

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 1

**BENCH TRIAL (Excerpt)**  
**BEFORE THE HONORABLE BERNARD A. FRIEDMAN**  
**UNITED STATES DISTRICT JUDGE**

100 U. S. Courthouse & Federal Building  
231 West Lafayette Boulevard West  
Detroit, Michigan 48226  
TUESDAY, FEBRUARY 25, 2014

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W I T N E S S E S

David Brodzinsky, Ph.D.

Direct Examination by Ms. Stanyar

OPENING STATEMENTS  
TUESDAY, FEBRUARY 25<sup>TH</sup>, 2014

3

1 Detroit, Michigan  
2 Tuesday, February 25<sup>th</sup>, 2014  
3 (At or about 9:15 a.m.)  
4 (Excerpt of Proceedings.)

5 \_ -- --- --

6 THE COURT: With everyone here, we'll start with  
7 the plaintiffs' Opening Statement, please.

8 MS. STANYAR: Good morning, your Honor.

9 THE COURT: Good morning.

10 MS. STANYAR: This case is about marriage  
11 equality, and it's also about the well being of children.  
12 We have a rare opportunity in this case to rid ourselves of  
13 two laws that hurt so many people so deeply. And we have an  
14 opportunity to help children, a lot of children, some of  
15 the most vulnerable children in our society. I know that I  
16 speak on behalf of my co-counsel that this is a privilege  
17 and a honor to be standing here trying this case before you  
18 today.

19 The Supreme Court recognized over 40 years ago  
20 that the freedom to marry is one of the vital personal  
21 rights essential to the orderly pursuit of happiness by  
22 free men. Marriage is a coming together for better or  
23 worse, hopefully enduring, and intimate to the degree to  
24 being sacred.

25 We're going to show you in this case through the

1 testimony that marriage is central to life in America. It  
2 promotes mental, physical and emotional health. It provides  
3 economic strength and security. And most important,  
4 marriage brings stability to families. It helps children  
5 immensely.

6 The adult plaintiffs are a loving couple, deeply  
7 committed to each other. By all accounts they are wonderful  
8 and caring parents, parents who have made unbelievable  
9 sacrifices to bring these ailing, abandoned special-needs  
10 children into their home.

11 Your Honor by now is very familiar with April and  
12 Jayne and the children. The parties have actually entered  
13 into a stipulation which respect to the facts. Their  
14 character, their history is not in dispute. I'll talk a  
15 little bit more about them later.

16 Your Honor has framed the issues for us. We are  
17 to focus on the rationales offered by State defendants, the  
18 justifications advanced for these laws. Providing children  
19 with biologically connected role models of both genders  
20 that are necessary to foster healthy psychological  
21 development; forestalling the unintended consequences that  
22 would result from the redefinition of marriage, tradition  
23 or morality; and promoting the transition of naturally  
24 procreated relationships into stable unions.

25 We'll be addressing numbers two, three, and four

1 with our marriage historian witness, Professor Nancy Cott.  
2 Her qualifications, she is a leading expert in the country  
3 on the history of marriage. Her book, "Public Vows" is a  
4 textbook reading in any college or graduate school on the  
5 history of marriage. She testified in the Perry trial in  
6 California. She was qualified as an expert. Her testimony  
7 was credited.

8 First, she'll explain that marriage is a civil  
9 institution. She will testify that in the United States  
10 marriage is created, authorized and regulated by the  
11 government. While different faiths have their own religious  
12 rights of marriage, and religious figures can officiate  
13 civil ceremonies it is the civil law that determines the  
14 legal validity of marriage.

15 Even today marriage is tied to citizenship. You  
16 are not married under the law without a government marriage  
17 license. She'll talk about the underlying purposes of  
18 marriage over the course of history. Historically, marriage  
19 was used as a vehicle to govern the population. It provided  
20 more or less a chain of command for the government to  
21 control the population. The husband was the head of the  
22 household, followed by his wife, the children, their  
23 relatives, all the way down in olden times to the slaves.

24 A related historical purpose, the economic public  
25 order rationale: marriage created economic financial

1 obligations between the spouses. It obligates the husband  
2 and later the wife to support their dependence in each  
3 other.

4 The State defendants offer rationale number four  
5 to justify the Michigan Marriage Amendment but Professor  
6 Cott will explain that marriage has never required the  
7 ability or willingness to procreate. And here she'll tell  
8 you about an important distinction: an inability to engage  
9 in sexual intimacy can be a reason to annul marriage in  
10 some states. But the ability to procreate has not been a  
11 prerequisite to marriage in any state. People well beyond  
12 child-bearing years can enter into marriages. People in  
13 prison for life can marry.

14 She will describe the evolution of marriage in  
15 this country. She will explain that there is no single  
16 definition of marriage across history. There's no single  
17 tradition of marriage across history.

18 In the area of gender, historically laws were  
19 based upon a legal fiction that marriage was a legal unit.  
20 The husband was the sole legal, economic and political  
21 representative. A wife's identity was absorbed into or  
22 covered by the husband, hence, the word "coverture."

23 The wife was kind of irrelevant. Legally, there  
24 was no such thing as no-fault divorce. Men were legally  
25 prohibited from abandoning wives because wives were

1 dependent and subordinate to husbands.

2 Also in the area of race, there's been an  
3 evolving tradition. Slavery. African Americans were seen as  
4 the property of the slave owner. They could be bought and  
5 sold and their marriage got in the way of that. So slaves  
6 historically were not allowed to marry. African Americans,  
7 therefore, were excluded from the definition of marriage in  
8 this country.

9 Interracial marriage. In the past, laws  
10 prohibited the blending of races based upon notions of  
11 white supremacy. A black man could not marry a  
12 Caucasian woman. Other laws prevented interracial marriages  
13 between Chinese people, Indian people, and Caucasian  
14 people.

15 Professor Cott will explain that marriage  
16 evolved. Traditions changed. Discriminatory practices were  
17 struck down at times by federal courts most often under the  
18 Equal Protection Clause. Women became equal to their  
19 husbands in the eyes of the law. Coverture laws were  
20 repealed. Along came no-fault divorce. Women entered the  
21 work force, became financially independent. Marriage is now  
22 an equal gender neutral partnership with each party having  
23 the same rights and obligations to each other and to  
24 society.

25 The definition of marriage changed again once

1 slavery was abolished. Loving versus Virginia did away with  
2 the ban on interracial marriages.

3 We will be responding to the State's rationales  
4 in this case for the two laws that we challenge. In past  
5 briefing we've already shown you that based upon Supreme  
6 Court precedent that tradition and morality cannot be used  
7 as justifications for the disparate treatment of United  
8 States citizens.

9 Laws can be based upon notions of morality, for  
10 example, there can be no liquor sales before noon on a  
11 Sunday, but they cannot under the Constitution have a  
12 disparate impact on a disfavored minority.

13 As to rationale number -- that would be two,  
14 throughout history in a series of Supreme Court cases the  
15 state threatened that dire, quote, "unintended consequences  
16 would result from the redefinition of marriage."

17 That didn't happen. The laws were struck down as  
18 discriminatory. Loving versus Virginia the Supreme Court  
19 struck down the interracial marriage ban not just based on  
20 race but because marriage is a fundamental right. Loving  
21 brought us more freedom to marry the person we love. It  
22 brought us beautiful blended babies. The institution of  
23 marriage did not suffer one bit.

24 We will be refuting the State's other arguments  
25 in this case, that is, that only a heterosexual marriage

1 will promote the transition of naturally procreative  
2 relationships into stable unions, and that the marriage ban  
3 promotes the ideal -- what the State calls the ideal  
4 mother-father intact family.

5 First of all, we're going to show you in this  
6 case that same-sex marriage in other states has had no  
7 affect whatsoever on heterosexual marriage. Secondly, these  
8 marriage bans are not having any affect on heterosexual  
9 procreating decision-making.

10 Straight people are doing what they've always  
11 done. They're getting married or not. They're having  
12 children, or not. Their behavior is not affected by what  
13 gay people are doing. There's no correlation, there's no  
14 link here.

15 Even more importantly, not allowing marriage is  
16 not preventing same sex couples from having and raising  
17 children. Evidence from the United States census -- we're  
18 going to introduce through Gary Gates -- shows that same  
19 sex couples are having families with children in all states  
20 whether or not they're allowed to be married in those  
21 states.

22 The children are there. The families are there.  
23 The laws aren't deterring the parents, they're hurting the  
24 families. So these rationales don't make sense and they  
25 don't pass rational basis.

1           In response to our briefing on marriage law, in  
2           response to the testimony of Professor Cott the State  
3           offers the testimony of Sherif Girgis. Mr. Girgis hopes to  
4           be a lawyer some day. He has never testified as an expert  
5           before. He has no advanced degree in any field that matters  
6           in this case, psychology, sociology, demography, history.  
7           He is a philosopher. He's testifying apparently because he  
8           has an opinion.

9           According to Mr. Girgis, the purpose of marriage  
10          is procreation and procreation only. All that language from  
11          the Supreme Court that I quoted earlier, a sacred intimate  
12          bond, marriage as a means of emotional security, physical  
13          well being, economic stability, none of that matters to Mr.  
14          Girgis, only procreation.

15          From our pretrial briefing the Court is already  
16          aware of our concerns about the admissibility of his  
17          testimony. We also contend that little weight should be  
18          afforded his testimony. We believe that Professor Cott is  
19          the far more credible and qualified witness in this case.

20          The child outcome rationales: The bulk of the  
21          trial testimony will address these rationales: Primarily  
22          providing children with a biologically connected role  
23          models of both genders that are necessary to foster  
24          healthy, psychological development. And to a lesser extent  
25          this will also touch on number two, forestalling the

1 unintended consequences that would result from the  
2 redefinition of marriage.

3 We will be introducing you or re-introducing you  
4 to the families headed by same sex couples in America.  
5 They're demographics, who they are, where they are. We'll  
6 look at the parents. We'll look at the children. And we'll  
7 talk about the large percentage of children adopted from  
8 the foster care system by lesbians and gay men because this  
9 is a crucial fact in this case. Foster care prior to  
10 adoption has a big affect on child outcomes. We'll bring  
11 you some of the leading experts in the country in areas of  
12 psychology, sociology, statistics, demography. Expert  
13 testimony and adoption, same sex parenting, child  
14 development.

15 We're going to try to come at this from all  
16 angles. This is an important discussion. This Court wanted  
17 a trial to look at this rationale in particular I believe.  
18 You told us you wanted and needed to assess the credibility  
19 of these expert witnesses. We really hope that here in this  
20 courtroom we can resolve once and for all the question of  
21 whether or not gay and lesbian people can make good  
22 parents. Not just for the sake of April and Jayne and the  
23 children but for same sex parents and their children across  
24 Michigan, across the country. We want to be thorough. We  
25 would like this to be the last trial in America where same

1 sex parents will have to defend themselves this way.

2 We'll look at things that affect child outcomes.  
3 What makes a good parent? When do children thrive?

4 The answer to that question comes from 50 years  
5 of social science research. That research crosses the  
6 social science field. There is a broad consensus about the  
7 factors that predict positive adjustment in children.  
8 Family processes, family resources. The quality of the  
9 relationship between the parents. The quality of the  
10 parent-child attachment, the parent-child relationship,  
11 parenting characteristics, warmth, empathy, sensitivity to  
12 the child's needs, educational opportunities for the child,  
13 resources and support available to the family, and the good  
14 mental health of the parents.

15 These factors are all well-known within the  
16 social science community. These families have been -- these  
17 factors have been studied as to all family forum. Single  
18 parent families, adopted families, divorced parent families  
19 and the same sex couple families. We know very well what  
20 makes a good parent and what makes for good child outcomes.

21 The State defendants claim here that a child  
22 needs a parent of both genders in order to thrive. This is  
23 an odd argument because Michigan allows single parents to  
24 adopt. Nevertheless, we're going to present expert  
25 testimony in this case from psychologist, David Brodzinsky.

1 He's a leading expert in the country in the areas of child  
2 development, adoption and child outcomes, parenting by gay  
3 and lesbian couples. He's a professor, a researcher, a  
4 clinician and almost most importantly he has counseled  
5 thousands of families including families headed by same sex  
6 couples and he's counseled their children as well. He's  
7 also an author. He's written the leading book on parenting  
8 by gay and lesbian couples. He's conducted studies through  
9 his institute, the Donaldson Adoption Institute.

10 He's also testified in marriage and adoption  
11 cases in other states. He'll explain that while it may be a  
12 popular belief that children must have both a mother and a  
13 father in order to function well children actually thrive  
14 equally well when they have two moms, when they have two  
15 dads.

16 Doctor Brodzinsky is going to explain that in  
17 heterosexual families, for example, mothers and fathers do  
18 sometimes adopt different parenting styles. But he'll  
19 explain there's lots of variations in all families. He's  
20 going to explain that parenting style is most often more a  
21 function of whether the parent is the primary as oppose to  
22 the secondary parent. A stay-at-home dad is going to look  
23 different than an Ozzie Harriet dad in terms of gender role  
24 modeling, and there's no one single correct gender modeling  
25 style. Children do generally well no matter what style

1 their parents adopt.

2 Doctor Brodzinsky is going to explain that moms  
3 and dads are both important to children, but they're  
4 important as parents. Two parents bring double the resource  
5 to the family. He will explain that this all goes back to  
6 the factors we talked about earlier, family process and  
7 especially family resource. Two parents bring more  
8 resources to the family.

9 The State defendants really take two positions on  
10 whether or not the children of gay and lesbian parents have  
11 worse outcomes than the children of heterosexual parents.  
12 The first position and expounded by Dr. Loren Marks. His  
13 position is that we just don't know enough yet. According  
14 to Dr. Marks same sex parenting is too new, the research is  
15 too nascent. According to Dr. Marks -- he says the studies  
16 aren't the right type of studies.

17 The second position is a little different. The  
18 State defendants' experts Mark Regnerus, Douglas Allen and  
19 Joseph Price is that academic and various other outcomes  
20 for the children of same sex parents are worse. They claim  
21 that the research demonstrates that these outcomes are  
22 worse.

23 What you're going to see in this case is that  
24 neither of these positions are correct. The evidence in  
25 this case is going to show that there are now 30 years of

1 research, well over a hundred studies, nearly 150 studies,  
2 and a broad base consensus across the social science  
3 community that children raised by same sex couples do every  
4 bit as well as children raised by heterosexual parents.

5 These families have been researched from every  
6 angle. We've researched the parents. There's an abundance  
7 of research and studies regarding parents looking at their  
8 parenting ability, their commitment to children, how they  
9 parent. There's research, an abundance of research and  
10 studies evaluating children, showing their adjustment,  
11 their psychological well being, behavioral issues, peer  
12 relationship, and their educational attainment. These  
13 studies have found that gay and lesbian parents are equally  
14 capable, equally committed to their children in comparison  
15 with heterosexual counterparts. And the children of same  
16 sex parents fair no differently than their peers.

17 We're going to look a lot at methodology in this  
18 case. The studies first used different methodologies to  
19 recruit their subject. Many you're going to hear of these  
20 100 -- 150 studies use convenient samples. This is very,  
21 very typical of psychological research. You take a smaller  
22 study group. You measure them and assess them more deeply.  
23 Other studies have used representative samples. You take a  
24 large data set like the U.S. Census. You look across the  
25 population and then you pull out your sample subjects.

1           These studies also use different methods of  
2           assessment: observing the children, observing the parents,  
3           talking to their teachers, standardized testing. The  
4           studies are diverse in terms of the length of the study  
5           period. There have been some longitudinal studies which are  
6           studies obviously over time and there have been cross-  
7           sectional studies.

8           For example, research will take seventh graders  
9           all across the country at one fixed point in time and  
10          measure a specific outcome. That's a cross-sectional study.

11          The evidence is going to show that the research  
12          has been conducted primarily by psychologists. That's  
13          because psychologists study child development. The State  
14          defendants in this case are not going to be introducing an  
15          expert psychologist in this case.

16          On the question of methodology the defendants'  
17          expert, Loren Marks, will basically be criticizing the  
18          standard bread and butter methodology of psychology. It's  
19          an indictment of the field of psychology. His view is that  
20          we can't know definitely about the outcomes of children, of  
21          same sex parents unless we have a large representative  
22          randomly sample longitudinal study that will span,  
23          according to him, some 20, 30, 40 years before we can  
24          answer this question and move on. But there have already  
25          been over 100 studies over the course of 30 years. And we

1 have research at all ages. We have research on young  
2 children. We have research on adolescents. We have research  
3 on young adults.

4 Doctor Brodzinsky will explain that the  
5 replication of results over time in different studies using  
6 different methods assure us of reliability particularly  
7 where the studies come to a near universal conclusion that  
8 there's no difference between the outcomes for children of  
9 same sex parents and the outcomes for heterosexual parents.  
10 That finding is sometimes referred to as the "No Difference  
11 Conclusion."

12 Secondly, psychologists and social science  
13 researchers know the predictors of good and bad outcomes  
14 for all children. Psychologists have been studying known  
15 predictors of children for 50 years. Children are children.  
16 If they are going to have problems they don't just start to  
17 have problems in their 20s and 30s. There are certain known  
18 predictors earlier in childhood that will tell us whether  
19 or not there's a tendency or a correlation to worse  
20 outcomes later on.

21 The standard predictors of child behavior all  
22 look good for the children of same sex parents. Beyond that  
23 there is a consensus across the social science community.  
24 This "No Difference Conclusion" is supported by a  
25 consensus. It's recognized by every major group in this

1 country dedicated to children's health and well being. The  
2 American Psychological Association, the American Academy of  
3 Pediatrics, the American Psychiatric Association, the  
4 American Medical Association, the American Academy of Child  
5 and Adolescence Psychiatry, and the National Association of  
6 Social Workers, and the Child Welfare League of America.  
7 All of these professional organizations in various forms  
8 using various languages have issued policy statements on  
9 the subject of same sex parents and the well being of their  
10 children. And they all say essentially the same thing.

11 Here's the language from the American  
12 Psychological Association. This was passed back in -- we've  
13 known this since 2004, I believe, or 2005.

14 "There's no scientific basis for concluding that  
15 lesbian mothers and gay fathers are unfit parents on the  
16 basis of their sexual orientation. Overall, the results of  
17 the research suggest that development, adjustment, and well  
18 being of children with lesbian and gay parents do not  
19 differ markedly than that of children raised by  
20 heterosexual parents."

21 The State also contends that children need a  
22 biological mother and father in order to thrive. This is  
23 another odd argument because Michigan does not require a  
24 biological tie between parent and child. Like every other  
25 state Michigan has a very robust policy in favor of

1 adoption.

2 In any event, this argument is going to lead us  
3 in this trial to a little more detailed discussion that is  
4 necessary in this case about the affects of adoption, the  
5 affects of foster care placement prior to adoption, the  
6 affects of artificial reproductive technologies on the  
7 outcome of children.

8 Professor Brodzinsky is going to explain that  
9 when you're talking about adoption whether it be by  
10 heterosexuals or by same sex couples most children do fine.  
11 Adoption has been a tremendously successful social policy.  
12 We're rescuing children from parents who abandon, abuse and  
13 neglect them, helping children of deceased parents, and we  
14 give them to competent caring parents who want them like  
15 Jayne and April. It's been an enormous success, far  
16 superior to what we were using in the past, the orphanages.  
17 And there's been a huge cost savings to the State on top of  
18 that.

19 But Dr. Brodzinsky will explain however that  
20 there is a statistically significant percentage of these  
21 children who will have some problems with adjustment, all  
22 adoptive children. He says most do very well, but some have  
23 problems and some of those problems will pass over time.  
24 You might see children have problems in elementary school  
25 that are gone by high school. Some of the problems persist.

1           Doctor Brodzinsky is going to explain that we  
2           know what causes poor outcomes on children, on average in  
3           adoptive children. There's two categories.

4           Prenatal experience. Under this category you may  
5           see the lack of prenatal care that comes with poverty, poor  
6           nutrition for the birth mothers, drug exposure, substance  
7           abuse. These are high stress pregnancies. We know that at  
8           the end of the pregnancy the mother is giving up her child  
9           so there's a lot of stress associated with the pregnancies  
10          of these women turning their children over to adoption.

11          Postnatal experience. That's the time obviously  
12          post birth but before they're placed with their adoptive  
13          parents. They may have problems again with their birth  
14          parents. There might be abuse and neglect. They might have  
15          a failure to thrive. There might be nutrition problems.  
16          Many have problems related to their stay depending on how  
17          long it is they are in foster care. Many children have a  
18          series of foster placement. With those children you will  
19          have a higher percentage of problems having to do with  
20          attachment, for example.

21          Our witnesses in this case are going to make a  
22          very important point here. Same sex couples are more likely  
23          to adopt these harder children, special needs children than  
24          straight couples. Same sex couples are more likely to adopt  
25          from the foster care system than straight couples. If you

1 put all this together we know that the children most at  
2 risk for these pre-adoption risk factors they are the  
3 children that gay and lesbian people are more likely to  
4 adopt.

5 On the flip side, if you take children adopted at  
6 birth by all families, heterosexual families, same sex  
7 families, children raised from birth to age 18 by same sex  
8 parents, the intact family, the adjustments are very  
9 similar to what the state is touting as the ideal  
10 biological mother-father family. Adoptive parents are every  
11 bit as good as biological parents.

12 There are studies that show they have some real  
13 advantages over even birth parents. They tend to be more  
14 educated, they have higher incomes. These are planned  
15 families. The children are fairly all wanted.

16 So Dr. Brodzinsky is going to conclude that  
17 biology is not the controlling factor here. To the extent  
18 there is some difference in maladjustment in adoptive  
19 children it is caused by other factors not by their  
20 parenting, not by the orientation of the parents.

21 He's going to define some concepts for us that I  
22 have -- many of us were not aware of. But maladjustment  
23 obviously usually means adjustment that requires  
24 therapeutic intervention. Doctor Brodzinsky is going to  
25 distinguish that from a normative challenge and he's going

1 to distinguish that from a difference that doesn't qualify  
2 as maladjustment.

3 An example of a normative challenge in adoptive  
4 children. They may have challenges relating to questions of  
5 identity, who are my parents, who is my father, a sense of  
6 loss why didn't my parents keep me. And bi-racial adoptions  
7 as well where the parents are white and the children are  
8 African American or vice-versa. You may have normative  
9 challenges associated with that. None of these factors are  
10 considered maladjustment in the field of psychology.  
11 They're considered normative challenge. Good parents  
12 address those issues. They help the children through it.  
13 They don't lead to adjustment problems.

14 An example of a difference that's not  
15 maladjustment. The children of same sex couples and there's  
16 been studies on this, are more tolerant of difference.  
17 Differences in race, differences in ethnicity, culture.  
18 You're not going to see the kids on the playground hurling  
19 racial slurs at each other. They're less likely to be  
20 bigoted people. These children also typically don't hold  
21 rigid views of gender modeling that a wife has to do "X" or  
22 a husband has to do "Y." This isn't maladjustment, it's  
23 just difference, and it's differences that the researches  
24 that you see in the children of same sex parents.

25 In this case I think all of the experts are going

1 to talk about others types of families that on average  
2 don't do as well. The experts on both sides are going to  
3 talk about step-families. The step-family experience is  
4 correlated with worse outcomes for children.

5 Coming from divorce families. This is well-known  
6 that some children of divorce families struggle more often.  
7 We don't mean all children of divorce, but there is a  
8 statistically significant percentage. These factors are  
9 relevant here and they come into play when you're talking  
10 about the studies, when you're talking about the research  
11 and what it really shows because the experts are going to  
12 be attacking the consensus that we talked about earlier.

13 For example, the State defendants offered the  
14 testimony of Mark Regneris. He's a sociology professor  
15 regarding his study from a large data set called the New  
16 Family Structure Survey, the NFSS.

17 The most important thing you can say about Dr.  
18 Regneris' study is that it didn't really evaluate the  
19 adjustment outcomes for children raised by same sex  
20 parents. He didn't do an apples-to-apples comparison. In  
21 one comparison group Mark Regneris puts what the State  
22 considers the ideal family. Biological mother-father,  
23 raising the child from birth to 18, the intact family.  
24 That's the first category. There's no step families in  
25 there. There's no children of single parent families in

1           there, no divorce families in there.

2                         In the other group we don't have same sex couples  
3           raising children from birth to 18. Instead we have a miss-  
4           match category that includes basically any child who  
5           reports that one of their parents at some time had a same  
6           sex relationship at some point during the respondent's  
7           childhood. So they're not same sex couples, this category  
8           based upon this definition.

9                         So he's comparing the ideal category with this  
10          other category that includes children of divorced parents,  
11          the children of step families. It's not an apples-to-apples  
12          comparison. It's not a fair comparison. And it's not good  
13          science.

14                        Including children of divorce, children of step  
15          families in the same sex parents group skews the research.  
16          Our experts are going to call this the failure to control  
17          for family instability. There are many other studies --  
18          many other problems with that study which we're going to  
19          lay out through another one of our witnesses.

20                        You're going to be hearing from Professor Michael  
21          Rosenfeld, from Stanford University. He's our witness. He's  
22          a sociologist -- experts from both sides will acknowledge  
23          he's a highly regarded, highly respected social scientist  
24          and scholar. Doctor Loren Marks who is there expert has  
25          said that Michael Rosenfeld has produced one of the gold

1 standard studies in the field.

2 Rosenfeld generated the study regarding academic  
3 achievement based upon the United States Census. His study  
4 is a large representative study which finds that children  
5 of same sex parents fair just as well. In addition,  
6 Professor Rosenfeld takes the same NFSS data set that Mark  
7 Regnerus is using and when he controls for family stability  
8 he finds that the children in the other group, that is, the  
9 children who reported that they had a parent who had  
10 engaged in a same sex relationship they didn't fair any  
11 worse than the children of heterosexual couples.

12 In other words, when you take out a factor known  
13 to cause worst outcome: instability. When you're left with  
14 same sex parents actually raising children together the  
15 adjustment problems are no different for the two groups.

16 Mark Regnerus has acknowledged that when his NFSS  
17 study came out it was widely condemned in the social  
18 science community. He admits -- or he admitted during his  
19 deposition that he was pretty stunned by the negative  
20 outcry. You'll see that there is a consensus going in the  
21 other direction away from Mark Regnerus. His professional  
22 peers don't agree with him at all. In fact, the same  
23 journals, social science research, which published his  
24 study in the first place immediately turned around and  
25 published an audit of his findings that was highly

1 critical. We contend this is relevant to his credibility.  
2 It's relevant to the weight that this Court if it admits it  
3 should afford his testimony, and it's relevant under the  
4 Daubert analysis that is ongoing because we're running the  
5 two together.

6 Two other experts I'll talk about briefly. The  
7 State will present Douglas Allen and Joseph Price, both  
8 sociologists. I put them in the same group because they  
9 both wrote an article together, but in addition Douglas  
10 Allen did a study based upon data from the Canadian Census.

11 Allen claims that his study shows poorer  
12 graduation rates by kids in same sex couple families. But  
13 here we don't even know if the children were raised in same  
14 sex couple families for the bulk of their lives.

15 Doctor Rosenfeld, our expert, will explain and  
16 rebut his findings. He will tell you that this is another  
17 case of not isolating for the factor that you're trying to  
18 study. It's another case of not having the apples-to-apples  
19 comparison.

20 When Rosenfeld used the same data as Douglas  
21 Allen, when he controls for the factor of family  
22 instability again the differences in outcome disappears for  
23 the children of same sex couples. For most of the subjects  
24 in Allen's study you don't know where the children lived  
25 for most of their school years. So he took them -- I think

1       it was 2006, but for a 17 year old you don't know where the  
2       child lived from birth to age 12. For a 22 year old, that's  
3       the age span he measured, 17 to 22 year olds, you don't  
4       know where that child lived from birth to 17. So basically  
5       it's a whole childhood.

6                There's a third study that the State defendants  
7       will be relying on. There's an Australian researcher named  
8       Sarantakos. His study is being relied on by Loren Marks so  
9       I will address that.

10               Sarantakos, like the other defendants' experts,  
11       claims that he saw poor primary school performance and  
12       other social outcomes among children of same sex couples  
13       compared to children of heterosexual couples. Again, we see  
14       the same problems, not an apples-to-apples comparison. And  
15       what you see in Sarantakos' study is that all of the  
16       children in the study were the product of a prior  
17       relationship, and most often that was a prior heterosexual  
18       relationship that failed. Therefore, the parents had  
19       experienced -- the children had experienced a breakup of  
20       their parents or they experienced single parenthood, also a  
21       risk factor, or both. And we know that these circumstances  
22       are associated with poor outcomes.

23               Now, there's an analogy that works for me and I  
24       hope it will help you as you listen to this kind of complex  
25       testimony. And my apologies in advance, this is coming from

1 a person who has attended way too many child sporting  
2 events.

3 Let's say we're a track meet. We'll put eight  
4 kids on the starting line of a 100-meter dash. Now, we'll  
5 take one of those kids and we're going to start him 20  
6 yards back from the starting line. We'll take that same  
7 child and we'll have just him carry the juice boxes and the  
8 oranges and maybe the First Aid kit, and then we'll let  
9 them all race. And we're wondering why they don't all  
10 finish at the same time. It's not that complicated. It's a  
11 not a fair competition. These children, the foster kids,  
12 the children raised by single parents, the children of  
13 divorce, the step children, they're not playing on a level  
14 playing field, and yet we're faulting them for not  
15 thriving, and we're blaming their parents.

16 I think this underscores we're going to show in  
17 this case a fundamental flaw in the State's ostrich  
18 approach to the research.

19 Assessing based upon outcomes alone especially  
20 under the Allen study, for example, where he just zones in  
21 on high school graduation rates has real limitations. The  
22 State witnesses are also preoccupied with what we would  
23 consider a minuscule portion of this board based research.  
24 All of the State studies suffer from huge flaws in  
25 methodology which we're going to point out. And all of them

1 conflict with the broad body of research. We have 100 to  
2 150 studies spanning 30 years measuring everything to tell  
3 us more. It tells us what we need to know here. It tells  
4 you everything that you need to know to decide this case,  
5 Judge. That's the research I think that will be most  
6 helpful to you.

7 At this point I want to do a little detour out of  
8 the child outcome research to the history of discrimination  
9 before I turn back to some final points about same sex  
10 parents.

11 We have presented a stipulation which admits into  
12 evidence the expert witness report of Professor George  
13 Chauncey. He talks about the history of discrimination, the  
14 history of disparate treatment of gay and lesbian people in  
15 this country. He explains that gay and lesbian people have  
16 been classified in this nation as degenerates. They have  
17 been the victims of hate crimes. They were targeted by  
18 police, harassed in the workplace, censored, demised,  
19 barred from government jobs, fired from government jobs,  
20 excluded from our armed forces. And up until 2003, they  
21 could be arrested in this country for their private,  
22 intimate sexual conduct up until Lawrence versus Texas was  
23 decided by the Supreme Court.

24 Professor Chauncey will tell us that lesbian and  
25 gay people live the legacy of discrimination even today.

1 They have been repeatedly stripped of their fundamental  
2 rights by popular vote. Forty states have enacted marriage  
3 bans.

4 The State defendants defend these laws saying  
5 they just reflect the traditional definition of marriage.  
6 This is the way we've always done it, therefore, it's  
7 justified. But Professor Chauncey explains in his report  
8 that this, quote "tradition is nothing more than an  
9 extension of the pattern of discrimination against same sex  
10 couples." He will explain that there has been some progress  
11 and we have seen it mostly in states other than Michigan.  
12 But even then with the progress there's been backlash.

13 Over the course of history, Dr. Chauncey  
14 explains, "anti-gay laws often were passed or enacted in  
15 response to periods of relative growth in the visibility or  
16 tolerance of gay people."

17 He'll explain that in November of 2003, the  
18 Supreme Court of Massachusetts was the first to uphold  
19 marital rights for same sex couples. In the very next  
20 election cycle in Michigan came the backlash. November of  
21 2004, was when the Michigan Marriage Amendment was passed.

22 Through Professor Chauncey, we will show that the  
23 passage of the marriage ban here has to be viewed on the  
24 context of a larger, pervasive, relentless history of  
25 discrimination against gay and lesbian people in this

1 country. Our marriage ban did not happen in a vacuum. This  
2 Court said in its order "when there is a history of  
3 disparate treatment against an unpopular minority a more  
4 exacting forum of scrutiny is required." Well, if it looks  
5 like a duck, and walks like a duck it's probably a duck.

6 We will be asking you to conclude at the end of  
7 this case that the proponents of the marriage ban fully  
8 intended to exclude this politically unpopular group from  
9 the rights and benefits of marriage.

10 THE COURT: His testimony will be by his report,  
11 he will not be testifying?

12 MS. STANYAR: That's correct, Judge.

13 THE COURT: Okay. And what exhibit is that, just  
14 so -- if you know. We can get it later.

15 MS. STANYAR: It's 51, but we'll get you that.

16 The language of our ban is identical to the  
17 federal DOMA statute struck down in Windsor. The intent was  
18 the same. This is discrimination.

19 We're going to be asking you in this case to look  
20 at how the history of discrimination interacts with the  
21 research, how it interacts with the history of these  
22 families generally and child outcomes more specifically.  
23 How all of this comes together.

24 Thirty years ago, your Honor, very few people in  
25 America were living openly out of the closet as gay or

1       lesbian. In the 1907s, 1980s, most people including gay  
2       people still believed that orientation, sexual orientation  
3       was a choice. And very few people back then would choose to  
4       be a, quote, "homosexual." In the face of that kind of  
5       discrimination, that kind of stigma, that kind of abuse,  
6       gay and lesbian people were not living openly with  
7       partners, and far fewer were participating in planned same  
8       sex families 30 years ago.

9               Adoption by same sex couples. There were some,  
10       but they weren't happening much. Most states didn't allow  
11       them. Artificial reproductive technologies for lesbians and  
12       gay men really weren't happening back then either.

13               We'll hear testimony in this case there certainly  
14       were gay and lesbian people. They were always there. Gary  
15       Gates is going explain the demographics. A predicable  
16       consistent percentage of the population both then and now.  
17       But back then in the face of that kind of discrimination  
18       most lesbians and some gay men were trying to live straight  
19       lives. Like a lot other people they were inspiring. They  
20       wanted the State's ideal family, too. They wanted the  
21       picket fence, the children. They wanted an intact family.  
22       Many lesbians and gay men were trying to function in  
23       heterosexual marriages. Predictably it didn't work. You  
24       can't choose your orientation. Now we know that, didn't  
25       then.

1                   We'll be showing you how this unique history  
2                   relates to the child outcome research. Those marriages  
3                   failed. They were doomed to fail. The children of those  
4                   marriages would struggle the way of the children of divorce  
5                   may struggle as well. That means that the children of gay  
6                   men and lesbians born initially into mother-father families  
7                   during that particular time period, '70s, '80s some of the  
8                   '90s will be associated with the predictably higher  
9                   percentage of adjustment problems. Those men and women  
10                  eventually did come out of the closet, most of them. They  
11                  are the men and women in these studies that you're going to  
12                  hearing about.

13                  But we'll show you how -- we have to look at that  
14                  and how it impacts the child outcome research. We'll show  
15                  in this case unless we're careful that history that I just  
16                  talked about will skew the research. With the passage of  
17                  time and this is the good news fewer and fewer lesbian and  
18                  gay men were trying those starter marriages and far fewer  
19                  today.

20                  But the discrimination was still there. It is  
21                  still here, but with each passing year there was a growing  
22                  awareness by these men and women that sexual orientation is  
23                  not a choice.

24                  We're going to ask the Court to peel back the  
25                  layers, the layers of history, the layers of

1 discrimination, the layers of the research. And at the end,  
2 we'll ask you to find that the best way to know how  
3 children will fair, if they are raised by same sex couples,  
4 is to look at the children actually raised by same sex  
5 couples. Look at their parenting. Look at the children and  
6 judge them fairly.

7 One last point on the child outcome rationale,  
8 we've mentioned before, I'd like to mention it again  
9 because it is important. No other group in society has to  
10 pass a parenting competency test before they're allowed to  
11 marry, before they're allowed legal status as second  
12 adoptive parents.

13 You'll hear testimony that there are groups of  
14 parents in society that we know have children with poor  
15 outcomes on average. Parents who have low incomes. Parents  
16 with lower educational levels. Parents who marry, have  
17 children, get divorced and want to marry again. There's no  
18 competency tests for these parents. But we don't bar them  
19 from marriage. We don't bar them adopting as second  
20 parents. So that's an additional reason that these laws are  
21 affirmatively irrational.

22 Briefly on injury under 1983, through a  
23 combination of briefing and testimony we will demonstrate  
24 to the Court the injuries cognizable under Section 1983.  
25 Over the past two years we have briefed for this Court the

1 loss of important economic resources, the loss of health  
2 insurance, social security and disability benefits, the  
3 loss of survivors' benefits, inheritance rights, many  
4 others associated with the marriage ban. So part of the  
5 injury here is clearly economic and we know that already.

6 We know from the family resource factors that we  
7 talked about at the beginning at adequate resources, family  
8 resources are necessary for children to thrive. A lack of  
9 resources hurts children.

10 Doctor Brodzinsky will also talk about the  
11 psychological injury to children caused by both of these  
12 laws. Marriage ban, the same sex -- the second parent  
13 adoption ban. He will explain that no matter how competent,  
14 how loving, how devoted, how caring that second parent is  
15 from the child's perspective some children will suffer from  
16 what he calls an ambiguous socially unrecognized seemingly  
17 non-permanent relationship with that second parent. He'll  
18 tell us that such an arrangement can deprive the child of  
19 emotional security, societal affirmations, a sense of  
20 normality, identity, and social stability that becomes a  
21 full legal relationship with that second parent. They can  
22 suffer unnecessary fear, anxiety, insecurity relating to  
23 possible separation from the second parent in the event of  
24 the parent separation or the death of the biological or  
25 adoptive parent.

1                   We offer this evidence because, first of all,  
2                   it's clearly relevant to injury, and we're entitled to show  
3                   this. We offer it also because it interconnects with the  
4                   State's child outcome rationale.

5                   All the experts will tell you that families  
6                   benefit by the stability that marriage brings. Children  
7                   thrive when there's stability.

8                   Another generation of Michigan's children should  
9                   not have to await the perfect longitudinal study before  
10                  they have rights, before they can enjoy stability, before  
11                  they can really count on that second parent.

12                  These two laws in tandem perpetuate  
13                  discrimination. The marriage ban singles out gay and  
14                  lesbian people alone for the exclusion from the institution  
15                  of marriage even though they are and have always been fully  
16                  contributing members of our society. It is hard to imagine  
17                  how the adult plaintiffs in this case could be contributing  
18                  any more than they are. April Deboer in a nicu nurse. She  
19                  cares for sick and dying infants every day. Jayne Rowse is  
20                  an emergency room nurse. She's taking care of all of us.

21                  Together they took in the babies that were left  
22                  behind, special needs children, an incu baby on a  
23                  respirator struggling to live. Harder to place children.  
24                  Children of color. They nurse them back to health. They  
25                  loved all of them. They gave the children what they needed.

1 And I'm happy to report all these children are thriving  
2 now.

3 Yes, this case is about marriage equality. It's  
4 also about the health and well being of children. It's  
5 about bringing stability. Bringing dignity to children.

6 These two women have been taking care of  
7 Michigan's children day in and day out for years. These two  
8 women are heros.

9 Thousands of others of same sex couples in this  
10 state are heros, too, raising children, rescuing children,  
11 adopting them from the foster care system. These parents,  
12 all these children, all these families should be embraced.  
13 They should be supported and they should be celebrated.

14 At the end of this case, we'll ask you to strike  
15 down both of these laws and to reaffirm once and for all  
16 that there are no second-class citizens in this country.

17 THE COURT: Thank you, very much.

18 State defendants, you may proceed.

19 MS. HEYSE: Thank you.

20 OPENING STATEMENT

21 MS. HEYSE: Good morning, your Honor.

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

24 Nice to see you again.

25 THE COURT: Nice to see you always.

1 MS. HEYSE: A pleasure to be before you today.

2 THE COURT: Thank you.

3 MS. HEYSE: I just want to take a brief moment  
4 before I get started, your Honor, to thank you and your  
5 staff for the courtesies that you have extended to the  
6 parties in this case. You've all certainly gone out of your  
7 way to make this easier on us and we do appreciate that.

8 THE COURT: Thank you.

9 MS. HEYSE: I also want to take just a brief  
10 moment to thank opposing counsel for their cooperation and  
11 collegiality throughout these proceedings.

12 As you can imagine preparing for a trial in a 120  
13 days is no easy feat, but we've all made it through. We're  
14 adversaries. We're not enemies. I think that says a lot  
15 about counsel on both sides of the aisle.

16 THE COURT: I agree with you. The civility between  
17 the attorneys is textbook as it should operate all the  
18 time.

19 MS. HEYSE: Thank you, your Honor.

20 But turning now, your Honor, to the reason we're  
21 all here today is to determine the constitutionality of  
22 Michigan's Marriage Amendment. I'm going to address five  
23 points with you this morning, your Honor, and I'd like to  
24 just outline them for you quickly.

25 First, I'm going to discuss the standard of

1 review for this case.

2 Second, I'm going to discuss the implications  
3 this case has for the democratic process.

4 Third, I'm going to discuss the valid reasons  
5 that voters might have had for supporting the amendment,  
6 such as, encouraging the ideal environment for raising  
7 children, where kids are raised by both a mom and a dad.

8 Fourth, I'm going to tell you what the  
9 plaintiffs' experts in their studies will say.

10 Fifth, I'm going to tell you what our experts  
11 will say.

12 Again, at the outset, your Honor, I think it's  
13 important to point out that plaintiffs have the burden  
14 here. It is their job to negate every conceivable reason  
15 for the Marriage Amendment. Therefore, questions like why  
16 not allow same sex marriage and what will it hurt are not  
17 appropriate because those are not the issues before this  
18 Court.

19 The people do not have the legal burden in this  
20 case. Rather, it's plaintiffs who must show that the  
21 people's decision to retain the definition of marriage as  
22 between a man and a woman is irrational.

23 I think it's important, your Honor, to clarify  
24 what this case is about because it's very easy to get  
25 caught up in the emotion and sentiment that surrounds it.

1           This case is about one thing, your Honor, the  
2           will of the people. The people of the State of Michigan  
3           have decided to retain the definition of marriage that  
4           encourages what's best of children being raised by both a  
5           mom and a dad. They have both the authority to address  
6           policy questions like this, and they have rational reasons  
7           for doing so. Thus, that decision must govern.

8           After Windsor there can be no doubt that defining  
9           marriage is within the exclusive province of the state. And  
10          the people of the State of Michigan have defined marriage  
11          as between one man and one woman. This was not the whim of  
12          a few but rather the choice of a majority.

13          Indeed, nearly 2.7 million voters chose to  
14          reaffirm Michigan's definition of marriage. This was not a  
15          vote against same sex couples. It was not based on animus  
16          or bigotry. But this was rather a vote to maintain a  
17          definition of marriage that's been in existence since the  
18          inception of this state. A vote to recognize and celebrate  
19          the fact that both moms and dads are important.

20          Now, plaintiffs here ask this Court to wholly  
21          redefine marriage for the State of Michigan, and the change  
22          they are seeking is not at all similar to the Loving case  
23          that Ms. Stanyar mentioned. In Loving, race was improperly  
24          injected in Virginia's definition of marriage as between a  
25          man and a woman. Here, Michigan's definition of marriage

1 has never changed and has always been understood as being  
2 between one man and a woman.

3 While plaintiffs will claim that Michigan voters  
4 were somehow ignorant or irrational when they passed the  
5 Marriage Amendment that's simply not the case. This Court  
6 has already recognized that the people of Michigan have  
7 articulated justifications for adopting the Marriage  
8 Amendment. And while plaintiffs do have the burden here the  
9 fact of the matter is the evidence will show that these  
10 justifications are rational for three basic reasons.

11 First, it was rational for the people of the  
12 State of Michigan to want to encourage the raising of  
13 children by a mom and a dad recognizing that gender  
14 diversity in parenting is what's best for kids.

15 This is a modest point, your Honor, not an  
16 unreasonable or irrational one. There was a broad body of  
17 research that supports that being raised by both a mom and  
18 a dad is ideal. The fact of the matter is men and women are  
19 different. They're not interchangeable. In fact, the United  
20 States Supreme Court has acknowledged this in Taylor versus  
21 Louisiana and I quote,

22 "The truth is that the two sexes are not  
23 fungible; a community made up exclusively of one is  
24 different from a community composed of both; The subtle  
25 interplay of influence one on the other is among the

1       imponderables.”

2                   To insulate the courtroom from either may not  
3       either in a given case make an iota of difference, yet a  
4       flavor. A distinct quality is lost if either sex is  
5       excluded. Likewise, a distinct quality is lost in a family  
6       if either of the sexes is not present.

7                   Michigan’s definition of marriage guarantees that  
8       each of the sexes is represented in the family and in the  
9       raising of children.

10                   Now, we recognize that not all children can be  
11       raised by a mom and dad, but that does not make the  
12       people’s desire to promote the ideal environment or in  
13       other words, your Honor, the best case scenario any less  
14       rational.

15                   Second, it was rational for the people of the  
16       State of Michigan to want to encourage marriage between a  
17       man and a woman for the simple biological fact that that’s  
18       the only union that can actually produce children.

19                   Third, it was rational for the people of the  
20       State of Michigan to want to proceed with caution when  
21       considering a change in this fundamental institution of  
22       marriage. An institution that’s been existence since time  
23       and armorial and has served our society well.

24                   This is especially true when we’re dealing with  
25       such a new and emerging area of social science. Same sex

1 marriage has only been in existence in the United States  
2 since 2004. A decade, your Honor, is not enough time to  
3 determine with any certainty the affects that same sex  
4 marriage will have.

5 Therefore, it was not irrational for the people  
6 of the State of Michigan to want to take their time with  
7 this unsettled area of social science.

8 Now, as Ms. Stanyar noted you're going to hear a  
9 lot of expert testimony in this case. In fact, for this  
10 whole first week you're going to hear from plaintiffs'  
11 experts. And they're going to try to convince you that the  
12 people's decision to retain the definition of marriage was  
13 irrational because there is no ideal setting for raising  
14 children, and because there are no differences in outcomes  
15 for the children being raised by same sex couples. They're  
16 going to tell you that there are reasons -- no other reason  
17 beside animus for the marriage amendment.

18 But wait to hear from our experts, your Honor,  
19 because they're going to explain to you why plaintiffs'  
20 experts are wrong and why the people's decision to retain  
21 the definition of marriage was not only rational but it was  
22 prudent.

23 Our experts are going to tell you that there are  
24 reasons for defining marriage as between one man and one  
25 woman that have nothing to do with animus. Our experts are

1 going to explain to you why the "No Difference Consensus"  
2 that plaintiffs rely on is flawed. They will tell you that  
3 the studies relied on to come to this so-called "No  
4 Difference Consensus" suffer from three major deficiencies.

5 First, they're not representative of the same sex  
6 parenting community as a whole. These studies can tell you  
7 a lot about the people that are being sampled and studied  
8 but very little, if anything, about the general population.  
9 They are what we call small convenient sample studies.

10 One study in fact, your Honor, has a sample group  
11 as small as five individuals with 30 being the average  
12 number of individuals being studied.

13 I just want to repeat that fact for you, your  
14 Honor, because it's a very telling point about the strength  
15 of the social science that plaintiffs rely on. The average  
16 number of participants in these studies is just 30  
17 individuals. That's not enough to be statistically sound.

18 In addition, participation in these studies is  
19 not random. Participants often are either recruited or  
20 they're self-selected volunteers. This results most often  
21 in only the most affluent lesbian couples being studied.  
22 That's a problem, your Honor, because the same sex  
23 community is diverse, and there is no diversity within  
24 these study groups. This is not acceptable for generalized  
25 research. Our experts will tell you that such results

1 cannot be generalized to a community let alone to the  
2 nation as a whole.

3 Second, these studies call what we call soft  
4 variables which are unreliable because they're subjective  
5 in nature and they generally cannot be verified by an  
6 independent third party.

7 And, third, these studies use improper comparison  
8 groups. In other words -- for example, in the 59 published  
9 studies that are relied on by the American Psychological  
10 Association or the APA almost half of them did not even  
11 include an opposite sex comparison group. So they weren't  
12 comparing same sex couples to opposite sex couples in those  
13 studies.

14 Our experts will tell you that these small  
15 convenient sample studies are preliminary in nature. So  
16 they're a good start, but they are in no way conclusive of  
17 the outcomes for children raised by same sex couples across  
18 the nation.

19 Our experts will tell you that they have  
20 conducted large random representative studies which do show  
21 a difference in outcomes for the children being raised by  
22 same sex couples and directly refute the APA studies.

23 These large studies have sample sizes in the  
24 hundreds so they are representative of same sex couples as  
25 a whole.

1                   These studies use hard variables such as progress  
2                   in school which is reliable and verifiable. And these  
3                   studies use heterosexual couple comparison groups.  
4                   Our expert studies are objective, methodologically sound  
5                   and nationally representative.

6                   But more importantly, your Honor, our experts are  
7                   going to tell you that the research in this area is  
8                   unsettled. It's just too new to know with any certainty  
9                   whether the children of same sex couples fair just as well  
10                  as other families.

11                  Likewise, it's too early to the know the affects  
12                  that redefining marriage will have on the institution  
13                  itself. Everyone agrees this is a new area. And everyone  
14                  agrees that same sex couples are a difficult group to study  
15                  because they constitute such a small population of our -- a  
16                  small portion of our overall population.

17                  Our experts will tell you that what is needed to  
18                  make a definitive conclusion about whether there are, in  
19                  fact, no difference in the outcomes for children raised by  
20                  same sex couples is a large nationally representative,  
21                  long-term study. Children being studied from birth to  
22                  adulthood. And right now, your Honor, no such study exists.

23                  But in addition to waiting to hear what our  
24                  experts are going to say I also ask that you pay close  
25                  attention over the next few days to what plaintiffs'

1 experts will not say. They will not say that the people of  
2 the State of Michigan do not have the authority to define  
3 marriage because they clearly do. And they will not say  
4 that marriage has ever been defined any other way here in  
5 the State of Michigan because it hasn't.

6 Plaintiffs' experts will not tell you that moms  
7 and dads aren't important because they are. And they won't  
8 tell you that moms and dads raising their children together  
9 is a bad thing because clearly your Honor it's not. They  
10 won't tell you there's absolutely no benefit to a  
11 biological connection between a mom, a dad and a child  
12 because there is. And they will not say that there's a  
13 large scale, long-term nationally representative study on  
14 the outcomes for children raised by same sex couples  
15 because there's not.

16 Now once you've heard from all the experts and  
17 gone through the mountain of information that you're  
18 inevitably going to be provided, you'll see, your Honor,  
19 that the plaintiffs cannot meet their burden in this case  
20 because again if there is any conceivable rational basis  
21 for the people of the State of Michigan's decision to  
22 retain the definition of marriage as between a man and a  
23 woman then that decision must govern. In other words,  
24 plaintiffs must show that all possible reasons for the  
25 people's decision are irrational and that's a very high

1 bar, your Honor, and one the plaintiffs' in this case can't  
2 meet.

3 Now, your Honor, I'm sure you're thinking,  
4 counsel, what about the recent decisions in Utah and  
5 Virginia and Oklahoma, why shouldn't this case turn out any  
6 different? My response to you, your Honor, is unfortunately  
7 those courts lost sight of the proper standard. They forgot  
8 who should define marriage.

9 As I'm sure you're very aware in the last two  
10 years five district courts have examined the reasonableness  
11 of a state law defining marriage as between a man and a  
12 woman. Two of those decisions actually upheld the laws,  
13 while three others all decided after Windsor have found  
14 them irrational. Again, Windsor recognized that the  
15 definition of marriage is the foundation of the State's  
16 broader authority to regulate the subject of domestic  
17 relations. These three later decisions finding that state  
18 laws were irrational failed to give effect to the Supreme  
19 Court's emphasis in Windsor that marriage is for the people  
20 of the state to determine.

21 But even more notable is that none of these three  
22 decisions challenged the premise that it's beneficial for a  
23 child to have both a mom and a dad. Instead, in those cases  
24 the courts claim that point would not justify excluding  
25 same sex couples. That improperly inverts the standard of

1 analysis, your Honor. Here, the amendment that the people  
2 of Michigan passed need only be relationally related to its  
3 end and it is. It enables every child to have a mom and a  
4 dad which benefits every child. To overturn the will of the  
5 people, the Court must conclude that being born and raised  
6 by a biological mother and father is inconsequential.

7 Michigan agrees there can be many kinds of  
8 effective parents and parenting structures, but social  
9 science has not yet proven that there is zero value in the  
10 diversity of a child being raised by both a mom and a dad.  
11 This Court should not race to embrace a position that  
12 mothers and fathers are interchangeable or even  
13 dispensable.

14 Finally, your Honor, I'd like to return to the  
15 fact that the Marriage Amendment was a product of the  
16 political process, a process that's at the very core of our  
17 constitution. Again, this was not a whim of a few, but a  
18 vote of a majority, the will of the people.

19 The Supreme Court has counseled against judicial  
20 intervention of the political process especially when we're  
21 dealing with such novel social issues recognizing that  
22 courts should allow states themselves to be the  
23 laboratories for social change. The fact of the matter is,  
24 your Honor, no society anywhere has had even a single  
25 generation's worth of experience with same sex marriage.

1 And there is a rich and robust debate going on throughout  
2 the nation including Michigan. This Court should not end  
3 that debate by deciding the social issue that is both -- as  
4 both unique as it is new. Indeed, decisions reached through  
5 the democratic process are more likely to be regarded as  
6 legitimate and be widely accepted.

7 Same sex marriage will likely be on the ballot in  
8 2016. The people of the State of Michigan should be allowed  
9 to decide if it is the time to redefine marriage.

10 Thank you, your Honor.

11 THE COURT: Thank you, very much.

12 Mr. Pitt, would you like some time, please, to  
13 argue on behalf of your client, Lisa Brown?

14 OPENING STATEMENT

15 MR. PITT: Good morning, your Honor.

16 Michael Pitt, on behalf of defendant Lisa Brown,  
17 Oakland County Clerk.

18 Defendant Brown stands before the Court as a  
19 defendant in this case but her role here is greater than  
20 that of just a defendant. She's here as the voice of all  
21 the county clerks of the State of Michigan, all the county  
22 clerks who have taken the same oath of office to uphold the  
23 Michigan and federal constitutions. All the county clerks  
24 are eager for the Court's decision on this important issue  
25 and to get a final resolution of the important legal issue

1           that this case presents.

2                       The clerk of every county in this state has taken  
3           the same oath. This oath of office does not permit any of  
4           the county clerks to discriminate against any couple  
5           wishing to marry because of their race, because of their  
6           religion, national origin, political viewpoint, disability  
7           status, or any other intimate personal relationship which  
8           is otherwise constitutionally protected. Of course, what we  
9           have here today is this otherwise constitutionally  
10          protected issue are same sex couples entitled to the  
11          protection of the law, do they have a intimate personal  
12          relationship that the Constitution of the United States  
13          would recognize as protected.

14                      Make no mistake that when the county clerk issues  
15          a marriage license a very important legal right between  
16          those two people is created, and the only way that legal  
17          right can be disturbed is through the death of one of the  
18          partners or by divorce. Otherwise, that legal right is  
19          invaluable, that legal right is a bedrock of our society  
20          and those two people can go through life knowing that they  
21          are secure and that they have a legal right that nobody can  
22          ever take away from them unless they voluntarily relinquish  
23          it or because of death.

24                      In carrying out the duties of her oath of office,  
25          the clerk is not required to listen to the Governor of the

1 State of Michigan. She's not required to listen to Mr.  
2 Schuette, the Attorney General of the State of Michigan.  
3 She is not required to listen to the Governor's view of  
4 what he thinks a traditional marriage is, and she's not  
5 required to listen to the view of the Attorney General  
6 as to what he may think constitutes a traditional marriage  
7 relationship and whether or not a traditional marriage  
8 relationship between a man and a woman is good or bad for  
9 children. In carrying out her duties of her oath of office  
10 she's not required to listen to the opinions of the AG, and  
11 also she's not entitled to or required to listen to the  
12 opinions of the voters in 2004 who voted to ban same sex  
13 marriage and to redefine what marriage is in the State of  
14 Michigan. Those are views that are expressed by a majority  
15 of people in the State of Michigan, but those views as  
16 expressed in 2004 do not create a constitutional right that  
17 she has to follow. What she is required to do is to follow  
18 what the courts have said is the constitutional protection  
19 that a particular type of intimate personal relationship is  
20 entitled to regardless of what the majority of the people  
21 of the State of Michigan may think. If the people of the  
22 State of Michigan had voted in 2004 to ban interracial  
23 marriages I don't think we would be here today. I think  
24 there would have been a finding that that vote even though  
25 by the majority of the people was an unconstitutional act

1 and that those types of relationships could not be subject  
2 to the whims of the majority vote.

3 The same applies here, and at the end of the day  
4 that analysis that would be used for interracial marriages  
5 is going to be applied I believe to same sex marriage  
6 equality issues.

7 More importantly, she will not even listen to her  
8 own judgments about what is good or bad when it comes to a  
9 traditional marriage. As clerk that's not her role. She may  
10 see and she has told me that she has seen couples come  
11 through the County Clerk's Office where the relationship  
12 probably would be better not being formed. It's not her job  
13 to form those judgments. Although she may think that it's a  
14 bad idea for a woman to marry a man who has been convicted  
15 ten times of aggravated spousal abuse she -- that woman is  
16 entitled to a license. She's entitled to enter what people  
17 in this courtroom have referred to as a traditional  
18 marriage relationship even though marrying that particular  
19 individual may end up costing her life or causing her  
20 injury. Clerk Brown cannot prevent that woman from entering  
21 into that relationship even though she thinks it's a bad  
22 idea. It's not her job. Her job is to issue a marriage  
23 license based on legal status and she's here today to  
24 participate in the process so that there is a clear  
25 understanding of what the legal status is when same sex

1 couples come to her counter asking for a marriage license.  
2 She's going to testify also about implementation  
3 and remedy. If the Court were to determine that the ban on  
4 same sex marriage in Michigan is unconstitutional then  
5 there's going to be a time in this process where  
6 implementation is going to be required. And she has  
7 testified in deposition and she will testify here in court  
8 that she has taken extraordinary steps already in  
9 developing a protocol that will facilitate immediate,  
10 immediate implementation of the Court's order so she has  
11 worked with the State Registrar. Under the Michigan statute  
12 the State Registrar is required to approve all of the  
13 marriage license applications and the marriage license  
14 forms. She and other clerks around the state have been  
15 working with the State Registrar to devise gender neutral  
16 forms that could be used to facilitate immediate  
17 implementation of any court order may arise. She's prepared  
18 to move forward swiftly and is looking forward to the time  
19 when that may occur in the very near future. She is going  
20 to follow the Court's order. She has indicated that she is  
21 not going to obey any other public official other than this  
22 Court and this Court's orders. If the Governor says she  
23 shall not issue licenses after this Court has made its  
24 ruling, she's going to obey this Court. If the AG says she  
25 shall not issue licenses, she's going to obey the judicial

1 determination. She's going to follow the law as the  
2 judicial department issues its instructions and its orders,  
3 and not other public officials no matter what they may  
4 think about the particular issue. She's prepared to do  
5 that. I believe there are many other clerks in the State of  
6 Michigan who have expressed a similar view that they're  
7 going to be ready to move forward with the issuance of  
8 licenses to same sex couples just as soon as the courts  
9 resolve this issue.

10 I thank you for your attention, your Honor.

11 THE COURT: Thank you.

12 I appreciate it, Mr. Pitt.

13 (End of Excerpt.)

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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

February 27<sup>th</sup>, 2014