permanent homes that will allow them to exit the foster care system.

"It is also irrational as a matter of law for the state to allow April and Jayne to be certified as a couple, as foster parents and yet not to be permitted to adopt each other's children.

"And it is irrational and cruel that there is one circumstance in which the non-legal parent can adopt their partner's child and that's if the legal parent dies."

Then they have to stand in line and don't get any priority line and may or may not be successful in adopting. But if the non-legal parent is good enough to adopt after their partner dies and not good enough to adopt while their partner is alive that is a level of cruelty in our law that I don't think the Constitution counts on.

I want to end with talking for a few minutes about tradition. Tradition in two respects. The so-called traditional notion of marriage which has also been something that's been discussed a lot and discussed by Professor Cott in her testimony. And the role of tradition in the law and how that role applies in this case.

Last Friday, Professor Cott gave us all a wonderful lesson in the history of the institution of marriage in the United States. And there are several important points that we should take away from that discussion. The whole notion of a traditional notion of marriage is historically inaccurate. There is no single definition of traditional marriage. It is an institution that has continually evolved over time. Within the span of the United States history, marriage has evolved from a hierarchical institution with asymmetrically assigned

gender roles to one in which women have achieved equality within the relationship in opposite sex marriages. A relationship in which the condition -- the importance of continuing mutual consent of spouses has been strengthened by easing conditions for exit through the enactment of No-Fault divorce laws in an institution as to which prior racial barriers have been eliminated most notably, of course, in Loving v Virginia in 1967.

Today, marriage as it has evolved, as it exists as a matter of law, not some idealist notion that some people would have, or a different idealistic notion that somebody else has, as a matter of law it is an entirely gender neutral institution with respect to rights to obligations as I've already mentioned.

Professor Cott also appropriately noted that at each stage where these qualitative changes were coming, there was some fierce opposition. Fear that the institution of marriage would be destroyed by women having equal rights in marriage, by No-Fault divorce, by allowing marriages between people of different races. It's unnatural, it's not part of a divined plan, a litany of objections. And, of course, time has shown those objections to have been unfounded.

In fact, time has shown that the tradition that has been most important in marriage has been the tradition

of being able to change with the changes that accompany the times, changes in social relations, changes in political, economic, ethnical conditions, that the changes in -- that the capacity for change has been core, of core value in the capacity of marriage, marriage to survive and thrive.

And, finally, with respect to Professor Cott, she noted that the trend toward legalization of marriage equality in the United States is consistent with these historical trends in the institution.

Tradition within the law. As lawyers, we know that tradition on a day-to-day basis is of great value in the law and in the legal system as a whole. It provides stability. It provides predictability. But tradition in the law as a whole including in constitutional law also includes a tradition of being able to and, in fact, changing as conditions and times change and the need for evolution of what had been longstanding legal principles becomes paramount.

In Williams versus Illinois in 1970, the Supreme Court stated that,

"Neither the antiquity of a practice, nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."

And to return once more to Lawrence v Texas and

to paraphrase slightly, history and tradition are the starting point but in all cases the ending point of the court's inquiry.

So how does this Court decide if we're at a tipping point? How does this Court decide whether a rule that has been in place obviously throughout American history is now a rule that is at a point where as a matter of constitutional law it must be discarded.

In Lawrence the Court used two phrases that I think inform that portion of the task this Court faces.

"As a matter of constitutional interpretation when an emerging awareness, when an emerging recognition provide us with the ability to see..." Those are the phrases from the Court. That's where the quote ended.

"...provide us with the ability to see a form of discrimination that previously regrettably went unseen by too many people it becomes time to act."

We are at and I suggest past that tipping point. There is, in fact, a well-emerged awareness, a well-emerged consensus. That denial of the right to marry to same-sex couples is a form of discrimination that our society can no longer tolerate.

I hope that one day April and Jayne -- and I want to mention here that I'm speaking for all of us who have been co-counsel for them and their children, it's been an

enormous honor to have the opportunity to represent them. I hope that one day April and Jayne can look back at this experience, look at each other and say something similar to what Mildred Loving said on the 40th anniversary of the decision in her case, and unfortunately her husband had passed by then.

"We made a commitment to each other in our love and lives, and now add the legal commitment called marriage to match."

"Isn't that what marriage is? I have lived long enough now to see big changes. The older generations fears and prejudices have given way and today's young people realize that is someone loves someone they have a right to marry.

"Surrounded as I am now by wonderful children and grandchildren not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me even if others thought he was the wrong kind of person for me to marry."

For April and Jayne and their children and for all the loving same-sex couples in the future who should not have to endure the discrimination that others have borne I ask you to find the Michigan Marriage Amendment unconstitutional and -- the Amendment and the parallel

statutes as violative of due process and equal protection.

Thank you, very much, Judge.

THE COURT: Thank you.

Mr. Pitt.

CLOSING ARGUMENT

MR. PITT: Good morning, your Honor.

THE COURT: Good morning.

MR. PITT: Good morning, everybody.

It has been an honor to represent Lisa Brown who has taken a very clear cut and courageous stand in this matter, and it's also a real honor to be involved in the case in general. I think this is a historic case, and I'm going to be -- hopefully reflect back on this moment.

THE COURT: Speak into the microphone.

MR. PITT: Be able to reflect back on this moment and proud being involved in such an important case.

Defendant Brown has been brought into this action as the public official who can and will at the appropriate time issue marriage licenses to same-sex residents of Oakland County. Her allegiance is to this Court and this Court alone. She is not required by law to follow the contrary directives of any state official including Attorney General Schuette. She will follow this Court's directive.

The Oakland County Clerk's oath of office

requires her to uphold the constitutions of the state of Michigan and the United States. Her oath of office does not permit her to discriminate against any couple wishing to wed because of their race, religion, national origin, political viewpoint or any other status that is constitutionally protected.

She testified here in court very clearly that if the ban on the same-sex marriage amendment were to be lifted or did not exist she would immediately issue marriage licenses to otherwise qualified same-sex couples.

She has testified that she is ready now to carry out this duty and she will begin issuing marriage licenses at the moment she is able to do so by law.

Her rationale for this position is clear. The Michigan Marriage Amendment is of no legal consequence. The U.S. Constitution guarantees that all citizens have certain fundamental rights. These rights vest in very person over whom the constitution has authority, and they are so important an individual's fundamental rights may not be submitted to vote. They depend on the outcome of no election.

Ten years ago Justice Kennedy said in Lawrence, quote,

"Our laws and tradition afford constitutional protection to personal decisions relating to marriage,

procreation, contraception, family relationship, child rearing and education."

And he said, quote,

"Persons in a homosexual relationship may seek autonomy for those purposes just as heterosexual persons do."

I would like to point out parenthetically that I happened to be in the Supreme Court when that Lawrence case was argued ten years ago, and I felt as though a change was occurring there. I could see on the faces of the justices what I interpreted was a sense of relief, that the tide was beginning to change and that was ten years ago.

Justice Kennedy went on to say in the Lawrence decision,

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life. Persons in a homosexual relationship may seek autonomy for these purposes just as heterosexuals do."

Those bedrock principles that were laid down in Lawrence ten years ago are here today, and need to be implemented.

Lisa Brown, the Clerk, knows as everyone in this courtroom knows that committed same-sex couples live together as a family sometimes for decades. That these

same-sex couples raise children together. Provide financial stability for each other. Help each other in time of illness. Help each other's family members. And at the end of life they are there to provide comfort and to say goodbye. And this is regardless of the fact that they are married or not married. It is the intimate relationship that is entitled to constitutional protection which is at the core of our concept of liberty.

So what has happened in our communities around the nation in the last ten years since Lawrence was decided? Has the Constitution changed? It is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian.

The Court cannot ignore the fact that the plaintiffs are able to develop a committed, intimate relationship with a person of the same sex but not with a person of the opposite sex. The Court and the state must adopt to this new reality.

The state through its experts have not challenged this reality. Instead, the state and its experts have engaged in what I would call breathtaking hypocrisy in its effort to define marriage in the so-called traditional sense. For the state and their experts the purpose of marriage is to procreate. Under the state's hypocritical reasoning a post-menopausal woman or an infertile man does

not have a fundamental right to marry because he or she does not have the capacity to procreate.

Under this theory, a prisoner who does not have conjugal access to a spouse cannot marry. This proposition is just flat out irreconcilable with the right to liberty that the Constitution guarantees everybody.

The liberty interest behind the right to marry is so fundamental that county clerks like Lisa Brown are not permitted to judge otherwise qualified couples to see if traditional marriage will ensue. She, like the other 82 clerks in the state of Michigan have no discretion in carrying out her duties. She does not inquire whether a couple intends to have children, whether they intend to live together. She makes no determination whether this relationship will be good or bad for children, or make any other type of personal assessment as to the nature of the marriage relationship that is proposed.

The right to marry the person of one's own choice is so rooted in our notion of liberty that county clerks may not interject personal opinion which may interfere with that liberty right.

By failing to act she has, in essence, told these homosexual couples and the entire world that their otherwise valid relationships are unworthy of state recognition. She no longer wishes to do that. She wants

that to end.

Rather than protecting or supporting the families of opposite sex couples, the Michigan Marriage Amendment perpetrates inequality by holding that the families and relationships to same-sex couples are not now nor will they ever be worthy of recognition.

Whether a citizen is homosexual or heterosexual in orientation they must be permitted to marry the person of their choice. To do otherwise, homosexual couples will forever be viewed and made to feel that they are second-class citizens.

This state's sanction and humiliation must end and it must end now.

Now, the state through its experts has argued that children raised by heterosexual couples do better than children of same-sex couples. These arguments, however, have not been supported by reliable studies.

The state has essentially conceded this when at the end of each expert's testimony they have elicited testimony which I would call the fallback position. Each of their experts have taken the fallback position saying, your Honor, if you think our studies are not reliable, then you probably should wait because we, as the experts, were compiling data to strike down the Michigan Marriage Amendment is too drastic and we have to wait, your Honor

should wait until the data is firmed up so that there is reliable evidence to support that type of action.

None of the experts that I heard from the state's side told us when this was going to happen. We don't know if they think that the data is going to be complete by the end of this year, or the end of the decade, or 25 years from now, but they have -- the state has taken this fallback position due primarily because of the unreliability of its evidence that the Court should take a cautious approach in its decision-making on this particular point. Clerk Brown says now is the time to act.

The evidence that the plaintiffs presented was sufficient. Common sense is sufficient. The ten years since Lawrence has informed us about what it means to be gay and what has happened in those relationships, and I think it would be an error and wrong for this Court to accept the state's fallback position that it should take a cautious approach to this.

The state has not really been able to cite any evidence to justify its fears. The state's argument is analogous to the arguments made in the case of City of Cleburne versus Cleburne Living Center decided in 1985.

In that case, the City was concerned about issuing a permit for a home for the developmentally disadvantaged because of the fears of the property owners

who lived near that facility. The Supreme Court held that, quote,

"Mere negative attitudes or fear are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like."

Nothing that I heard in this trial justifies the state's fear that children will be harmed if same-sex couples are allowed to marry. There is absolutely no reason to take the cautious approach in this case.

The state has advanced a number of arguments but none of them overcome the basic reality that same-sex couples who cannot marry are not treated equally under the law today. The harm to them is real. It is not abstract. It's not speculative.

Defendant Brown urges this Court to issue an injunction against the enforcement of the Michigan Marriage Amendment. She requests that the Court order, restrain state officials from interfering in any way with the issuance of marriage licenses to same-sex couples. The Court's order should make it clear that all 83 of Michigan's county clerks are required to issue these licenses and that the failure to issue a marriage license to any otherwise qualified same-sex couple will be deemed a violation of this Court's order.

Are there county clerks who have personal or religious objections to same-sex marriage? I suppose the answer is probably yes. The Court's order should make it clear that these personal opinions must give way to the directives of this Court's order.

There is no automatic stay of an order granting a request for an injunction. Whether a stay is granted if the Court were to strike down the Michigan Marriage Amendment as unconstitutional and grant an injunction against its enforcement the state would have to ask for a stay. The stay is automatically provided under the Court rules. The Court would the be faced with the decision whether to issue a stay or not.

I call the Court's attention to the Sixth Circuit opinion of Michigan Coalition of Radioactive Material Users versus Griepentrog. There the Court said,

"We consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction."

THE COURT: I don't mind hearing your argument on a stay, but at this point that's not an issue. Should it become an issue I believe that notice has to be given to all sides should that become an issue, and certainly would welcome your decision, input and argument at that time. But right now it's not an issue, I don't believe.

MR. PITT: I understand. I would like to point out today though that there is a need for an immediate consideration of this issue because of the impact from the DOMA decision, the Windsor decision. And I think the Court is aware that if Michigan were to permit same-sex marriages then the beneficiaries would be eligible for the benefits of federal and state benefits. I think -- I just want to point out just a few of these points.

An unmarried same-sex couple today cannot receive a number of health related benefits. They cannot claim leave under the Family and Medical Leave Act if a partner becomes sick. They cannot get coverage for health care as a spouse of a federal employee. They cannot be considered a spouse for immigration purposes which could be very important. They cannot participate in a survivor benefit plan as a spouse of an active retired member of the military. These are just but a few of the examples that the courts have noted that the results of being denied a marriage license for a same-sex couple has had profound effect.

So the essence of what the Clerk is asking the Court to do is, of course, you know, grant the injunction and to do it as quickly as possible so that individuals who had been denied equal protection for so long will have an opportunity at the earliest possible time to take advantage

of the federal and state benefits that they would be entitled to.

As the Clerk has said throughout her testimony and throughout her papers that she has submitted to the Court, the Clerk stands before the Court ready to do her duty at the moment the Court would permit her to do that.

And I remind the Court that when we were here in October of last year when we argued the cross-motions for summary judgment, I left the Court with the idea that time is of the essence. I ask the Court if not now, when? Again, I urge the Court to take into account that time is of the essence and allow the Clerk to begin to do her duty at the earliest possible time.

Thank you, your Honor.

THE COURT: Thank you.

Counsel?

CLOSING ARGUMENT

MS. HEYSE: Good morning, your Honor.

Assistant Attorney General, Kristin Heyse, on behalf of State defendants.

Your Honor, again I want to tell you what a pleasure it has been to be before you on this case.

THE COURT: Thank you.

MS. HEYSE: I know that I speak for my entire team when I say that to you. You've repeatedly commended the

parties for their cooperation and collegiality throughout these proceedings.

But you and your staff should also be commended. Your courtroom certainly fosters that type of atmosphere and you and your staff have been most gracious, so thank you.

THE COURT: I appreciate it.

MS. HEYSE: I'm going to briefly touch on the issue of second parent adoption and just point out to you, your Honor, that there is no fundamental right to adopt. And the children in this particular case have, in fact, been adopted so that's not the issue here.

Plaintiffs' disagreement with the state's methods for adoption do not make them unconstitutional. And I think that this Court has made very clear that what's at issue in this case is the constitutionality of the Michigan Marriage Amendment and that's what I intend to address here today.

Now, after listening to the parties' closing remarks in this case, it is clear, your Honor, that there's a lot of emotion surrounding these issues. And it would be very easy to get lost in that emotion and lose our focus. But, your Honor, this is a rational basis case about one simple question: Is there any conceivable basis on which a reasonable voter might have decided that marriage is between a man and a woman. In other words, could reasonable

people disagree on this issue. If they could, then this Court must rule in State defendants' favor.

Now, there is one thing that I would like to address at the outset and it's rather unfortunate that I actually have to do so. It's disappointing that rather than debate the merits of social science, plaintiff's attempt to make this case about something it's not. This case is not about religious beliefs of the State's witnesses. It's about science, data. It's about what's best for the children of the state of Michigan.

The fact that someone may have deeply religious beliefs does not mean that they cannot be an objective social scientist. Unfortunately, plaintiffs attempt to impose a religious test on who can be an expert witness. But these experts testified that science, the data, not their religious views have led them to the conclusions that they have reached. And that science, your Honor, is what should decide this case.

As we've seen over the course of this trial, there are multiple grounds for supporting Michigan's Marriage Amendment. First, it is rational to believe that it's a good thing for a child to have both a mom and a dad. Even plaintiffs' experts didn't dispute that point. It is rational to believe that society should promote that ideal. And at the very least, your Honor, it's rational to proceed

with caution before saying that eliminating a mom or a dad from raising a child in marriage won't affect children especially when the science in this area is so unsettled.

Plaintiffs bear the burden of negating every single rational basis a voter might have had, a showing that 2.7 million voters who all reached the same conclusion did not have among them a single rational reason for their vote. Plaintiffs have not met their burden in this case. And for that reason, their claim must fail.

To be clear, questions like why not allow same-sex marriage, or what harm would it cause to opposite sex marriage are not appropriate here. Those are the sorts of questions that the voters got to answer when they decided to pass the Marriage Amendment, and their votes ought to count for something.

This Court has a different question to answer. Did plaintiffs prove that there is no rational basis for the Marriage Amendment? The evidence showed that they did not.

In my Opening, I provided you with a general overview of what the state was going to address at the trial, and we did address each and every point. While we did not have any burden in this case we showed that there are rational reasons for the Marriage Amendment.

First, moms and dads are important.

Second, same-sex marriage and parenting is too new to make any definitive conclusions.

Third, caution should be taken before eliminating a mom or a dad from raising a child in marriage.

And, fourth, such a major change in a key social institution should be left for the people of the state of Michigan to decide.

Because there are no rational -- I apologize. Because there are rational reasons for it, the Marriage Amendment is not unconstitutional.

Again, plaintiffs have failed to meet their burden in this case because moms and dads, your Honor, are important. And the importance of moms and dads is very real.

Plaintiffs have failed to show that it was irrational for the people of Michigan to want to encourage the raising of children by a mom and dad recognizing that gender diversity and parenting is what's best for kids. Indeed, plaintiffs' witnesses did not say throughout the course of the trial that moms and dads are not important because they are. In fact, plaintiffs' expert psychologist, Dr. Brodzinsky, conceded that point on the very first day of trial. Additionally, plaintiffs' expert historian, Dr. Cott, agreed that different sexes bring different contributions to parenting, that each gender brings

something different to the table, and that's a good thing.

Plaintiffs' expert witness, Dr. Brodzinsky, also acknowledged that mothers and fathers have unique characteristics. He states that mothers tend to be more emotion focused. They tend to be more calming and soothing with their children. Mothers are more physically affectionate with their children, and they're more linguistically oriented.

Fathers, on the other hand, he stated are more playful, more boisterous in their interactions with their children, and more task oriented. The fact of the matter is that men and women are different. Mothers and fathers are not interchangeable, and they're certainly not dispensable.

The evidence also supports that being born and raised by a biological mother and father is not inconsequential. State defendant's expert, Dr. Joseph Price, opined that when he said, quote,

"The ideal environment for raising a child is to be raised by a father and a mother and particularly if the child is biologically related to both parents, and particularly if those parents are married."

There is a benefit to a biological connection between a mom, a dad, and a child. Therefore, the people's decision to retain a definition of marriage that encourages the raising of children by a biological mother and father

was not irrational.

The fact of the matter is, your Honor, that laws do shape our behavior. And the goal in defining marriage as between one woman and one man is to encourage certain ideals.

Now, this is not to denigrate other family structures, but to promote what the majority of the people think is the best environment for raising children. This is not to suggest that there aren't other kinds of effective parents and parenting structures. Clearly, there are. Indeed, there are all kinds of parents across a broad variety of family structures. But the evidence shows that there are benefits to a child being raised by both a mom and a dad. Therefore, plaintiffs have to meet their burden to show that the people were irrational in retaining the definition of marriage that supports raising of children in that environment.

Second, your Honor, plaintiffs have failed to show that it was irrational for the people of Michigan to maintain the definition of marriage as between a man and a woman because same-sex marriage is just too new. Everyone in this trial agreed that the notion of same-sex marriage is relatively new in this world and in this country. In fact, no society anywhere has had even a single generation's worth of experience with same-sex marriage.

Plaintiffs claim that there is no historical definition of marriage. However, their expert, Dr. Cott, conceded that marriage has always been between a man and a woman in the state of Michigan. In fact, Michigan has never recognized any other definition.

And plaintiffs' experts also conceded that there is no comprehensive study done to date on children actually raised by same-sex married couples. Thus, the evidence supports that it was rational for the people of Michigan to maintain a definition of marriage as between a man and a woman until we have more information about same-sex marriage.

Third, plaintiffs have failed to show that the people of Michigan were irrational in maintaining the definition of marriage because the social science on same-sex marriage and parenting is just too uncertain.

As this Court may recall, soon after Massachusetts allowed same-sex marriage in 2004, the American Psychological Association, or the APA, came out with its bold statement that, and I quote,

"Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents."

Plaintiffs rely heavily on that statement to argue that there is a clear consensus among professional

organizations and that there is no rational basis for the Marriage Amendment. They want this Court to believe that this issue is settled and not debatable.

As Professor Marks testified this policy statement is used in just about every same-sex marriage case around the country. However, if this trial has proved anything, your Honor, is that this area is unsettled, and this area is entirely debatable, and the issue as to whether there is truly no difference in the outcomes for children being raised by same-sex couples is not clear.

And, your Honor, if this matter and issue is at least debatable, this Court must rule in the state's favor. The evidence shows that there are problems with this "no differences consensus." Not only are there deficiencies in the APA position statement itself, but our experts testified that the studies that the APA relied on in making that statement are also deficient.

Our experts also testified that there are, in fact, studies that have actually found differences in outcomes, and that was the Regnerus study, the Price Allen and Pakaluk study, and the Allen study analyzing the Canadian Census data.

As to the APA position itself, Dr. Marks noted the extreme nature of that statement and after hearing that the APA had affirmed that position in 2011, he testified

that raised his curiosity. He wondered how could such a large organization with such differing viewpoints agree on such a controversial issue with a 157 to zero vote. He asked, is that science truly that settled? Is it entirely clear that there is no difference between children being raised in a same-sex household and children being raised by a mom and a dad, or is there something else going on, something that Dr. Marks called scientific group think.

To him, as he testified there was an advocacy position being taken that may not have any basis in social science. So what did he do?

He began exploring further, reading some of the underlying studies that formed the basis for the APA position, and he noticed something troubling. The sample sizes seemed unusually small, and there were other questionable features about those studies. So he took it upon himself to review all 59 studies forming the basis for the APA position statement.

Now, your Honor, this was unfunded research. It was done entirely on his own. No one asked him to do this, and he spent a lot of time carefully analyzing each one of those studies. And what did he find? He testified that he found that those studies that were relied on by the APA are not methodologically sound.

First, he testified that the vast majority of

those samples used in the studies were small, non-representative samples of privileged, white lesbian mothers.

He testified that only a very small number involved gay fathers in terms of child outcomes. And very, very few of them, if any, were ethnically or racially diverse even though everyone agrees that the same-sex community itself is diverse.

And of the 59 published studies that he reviewed, 45 or about three-quarters of them were based on convenient samples of less than 100 participants. Several studies were unusually small with one being the Wright study in 1998, having only five participants.

As Dr. Marks testified, once you took out duplicates and those studies that didn't even look into child outcomes you were left with 19 studies that had an average sample size of 36.

In addition, he noted that participation in these studies is not random. Participants are often recruited or they're self-selected volunteers. And Dr. Marks provided several examples of that in his testimony.

These small convenient samples are of limited value other than perhaps to psychologists. All of the state's experts testified that these convenient samples while convenient have a high likelihood of bias by

volunteers and they have low levels of external validity. Basically, your Honor, any information that's gleaned from those convenient samples cannot and should not be broadened beyond the narrow specific group of individuals that are part of that sample. From a social science view, they cannot and should not be used to make broad based claims as to the population as a whole.

Second, the studies that he reviewed did not include proper comparison groups. Of the 59 published studies, 26 did not even include a heterosexual comparison group. So only 33 published studies did. Of those 33 studies, 13 of the heterosexual comparison groups were actually single parents and not couples.

Again, as this Court heard repeatedly throughout the trial having a proper comparison group is important. I don't think I ever heard the term "apples-to-apples" so much in my life.

Third, there actually were studies that found a difference. Doctor Marks clearly and easily found two studies that refuted the APA's claim, and those were the Sarantakos' studies from 1996, and 2000. So even though the APA's brief only cited one in a footnote and tried to down play it the reality is that they did exist. Thus, the APA's claim of no studies existing was false.

Fourth, Dr. Marks testified that these studies

looked at soft, unverifiable outcomes rather than hard verifiable outcomes that are more reliable.

And, fifth, Dr. Marks stated that these studies are not sufficient to make any definitive statement regarding long-term outcomes for children. As he testified, very few comparison studies examine critical societal outcomes during late adolescent or early adulthood.

So as Dr. Marks made clear the APA brief is entirely lacking in substance, and its position statement blurred the lines between science and advocacy. He stated as well as our other experts that these studies are preliminary at best. And compiling a large number of them together does not make it any less deficient.

But addition to the deficiencies of these small convenient sample studies relied on by the APA, we also provided evidence that there are large population-based studies that do actually show a difference between children being raised in same-sex households and those being raised by a mother and father. Those studies are from Dr. Regnerus, Price, and Allen, State defendants' expert witnesses.

As Dr. Regnerus testified about his survey data collection project the National Family Structure Study, or the NFSS as we've all come to know it, that particular study included high quality data. And that was acknowledged

by plaintiffs' own expert, Michael Rosenfeld.

Doctor Regnerus' NFSS study was the first to call into question this no differences claim using the population base study. He testified that he conducted a large population base study of young adults which included 248 respondents who had reported that their parents had been in a romantic relationship with someone of the same sex while they were growing up. These respondents were between the ages of 18 and 39. Notably, those children who identified a parent as having had a same-sex relationship self-reported outcomes that were less favorable than those whose biological parents were and remain married. And despite all the criticisms and controversies surrounding the NFSS that particular study was never retracted from the journal that it was published in.

Both plaintiffs and State defendants' expert witnesses agree that conducting high quality empirical studies on same-sex parenting is challenging for a variety of reasons, not the least of which is that this is such a small population of individuals, and the fact that there's a lack of settled protocols about how to identify parental sexual orientation.

Doctor Regnerus' NFSS study acknowledged those challenges. But, nevertheless, Dr. Regnerus indicated in his expert report and during his testimony that no existing

study bears the ability to randomly locate, track and compare large numbers of children, thousands or even hundreds raised continuously by gay couples with the same among heterosexual couples over many years.

He testified that's the type of study that's needed, that the science in this area remains young. He agreed that it's probably too soon to get adequate data on married same-sex couples, and he recommended that more research should be done before the State alters its definition of marriage.

In addition to Dr. Regnerus' study, Doctors Price, Allen, and Pakaluk also found differences and outcomes for children being raised by same-sex couples. And Dr. Price and Dr. Allen were here to testify about those differences. They indicated that they replicated plaintiffs' expert witness Michael Rosenfeld's study regarding normal progress in school for elementary children. And they found that although the difference between outcomes of children being raised by same-sex couples and heterosexual married couples was not statistically significant, there was, in fact, a difference in outcomes. The odds for children in heterosexual married couples of making normal progress through school were 15 percent higher than for children of same-sex couples, and that was based on replication of Dr. Rosenfeld's study.

Now, as Dr. Joseph Price pointed out during his testimony, this is important. He stated and I quote,

"Is being 15 percent more likely to be held back in school that big of a deal? I think actually that is something that parents would be concerned about."

Doctors Price and Allen testified that when they ran the numbers on Rosenfeld's study with slight variations it did show a statistical difference in outcomes.

When they controlled for certain factors and depending on which restriction they restored they found that children from married heterosexual couples were between 25 and 30 percent more likely to make normal progress through school as compared to children living in same-sex households. And their numbers were statistically significant.

Doctor Allen also testified that he went on to replicate the Rosenfeld study using data from the Canadian Census which he testified has advantages over the U.S. Census data. In that study, he examined the association of household type with children's high school graduation rates in particular looking at children between the ages of 17 and 22.

Doctor Allen testified that with his study he had a large random sample and that in that sample he controlled for parental marital status. He distinguished between gay

and lesbian families, and he had a sample that was large enough to evaluate differences in gender between parents and children.

His study concluded that children living with gay and lesbian families in 2006, were about 65 percent as likely to graduate compared to children living with opposite sex married families. He also found that daughters of same-sex parents do considerably worse than sons meaning, as he testified, gender does matter.

Now, Dr. Allen acknowledged that census data is limited. But so is the data that Dr. Rosenfeld relied on for purposes of his study.

Doctors Regnerus, Marks and Allen all agreed that while there is evidence of poorer outcomes for children raised by same-sex couples this area of social science is not settled, and that definitive conclusions cannot be drawn from the existing research. They all agreed what's to make any definitive conclusions is a large, long-term nationally represented study tracking children of same-sex married couples. No such study currently exists.

And, again, I just want to point out, your Honor, that these experts focus on the merits of the social science. This case is not about their religious views of the State's witnesses. It's about science and data, what's best for children.

Plaintiffs have failed to show that it's not prudent for the people of the State of Michigan to wait until there is larger, more comprehensive data before redefining marriage. And, again, Michigan does not have to prove its reasons. Rather, plaintiffs must show that there's no rational basis for those reasons.

Right now, your Honor, it's just too early to know the effects that redefining marriage will have on the institution itself. And for that reason, Michigan voters acted rationally by encouraging a cautious approach before redefining marriage.

Now, plaintiffs raise several arguments in an attempt to improperly shift the Court's focus away from this rational basis review, but these arguments must be rejected.

Plaintiffs argue that because other groups with poor child outcomes are not excluded from marriage, it's not rational to exclude them. But this argument, your Honor, improperly inverts the standard. The question here is not whether it's proper to exclude same-sex couples, it should be whether including them would further the State's goals. Because doing so would not, plaintiffs' argument fails.

Plaintiffs also argue that allowing same-sex marriage would benefit families, it would stabilize them.

But what the evidence has shown in this case, your Honor, is we're just not sure if that's true. Doctors Price and Regnerus and plaintiffs' own witnesses, Doctors Brodzinsky and Rosenfeld testified that there is evidence of instability in the relationships of same-sex married couples. All agree that the studies in this area are mixed.

Plaintiffs also argue that same-sex marriage will not harm opposite sex marriage. But for the reasons I've just stated we just don't know yet. Plaintiffs argue that the natural evolution of marriage is that it's now become gender neutral, But that contradicts Dr. Cott's own testimony where she recognized that there is a difference between men and women.

Plaintiffs argue that the type of study that's required is not likely to happen any time soon so they should be allowed to marry. In other words, your Honor, let's make it legal and then see what happens. But this puts the cart before the horse.

I want to turn now to some of the case law that's been cited by both plaintiffs' counsel and Mr. Pitt. I will point out, your Honor, that Lawrence is distinguishable from this particular case. This case is not about the criminalization of same-sex intimate acts. This case is about the State's definition of marriage.

I also want to point out the distinctions between

this case and the recent decisions around the country that have struck down laws defining marriage as between one man and one woman because those cases, your Honor, are different from ours.

While those cases conclude that there's no rational basis for preserving marriage as between a man and a woman those cases did not consider some of the reasons voters might have supported the Marriage Amendment, reasons that we're presenting here in our case. Those cases do not consider that it might be prudent to proceed with caution when a change is so new and that social science on the issue is still in its infancy. Those cases while they may implicitly disagreed that the best setting for raising children is for a child to be raised by both a mother and father did not consider the basic point that moms and dads are different, and that kids benefit from having both.

They unfortunately appear to have misapplied the burden of proof and improperly framed the issue to reach their conclusions. As this Court has previously noted, those cases are different. Those cases didn't have a trial. Therefore, this Court can make its own independent decision and affirm Michigan's constitution.

As a side note, your Honor, despite the strength in our case we do recognize that there are never any guarantees. So should this Court rule in plaintiffs' favor

we do request a stay just as we've done so in the past.

I think it's clear from Oakland County Clerk Lisa Brown's testimony as well as her counsel's argument here today that she and likely other clerks are ready, willing and able to issue licenses immediately in the event of an adverse ruling by this Court. So a stay, your Honor, is imperative to maintain the status quo throughout the pendency of an appeal, and to avoid the confusion and the uncertainty that has resulted in other states when a stay has not been granted.

And on that note, your Honor, I think it's also worth pointing out that a letter that our Department sent out in October of 2013, did not tell clerks to disobey the law. Quite the opposite. That letter told clerks that they would need to follow the law including any stay that a court grants.

But this brings me to my final point, your Honor, and I can't stress enough this point: this decision to maintain the definition of marriage as between a man and a woman was a decision that the people of Michigan made, and one that they had the clear authority to make. Again, after Windsor it is clear that defining marriage is within the exclusive province of the state. Indeed, plaintiffs' expert, Professor Cott, agreed that states have the right to regulate marriage. Therefore, this Court cannot

interfere with the state's authority unless there is a clear constitutional violation.

And if there's anything that we've all learned over the course of the last few weeks, your Honor, is that not much is clear when we talk about the topics of same-sex marriage and parenting.

It's also important to note, your Honor, that plaintiffs have not put forth any direct evidence to show that the voters of the state of Michigan acted out of animus when they passed the Marriage Amendment. Rather, they rely on national trends at the time that the Amendment was passed, and they attempt to improperly impute those trends to the state of Michigan.

I want to be clear that the passage of the Marriage Amendment was not a vote against same-sex couples. It was not based on animus or bigotry, but rather a vote to maintain the definition of marriage that had been in existence since the inception of the state. This was not merely the whim of a few. This was the vote of the majority. It is the will of the people, and that decision should stand.

The Marriage Amendment is a product of state political process, something that federal courts rarely invade and should not. This is especially true given the Baker decision, a decision that Windsor did not repudiate

and it still stands as good law.

If plaintiffs are so confident that their position on this issue is the only viable one then why not put it to a vote? In fact, this issue is likely to be on the ballot soon. So why not let the people decide?

In conclusion, your Honor, if reasonable people could disagree then the Court must uphold the Michigan Marriage Amendment.

The alternative is to hope that 2.7 million voters who all reached the same conclusion did not have among them a single rational reason for their vote.

This is consistent with our most basic freedom, our freedom to govern ourselves which is just as important as any of the individual freedoms protected by the Bill of Rights. So I ask you again, your Honor, let the people decide.

For all of these reasons, your Honor, we ask that you rule in favor of State defendants.

Thank you.

THE COURT: Thank you, very much.

Rebuttal?

MR. MOGILL: If it please the Court, the Court has all of our arguments. The Court is aware of the evidence. Nothing that Ms. Heyse has said changes the law or the facts --

THE COURT: You've got to get a little closer.

MR. MOGILL: Nothing that Ms. Heyse has said changes the law or the facts or refutes our arguments. Therefore, there is no need for rebuttal.

Thank you.

THE COURT: Thank you.

Okay. Let me just make a few comments.

Number one, and I've said it before during the trial, the attorneys in this case are the epitome of collegiality. They are excellent. It's not often as a judge that you can get off the bench at the conclusion of a trial and say that the attorneys and the teams for both sides gave the highest, professional, and skill to their particular issues and did it in a manner that was collegial, that was fair, and that presented the evidence for their respective clients in a manner that would, as I've indicated before, did not only expect it, but would be exemplary. I appreciate it. And I can't tell you how important it is for both sides. I mean, it's just unbelievable, and I can't wait to share it with my colleagues because one of the things we always talk about, you know, the perfect trial in terms of collegiality, in terms of skill, in terms of presentation, in terms of representation of respective clients, in both case both sides were perfect. There's no other way of putting it, and

appreciate it. It's the greatest way for a judge to try a case.

Let me also take just a couple of seconds to thank my staff. As we all know, my staff was fabulous.

Carol Mullins who is our case manager, chief of staff, took care of all the details. I think it permitted me to get on the bench. It permitted the attorneys to be able to move this case in a manner that they did, in a very timely manner so we appreciate her services.

Pat Hommel who is our secretary now known as administrative assistant, put everything together internally for us. We could come out. We could listen to this case. We didn't have to be distracted with anything, phones, anything. Whatever it was, Pat took care of it.

We have Joan Morgan, of course, and Joan coordinated the court reporting and did much of it herself so that the transcripts could be available for the sides and whoever needed whatever they needed. I am sure that all of the court reporters that participated did an excellent job and the transcripts will be perfect.

The spectators, you know, the courts are open, and we don't often get spectators. It's the unusual case. It was such a pleasure to look out at the front at the friendly faces, many of which I saw day in and day out. Many of which I saw came in, came out. But it was a

pleasure because the Constitution does talk about a public court. Hopefully those that have come down today and the other days that we had the case, understand at least what it's all about and hopefully you'll come back on other cases. Hopefully -- when I was in the state court which was a long time ago we had court watchers. They came every day. Most of them were senior citizens or lots of times they -- there was a parent that would drop their child off at day care and come over and watch a case or two. And it is very interesting. Today unfortunately because of security it's much more difficult, you've got to take your belt off and so forth. But every single day -- of course, I love what I do, but every single day, it is of interest. We're talking about human things. People's problems. The Constitution. The statutes. As most of you have seen, at least once or twice during the trial we swear in new citizens. Just fantastic. So I appreciate looking out every day seeing many of you day-to-day, many of in and out, but always a friendly face. And for that, I appreciate it.

Let's talk about what's next. For the attorneys they know what's next. For those who have an interest in the case and also the media. We should talk about the media. We know the media has been upstairs. They have their own media room, but they've been reporting. That's also important. First Amendment, freedom -- you know, all those

freedoms are very, very important for all of those folks that couldn't come down here on a daily basis have information. The media is a very, very check and balance. Our whole system is on a check and balance. Executive versus legislative. Judicial versus both of those. And the press and the people. That's what it's all about. So all of you that came and the press is important.

The next step is mine. As the judge in this particular matter what's -- we all know I have to do something. I have to decide this case. How do I decide this case?

I have essentially two duties to do. I have to make findings of fact and conclusions of law. And those conclusions of law deal with statutory law, constitutional law. I have to make factual findings. You've heard the evidence. For those who weren't here during the trial, you say were both sides in the same courtroom because each side has its position. You can see each side has cited witnesses. We've heard witnesses. I have a lot of things to do. I've got a lot of reading to do. I have a lot of decision making to do. The kind of decision making that I have to start with is when I make the findings of the fact, who do I do that? I listen to the testimony. We have witness books. Most of you have seen them. I have to read all of those. I have to determine how much weight I'm going

to give to each witness. How credible they are. How believable they are. Does their testimony make sense in the context of this whole case. Those are the kind of decisions that I have to make.

Then I have to apply that to the law. As you can see, both sides differ as to lots of things in the law. So I've got to do that.

How do I do that? Just -- I go through it and it's going to take a lot of time. I have assistance. These two fellows who I have not introduced yet are my law clerks. This is Dan Weininger who is one of my law clerks. This is Steve Thoburn my other law clerk. They're going to play a role in it. What role do they play in it?

I'm going to read this. I'm going to go over it. And I'm going to have some questions that I need somebody to do some research for me and partially do it for me. That's what their position is. They're going to be working very, very hard because we've got a lot of reading to do. You could hear, there's a lot of cases. Got to read those cases. I'm going to have some questions. Each one of those cases that were cited today as well as lots of briefs -- they're stacked on Dan's desk. I mean, all around his office there's briefs. Every one of those has cases that are cited by either side. We not only have to read those cases, but within those cases there's other cases because

that's how we do it. The law is based upon precedent. And we also have the Constitution here. We have to analyze the Constitution. Those are the kind of things that we have to do.

And the reason I'm kind of alluding to it because most people don't know what we do. They say, oh, what do you do? That's what we do and it takes time.

So -- I think it's important. People have asked me well, you know, when are you going to make a decision?

Let me tell you that I know -- I know how much reading I have to do. At the beginning of the trial I think I told the attorneys that on these kind of trials -- when I say "these," a bench trial, where I don't have a jury and I have to do all those things, I have to do them relatively quickly because I have to remember -- I have a transcript of what was said, but I've got to remember how they said it, how it fit into something else. If I wait too long it gets clouded. Just like a jury decides, right after a case they go back there. It may take a week, two weeks, a day. They talk about it. They think about it. I do the same thing.

I know that I can't do it in a week, okay. This is our number one primary job. We have nothing else. I anticipate the week after next hopefully to be able to get it out. I just tell you that because I think it's fair. I

don't want you to be on pins and needles. We all are. Both sides are. I am. I am because I can't -- I'm anxious to get into it. Anxious to make those decisions. To look at them. To study them. To go over them. So I can assure you I will be doing that.

The way it's going to be -- I'm not -- some judges will convene court again and read it and so forth. I don't write that many opinions, number one.

But, number two, I'm going to -- we call it electronic file. It will be electronically filed. The attorneys will get it immediately. It will be immediately posted on our website. That's how we do it.

I am going to write it. It's going to take some time. But I'm going to write it so that everybody sitting here today, all our spectators who have been here and so forth, can understand it.

So that's going to take a little more time, too, because generally I write it for the lawyers. I'm still writing it for the lawyers, but I know how much interest there is, and I see those faces out there, and I appreciate those faces out there. Hopefully, we will put it together so everybody understands it.

So with that said, again, let me thank everybody. We will stand in recess, and I will get the opinion out as soon as I can.

Okay.

(Proceedings concluded, 12:10 p.m.)

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CERTIFICATE

I, JOAN L. MORGAN, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and number cause of the date hereinbefore set forth, and I do hereby certify that the foregoing transcript has been prepared by me or under my direction.

S:/ JOAN L. MORGAN, CSR
Official Court Reporter
Detroit, Michigan 48226

March 24, 2014