

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 APRIL DEBOER, ET AL.,

5 Plaintiffs,

Case No. 12-10285

6 -v-

7 RICHARD SNYDER, ET AL.,

8 Defendants.

9 / VOLUME 4

10 **BENCH TRIAL**

11 BEFORE THE HONORABLE **BERNARD A. FRIEDMAN**

12 United States District Judge

13 100 U.S. Courthouse & Federal Building

14 231 West Lafayette Boulevard

15 Detroit, Michigan

16 **Friday, February 28, 2014**

17 **APPEARANCES:**

18 For Plaintiffs: **Carole M. Stanyar, Esq.**
Dana M. Nessel, Esq.
19 **Kenneth Mogill, Esq.**
Robert Sedler, Esq.

20 For Defendants: **Kristin M. Heyse, Esq.**
Richard Snyder Joseph E. Potchen, Esq.
Bill Schuette Michelle Brya, Esq.

21 **Lisa Brown Andrea J. Johnson, Esq.**
22 **Beth M. Rivers, Esq.**

23 **To Obtain a Certified Transcript Contact:**

24 **Christin E. Russell, RMR, CRR, FCRR, CSR - (248) 420-2720**

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I N D E X

BENCH TRIAL, VOLUME 4

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NANCY F. COTT, Ph.D.

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CERTIFICATE OF REPORTER 78

1 Detroit, Michigan

2 February 28, 2014

3 8:58 a.m.

4 (Call to Order of the Court.)

5 THE COURT: Thank you, very much. You may be seated.

6 Any preliminary matters from either side?

7 MS. STANYAR: Not for Plaintiffs.

8 THE COURT: Okay. Defense, anything?

9 MS. HEYSE: Nothing.

10 THE COURT: Okay. You may call your witness, please.

11 MS. STANYAR: He stepped out for one minute. Oh, yes.

12 He just went to get the witness.

13 THE COURT: No problem.

14 (Off-the-record discussion.)

15 THE COURT: Next witness?

16 MR. MOGILL: May it please the Court, good morning.

17 THE COURT: Good morning.

18 MR. MOGILL: The next witness is Professor Nancy Cott.

19 THE COURT: Professor, can you step forward? You can
20 set your things down and raise your right hand.

21 (Witness is sworn.)

22 THE COURT: You may be seated. When you've had an
23 opportunity to be seated, if you would be kind enough to give
24 us your full name and spell your last name please, Professor.

25 THE WITNESS: Nancy F. Cott. That's spelled C-O-T-T.

1 THE COURT: Thank you. You may proceed.

2 MR. MOGILL: Thank you, Judge.

3 NANCY F. COTT, Ph.D.

4 called as a witness at 9:00 a.m. testified as follows:

5 DIRECT EXAMINATION

6 BY MR. MOGILL:

7 Q. Professor, if you could make sure you pull the microphone
8 close to you, so that you are heard throughout the courtroom.

9 Good morning. Professor, how are you employed?

10 A. I am the Jonathan Trumbull, pardon me, Professor of
11 American History at Harvard University, and also the
12 Pforzheimer Family Director of the Schlesigner Library
13 at Radcliffe Institute, which is at Harvard.

14 COURT REPORTER: Can you keep your voice up?

15 THE WITNESS: Oh, of course. Sorry. Did you miss
16 some of that?

17 THE COURT: Yeah. Why don't you repeat it.

18 THE WITNESS: I am the Jonathan Trumbull Professor of
19 American History at Harvard University, and the Pforzheimer
20 Director of the Schlesigner Library on the history of women at
21 the Radcliffe Institute, which is also at Harvard University.

22 THE COURT: Thank you.

23 BY MR. MOGILL:

24 Q. And how long have you been so employed?

25 A. Since 2002.

1 Q. And prior to your appointment at Harvard and Radcliffe, how
2 were you employed?

3 A. I was employed at Yale University in the history department
4 and American studies program, moving from being an assistant
5 professor in 1975 up to being a Sterling Professor, which is
6 Yale's highest honor for a professor in 2001.

7 Q. And while you were at Yale, did you hold any
8 administrative -- fulfill any administrative responsibilities?

9 A. Yes. At various times, I've chaired the women's studies
10 program of which I was a founder. I chaired the American
11 studies program. I was director of graduate studies in
12 American studies. I was the head of the division of the
13 humanities.

14 Q. During the course of your academic career, Professor, have
15 you received any special honors and recognitions?

16 A. Well, various fellowships from the Guggenheim Foundation,
17 the Rockefeller Foundation, the Center For Advanced Study in
18 the Behavioral Sciences, the Harvard Law School, the Ecole des
19 Hautes Etudes in Paris. And I had a Fulbright Lectureship in
20 Japan. Those are some that come to mind immediately.

21 Q. Thank you. Have you published any books?

22 A. Yes. I've published eight books.

23 Q. Okay. And do any of them concern the subject of marriage?

24 A. My most recent book, "Public Vows: A History of Marriage
25 and the Nation."

1 Q. And I'm not offering this as an exhibit, but is this a copy
2 of "Public Vows"?

3 A. It is.

4 Q. Okay. And the others, the subject areas of those, please?

5 A. The others also deal with U.S. history and focus on women,
6 the family, marriage and feminism.

7 Q. Have you published any articles in journals -- do you have
8 any articles in journals published by academic presses?

9 A. Yes. I have oh, about a dozen articles in peer-reviewed
10 journals and maybe twice or three times that number in other
11 invited academic anthologies.

12 Q. Have you also published a number of review essays and
13 reviews and, and the like?

14 A. Yes, very numerous --

15 Q. Okay.

16 A. -- reviews.

17 Q. Are those listed in your CV?

18 A. They are.

19 Q. Have you served on any editorial boards of academic
20 journals?

21 A. Yes, quite a number. Yes. I would say the major journals
22 in my field, including the Journal of American History, the
23 Journal of Women's History, the American Quarterly. I'm
24 forgetting, but at least seven or eight editorial boards.

25 Q. The Yale Review, as well?

1 A. Yes.

2 Q. And do you belong to a number of professional organizations
3 in your field?

4 A. Yes. The two most important I would point out are the
5 Organization of American Historians, and the American
6 Historical Association. But I'm also an elected member of the
7 American Antiquarian Society and the Society of American
8 Historians.

9 Q. With respect to the Organization of American Historians, do
10 you hold any elective office?

11 A. Yes. I have, in past, been a member of the Nominating
12 Board, the Executive Board. And at present, I am the
13 vice-president elect, which means that I will be president of
14 the organization in 2016.

15 Q. In your work at Harvard, is it also correct that you teach?

16 A. Oh, yes, I teach.

17 Q. As well as doing research and writing?

18 A. I teach graduate and undergraduate students both.

19 Q. All right. And are any of the course -- in any of the
20 courses that you teach, is the subject of same-sex marriage
21 included in the curriculum?

22 A. Yes. I would say in a fragmentary way, that is in a
23 percentage of the course I do lecture on what's been happening
24 recently, in recent history around same-sex marriage.

25 Q. Okay. In one course or more than one course?

1 A. In, in my two major lecture courses, one of which covers
2 the history of sexuality over 400 years, and another, which is
3 a 20th century course on, essentially on gender relations in
4 the 20th century in the United States.

5 Q. And is it the name of that course?

6 A. It's called Men and Women in Public and Private.

7 Q. Okay. And, Professor, if you could look at the binder
8 that's immediately to your left, and it should be opened to a
9 page that has a sticker on it.

10 A. Yes. I see it that.

11 Q. Marked Plaintiff's proposed Exhibit 500. If you could take
12 a look at that and let us know whether that is an accurate copy
13 of your curriculum vitae.

14 A. I think it's frankly a little out of date, but it is more
15 or less correct because the top --

16 Q. I know it doesn't have the vice-president elect.

17 A. Well, it doesn't have my most recent honor.

18 Q. Okay.

19 A. But it's roughly, you know, it's basically right.

20 Q. With those caveats?

21 A. Yeah.

22 Q. Okay.

23 MR. MOGILL: With that, I would move for the admission
24 of Plaintiff's proposed Exhibit 500.

25 THE COURT: Any objection?

1 MS. BRYA: No, your Honor.

2 THE COURT: 500 is received.

3 (Plaintiffs' Exhibit #500 received, 9:07 a.m.)

4 BY MR. MOGILL:

5 Q. Professor, if I could ask you a couple of questions,
6 please, about prior experience as an expert witness. Have you
7 ever testified as an expert witness before?

8 A. I've testified in court only once.

9 Q. Okay. And in what case was that?

10 A. *Perry vs. Schwarzenegger* in California.

11 Q. Okay. That would have been in 2010; is that correct?

12 A. Yes.

13 Q. And I don't think it's any, is there any question about the
14 subject matter of that case? Was that the same subject matter,
15 in essence, as the subject matter of this case?

16 A. Yes.

17 Q. Have you provided expert witness reports in other cases, in
18 which you ended up not being called as an expert because the
19 cases ended up not going to trial?

20 A. Yes, I have.

21 Q. And are those -- if you could please identify several of
22 those for the record.

23 A. Well, there are quite a few. Quite recently in
24 Pennsylvania and in Texas, in cases there, that are still in
25 process.

1 Q. If I can interrupt you for a second. Was the Texas case
2 *DeLeon vs. Perry*?

3 A. Yes.

4 Q. That was just decided two days ago?

5 A. Actually, that was the one that was just decided favorably
6 for the plaintiffs. Yes.

7 And then they are listed on my CV but, let's say -- I
8 don't know. It's hard for me to remember precisely the names
9 of the cases.

10 Q. Okay.

11 A. But they are listed on my CV.

12 Q. Okay. I think the point is they were --

13 A. I'm sorry, not on my CV. On my expert report.

14 Q. Yes. Okay. And the point is there have been a number of
15 them; is that correct?

16 A. Yes.

17 MR. MOGILL: Now, at this point, and if it please the
18 Court, I would offer Professor Cott as an expert in the history
19 of marriage as a public institution.

20 THE COURT: Any objection or voir dire?

21 MS. BRYA: No, your Honor.

22 THE COURT: She may testify as an expert in that area.
23 Thank you.

24 BY MR. MOGILL:

25 Q. Professor, are there more than one areas within the

1 discipline of history in which you've concentrated your
2 research over the years?

3 A. Yes. They are the -- I've focused mostly on the history of
4 women, marriage, feminism and the family within the larger
5 subject area that I teach, which is the social, cultural and
6 political history of the United States.

7 Q. How did you come to be interested in this area of study
8 and research?

9 A. Well, initially, because of the women's movement of the
10 late '60s and early '70s, I felt it was important to recover
11 the history of women, which have been too little recorded.

12 Q. Okay. And with respect to your interest in marriage in
13 particular, leading to the publication of "Public Vows"?

14 A. I had written several books by that time, focusing on women
15 and the family, and which marriage was also a feature but it
16 was not the main -- the main questions were not concerning
17 marriage.

18 And it seemed to me at a certain point, that the
19 history of marriage as the state had been interested in it, and
20 I meant state-level states in the United States and the federal
21 government, how the institution of marriage had been important
22 to the public and to public authorities, was a history that had
23 not been much attended to. That historians of marriage had
24 mostly tried to pars what had been the changing private
25 experience of being married.

1 And I thought this was a very interesting set of
2 questions; how marriage, as a public institution authorized by
3 the state had, had great deal of impact on the roles of men and
4 women. And that's what led me to it.

5 Q. How much time did you spend researching before publishing
6 "Public Vows"?

7 A. It took me about ten years to research and write the book.

8 Q. And the name is an interesting name. How did you come by
9 the name, the title, "Public Vows"?

10 A. Well, in my titles, I like paradoxes. One of my earlier
11 books was called "The Bonds of Womanhood," which had a double
12 meaning. Another one was also had a double meaning.

13 And in "Public Vows," I meant the double aspect of
14 marriage, that it is a public institution authorized by the
15 state, and it is a set of vows that a couple makes to one
16 another in public; that's required. They have to have
17 witnesses. So they vow to each other publicly. But also, what
18 marriage means in that it is a legal relationship, is that the
19 public, the state, vows to guarantee the couple's bond. The
20 state will protect that set of vows they make to each other.

21 Q. Which leads to my next question, and that is what are the
22 attributes of marriage?

23 A. I would describe marriage as a civilly authorized public
24 institution, which is both a contract, a civil contract made by
25 two parties to one another by free consent. Yet, at the time

1 that contract is joined, it also becomes a legal status,
2 because the state has certain requirements for eligibility in
3 licensing marriage, and also has -- places certain obligations
4 upon the partners who agree to marry.

5 Q. What are the purposes of marriage?

6 A. Well, in answering that question, I would answer it from
7 the point of view of the public or the state. What are the
8 state's interests or purposes in marriage, since that is what
9 is relevant here, it seems to me. And they are many.

10 Marriage, overall, is a complex institution, and has
11 -- can be looked at from many aspects: Legal, economic,
12 political, and of course personal. But from the point of view
13 of the state's interest, marriage has the purpose of regulation
14 of governance. It creates social order in the population by
15 having recognized marital couples and households they form.

16 It is, it is very important as an economic
17 institution, in that the couple are obligated to support one
18 another and any dependents that they have. And that is an
19 economic benefit to the state and to society. A marriage
20 creates a legal relationship between the couple and their
21 children, an automatic legal relationship.

22 And in, in the point of view of nation states,
23 marriage has been important, and regulations on marriage have
24 been crucial in forming the populus who compose the people of a
25 nation.

1 Q. Could you expand on that last one, a little bit, please?

2 A. Well, it's, it's very striking in the history of the United
3 States that there have been discriminatory laws about marriage
4 that have, at past times, that have been intended to describe
5 who are the desirable people to compose the United States.

6 For instance, there were laws in over 40 of the states
7 and territories, at least some period in their history, that
8 prevented a white person from marrying a black person, or in
9 many states an Asian person or a Native-American person. And
10 those laws were, of course, dictated by people's notions of
11 race, but, but also notions of who should be -- what kinds of
12 person should populate the United States.

13 Q. Thank you. Professor, is the capacity or desire to
14 procreate or adopt a requirement of marriage?

15 A. No.

16 Q. Has it been in the past?

17 A. No. No. There are no marriage laws of which I'm aware,
18 and I've looked at a lot, in the history of the United States
19 that put any requirement to bear children.

20 Q. Are there examples of who is eligible to marry, who is
21 unable to procreate that you can use to illustrate this point?

22 A. Well, there have never been later age barriers on marriage,
23 that is, women past menopause are free to marry. There have
24 never been laws that prevent someone who might be known to be
25 sterile from marrying. And so those, I would say, are the, are

1 the best examples.

2 You can also look at divorce law, where inability to
3 have a child has not been a ground of divorce in any state,
4 including Michigan.

5 Q. Thank you. By the way, with respect to sterility, is there
6 a famous historical example?

7 A. Yes. I like to cite the fact that George Washington, who
8 was, of course, called the father of our country, was known by
9 most people to be sterile, because his wife, Martha Custis had
10 been married earlier, and she had borne two children by her
11 prior marriage. Yet, when George and Martha were married for
12 quite a long time, they had no children. She was young enough.
13 She was quite young when they married. And so this was known.

14 And in fact, he mentioned, was going to mention it in
15 his inaugural speech. He crossed that line out, but his
16 earlier drafts are known. And in fact, it was an advantage to
17 him, because that way, people wouldn't fear that he would try
18 to have a hereditary presidency.

19 But it's interesting to think about as a model for a
20 non-biological family as our First Family, in that George and
21 Martha reared her children and then also reared her grandchild,
22 because her son was killed in the Revolutionary War and had a
23 young child. And they brought that child into the family and
24 reared that child.

25 Q. Thank you. Professor, is there any particular level of

1 parenting competency that is a requirement for one to be
2 eligible to marry?

3 A. No.

4 Q. Is there any particular test for a division of parental
5 roles that's a requirement of eligibility to marry?

6 A. No requirement at all. Although, for a long period of our
7 history, there were different roles in the economic sphere
8 required of husband and wife by law, not to enter marriage, but
9 once marriage was joined.

10 Q. Is sexual intimacy, that is a conjugal relationship, a
11 requirement for a valid marriage?

12 A. No. No. In fact, the state -- I mean, this is true
13 historically and today. The state does not enter the private
14 relationships within a marriage. It's considered -- marriage
15 is another of its paradoxes, that it creates the private arena,
16 while it is a public institution. But the state doesn't enter,
17 except in cases of abuse or violence.

18 Q. Thank you. What, if anything, is the state's interest in
19 allowing or encouraging marriages between people who will not
20 have children?

21 MS. BRYA: Your Honor?

22 THE COURT: I'm sorry. Go on. I didn't hear the last
23 part of the question. What is the state's?

24 MR. MOGILL: Interest.

25 THE COURT: Don't answer, Professor. I just want to

1 hear the question.

2 MR. MOGILL: What, if anything, is the state's
3 interest in allowing or encouraging marriages between people
4 who will not have children.

5 MS. BRYA: And, your Honor, I was going to object as
6 it calls for speculation.

7 THE COURT: She may answer. I think it's within her
8 expertise.

9 Go on.

10 THE WITNESS: Well, the, the items I mentioned before,
11 the economic and social order, advantages and purposes of
12 marriage, obtain certainly for couples who do not have
13 children, particularly the requirement of the state that the
14 couple support one another. This is absolutely in the state's
15 interests, and part of the state's purpose in licensing
16 marriage.

17 BY MR. MOGILL:

18 Q. Is there a particular historic occurrence that you can
19 point to, when non-procreated marriages between people capable
20 of bearing children became markedly more common and publicly
21 acknowledged?

22 A. Well, I would, I would locate that with the growing
23 availability of contraception in the 1920's. That at that
24 time, because condoms were available for so-called hygienic
25 purposes, they became much more widely used by married and

1 probably unmarried couples.

2 But for marriage, it was seen as a great watershed.
3 And at the time, it was a matter of tremendous controversy. In
4 fact, there were those who called it a marriage crises and felt
5 that contraception would destroy marriage.

6 On the other hand, most people greatly welcomed it
7 because it obviated the problem of unwanted children and too
8 many pregnancies that endangered women's and often babies'
9 health. So at that time, non-procreated marriages were already
10 a recognized type. And the possibility that couples could
11 decide for themselves whether their marriage would produce
12 children or not produce children, that was a great watershed.

13 Q. Thank you. Within, within marriage, historically, who
14 bears responsibility for the children born of or adopted into
15 the family?

16 A. Well, in, in most of the past, it was the man who was the
17 household head, at a time when marital roles were asymmetrical
18 and hierarchical, that is the husband and wife had different
19 roles assigned by law, and the husband had the higher role and
20 was the representative and provider for the family.

21 So that was the case for many hundreds of years.
22 Since the equalizing of rights between men and women in the
23 20th century, and particularly since the 1970's, now both
24 members of a couple, a spousal couple, are responsible for
25 their dependents.

1 Q. Is there a specific public purpose or purpose -- are there
2 specific public purposes for this responsibility?

3 A. Well, it is about economic provision. It is that part of
4 marriage to prevent the state from having to be responsible for
5 people who are not capable of providing for themselves, not
6 only minors, but historically marriage has been very important
7 for creating households in which the elderly can be cared for.

8 Q. Thank you. Now, you've already talked a little bit about
9 marriage as being regulated by civil authorities. How long has
10 that been the, been the case in the United States?

11 A. Marriage has always been a civil arrangement in the United
12 States. Some of the original colonies, most of them authorized
13 marriage by civil law. Only one or two actually authorized a
14 religious authorization.

15 And that latter example, this appeared at the time of
16 the founding of all of the states, for a number of reasons. Of
17 breaking away from England, and also because there were
18 numerous religions in the United States. That while there are
19 multiple religious understandings of marriage, nonetheless what
20 was valid marriage was a civil arrangement, authorized by law.

21 And one of the earliest spokesmen to talk about why
22 this was, was among a population that we think of as really
23 motivated by religion, that is among the Puritans.

24 William Bradford, who was the first governor of the
25 Plymouth colony, the group that was founded after Plymouth Rock

1 was sighted, he said that their distinction from England, which
2 had a Church of England marriage, their distinction from
3 England was because marriage was a civil thing on which much
4 property depends. And that both expresses the original point
5 of this, of being civil, and also its important economic
6 dimension, its ruling economic dimension from the 1600's.

7 Q. Thank you. In fact, in your preparation for testifying
8 here today, have you looked at Michigan's statutes with respect
9 to marriage, to determine whether a marriage is described in
10 Michigan law as a civil contract?

11 A. It certainly is, yes, a civil contract.

12 Q. So just to be clear, who has the authority to regulate
13 marriage in the United States?

14 A. The civil law, the legislators and courts.

15 Q. And what aspects of marriage are regulated by the state?

16 A. Eligibility, and requirements or obligations. Also,
17 rights. I think that covers the waterfront.

18 Q. All right. In Michigan --

19 A. Oh, also who can perform a marriage.

20 Q. Okay.

21 A. Ceremonies have to be.

22 Q. In Michigan and other states, is marriage given special
23 recognition in the law, including as to providing economic
24 benefits as a result of the status of being married?

25 MS. BRYA: Your Honor, I'm going to object to this

1 question, as it calls for a legal conclusion, I believe. And
2 Dr. Cott hasn't been qualified as a legal expert.

3 THE COURT: You want it in the non-legal sense?

4 MR. MOGILL: Absolutely. Yes.

5 THE COURT: The historical?

6 MR. MOGILL: That's correct, Judge.

7 THE WITNESS: Could you repeat the question, please?

8 BY MR. MOGILL:

9 Q. Yes. In Michigan and other states, is marriage given
10 special recognition in the law, including as to providing
11 economic benefits as a result of the status of being married?

12 A. Very definitely. And it's a major reason why people marry,
13 for the spousal benefits that marriage brings along with it.

14 For instance, the ability for a spouse to inherit, you
15 know, for a widow or to inherit the estate without taxes, the
16 being, being authorized to take retirement benefits. If one
17 spouse dies, the other spouse can take them or death benefits
18 for instance from workers' comp.

19 There are many coordinate ways, including at the
20 Federal level, of course, Social Security benefits goes with
21 the spouse, survivor's benefits for veteran's benefits. These
22 are all tied up in marital, a marital arrangement.

23 Q. Thank you. Now, we talked a little bit about interplay or
24 about the question of religion.

25 What, if anything, is the role of religious

1 authorities with respect to marriage in the United States?

2 A. Well, religious authorities have always been free to
3 exercise their aims and demands in crediting marriage of their
4 congregants. And so certainly civil authorities have typically
5 recognized the importance of religion as the way many people
6 may understand their marriage. But religious authorities have,
7 while free to say what is right for people of their religion or
8 of a given congregation, they have never had the power to make
9 a valid marriage.

10 They can perform marriage ceremonies, but the validity
11 of a marriage performed in a church or synagogue or other
12 religious institution is only because -- is only because the
13 clerical authority has been loaned the state authority. And
14 the state has relied on clerics and trusted them to perform
15 marriage vows.

16 Q. So with respect to the legal authority, the only -- is it
17 correct that what you're saying is that religious figures
18 officiating it, marriages, are acting only as agents of the
19 civil authorities?

20 A. Exactly. Deputies of civil authority.

21 Q. If a particular religious denomination chooses to impose
22 additional requirements beyond those in the law, before it will
23 accredit a marriage within the denomination, can those
24 requirements in any way affect the validity of a marriage that
25 complies with the requirements of the law?

1 A. No.

2 Q. Would a change in the law, allowing same-sex couples to
3 marry, in any way obstruct or otherwise interfere with any
4 religious denomination's ability to impose additional
5 requirements for recognizing or blessing a marriage within its
6 particular denomination?

7 MS. BRYA: Your Honor, I'm going to object to this
8 question again. It's calling for a legal conclusion, and Dr.
9 Cott hasn't been qualified as a legal expert.

10 MR. MOGILL: Again, in the non -- in a historical,
11 non-legal sense.

12 THE COURT: In a historical sense.

13 THE WITNESS: No. It's clear that religious
14 authorities are free to impose their own requirements for
15 people whom they marry. This has been so for many, many years.

16 Catholic churches, they don't approve of divorce.
17 Then don't believe in divorce. The states allow divorce. And
18 it's up to a Catholic cleric to decide whether or not to marry
19 someone. If that, the couple looks like they are likely to
20 divorce, they can refuse to marry that couple.

21 BY MR. MOGILL:

22 Q. Thank you. Professor, the State defendants in this case
23 are arguing, among their various arguments, that Michigan's ban
24 on same-sex marriage is justified because it's in keeping with
25 the traditional notion of marriage. From the perspective of a

1 historian, can you comment on this claim?

2 A. I think that it is -- it risks a lot of vagueness and
3 misguidedness, actually, to speak of traditional marriage, in
4 that, and as I mentioned at the outset, marriage is a complex
5 institution that has many aspects.

6 And perhaps more importantly, what has characterized
7 marriage through the U.S., through American history, is both
8 the retention of certain traditions and a great deal of change.

9 And the extent to which marriage has changed, in some
10 of its fundamental elements, over the history of this country
11 and the state of Michigan, suggest that saying traditional is
12 gesturing to something that is a moving target.

13 Q. Thank you. Can you identify specific key changes in the
14 institution of marriage, over the course of American history,
15 that reflect this process of change?

16 A. Well, I think three areas are particularly illustrative.
17 One would be the relationship between husband and wife.
18 Another would be the role of racial considerations in
19 eligibility and judgments of marriage. And then a third would
20 be in divorce.

21 Q. Okay. Why don't we take those three in order.

22 A. Okay.

23 Q. With respect to changes in the relationship between
24 spouses.

25 A. This is probably the area of greatest and most fundamental

1 change, in that marriage in the common law, which preceded
2 American law, was a profoundly asymmetrical institution. And
3 --

4 Q. If I can interrupt you for a second.

5 A. Yes.

6 Q. If you could describe for the Court what you mean by
7 asymmetrical.

8 A. Oh, certainly. That is the roles of the two spouses were
9 not the same. They were actually quite different. They were
10 seen as complementary and marriage itself was seen as a bargain
11 that put these two sets of requirements together to create a
12 household with the appropriate division of labor and of
13 stability.

14 And the husband was required to provide for his wife
15 and all their dependents, whether those were biological
16 children or other dependents, including servants, slaves,
17 orphans they might take in, other relatives. Whereas the wife
18 was commanded to serve her husband with her labor and to obey
19 him in terms of his commands. And the husband had a strong set
20 of responsibilities. They were enforced by law in all the
21 American states once the nation was started.

22 But before that, initially he, actually for quite a
23 few years, he got the, the privilege of representing his wife.
24 Her identity was buried in his. That is why Jane Roe became
25 Mrs. William Doe. She became part of William Doe. And you see

1 what I mean by asymmetry. She, she could not represent herself
2 legally or economically. She could not make a contract, she
3 could not collect a debt. She could not sue in court. She
4 could not sign her own will, in fact, without him joining her
5 in any of those things. And this was meant for marital harmony
6 that the two were one.

7 So over the years, this began to clash with the ways
8 the American economy was developing. Wives assets were
9 controlled in a variety of ways in order to keep them in the
10 husband's side of the bargain.

11 At any rate, over a very long period of time, these
12 rules clashed with emerging realities, and legislatures and
13 courts began to change them. It did take a very long time.

14 It wasn't until, well, by about 1900, most wives could
15 act as economic actors. They could own property, they could
16 keep their wages. But there were many other features of this
17 marital doctrine of unity, which was called coverture, that
18 persisted.

19 Q. And if you could spell coverture, for the record, please.

20 A. Oh, sure. C-O-V-E-R-T-U-R-E. It's the old French that was
21 the Norman French that infected the common law because of the
22 Norman conquest. And it really meant, though, covert; that the
23 wife's independence and individuality was covered by that of
24 her husband.

25 It took a long time for the wife to be able to emerge

1 as a legal and economic individual. Certainly, in Michigan
2 there were important changes in the law in the 19 teens that
3 gave wives a great deal more of individuality, but nothing like
4 total independence. And that wasn't really achieved until the
5 1960's with another change that did abolish the features of
6 coverture. So --

7 Q. Was that in the Michigan Constitution of 1963?

8 A. I believe so. I know 1963 is the date. And, yes, I
9 believe it was a constitutional change.

10 This was, for people who understood marriage in the
11 19th century, coverture was essential, it was fundamental.
12 Marital unity was what marriage was. And there were many
13 opponents to this change. The only way it happened, really,
14 was that it took a very long time.

15 And so the emergence of wives to full individuality
16 which nationally happened with the Women's Rights revolution of
17 1970's, this was a fundamental change in marriage. And states,
18 and then Supreme Court decisions also changed marriage at the
19 state and the federal level to be a contract in which the roles
20 of the two spouses were no longer asymmetrical or different.

21 But I think both of these characteristics of the
22 former nature of marriage are important, that wasn't simply
23 that they were different, the two roles. It's that they were
24 hierarchical. And one gave a lot more credibility, presence,
25 ability, leverage, et cetera, that is to the husband, than the

1 wife had. She was clearly subordinated in this relationship,
2 as much as it might have been claimed to be complementary. Of
3 course, a subordinate and a superordinate can be quite
4 complementary to one another. But that was vastly overhauled
5 in the middle and later part of the 20th century, so that
6 states and the nation now do not prescribe different roles for
7 couples.

8 And if I can just skip to divorce, although it was the
9 third. Let me just say a few things about --

10 Q. It's okay. Now we're making it the second instead of the
11 third.

12 A. Okay. Yeah. I think that certain parts of the evolution
13 of divorce emphasize the way in which by the mid and especially
14 the mid 20th century, I was going to say, and particularly by
15 the '70s and '80s, that the state has stepped out of
16 prescribing how a couple enact their marriage, in that divorce,
17 which was available in all the American states by not so long
18 after the American Revolution, but for very, very few causes,
19 adultery, desertion, divorce grounds gradually began to be
20 expanded during the 19th century and into the early 20th
21 century. And this greatly changed marriage, I think, anyone
22 looking at it would say that if one did not think one was yoked
23 for life, necessarily, and one could divorce without great
24 castigation from the society, that it made marriage a different
25 experience. So there's that long-term change.

1 But a major change that is really more relevant to
2 today, I think, was the move to no-fault divorce in the late
3 '60s to about 1980.

4 Q. Do you recall what year no-default divorce became effective
5 in Michigan?

6 A. It was '70s, but I am actually forgetting now. I know it's
7 in my --

8 Q. If I suggest that it was enacted in 1971, effective January
9 1, 1972?

10 A. That sounds right. That sounds right. So it wasn't among
11 the earlier states in fact, because it didn't start until 1969
12 with California.

13 But what divorce, a very important feature of divorce
14 in the longer past was that it was defined by the state, what
15 were the grounds. And in order to get a divorce, an aggrieved
16 partner had to prove that the other spouse had committed a
17 fault that was against the state's requirements. Not only a
18 fault, a personal injury, but a fault against the state. It
19 was an adversary process, that two spouses were not supposed to
20 collude in becoming divorced.

21 Q. Can you illustrate what an act against the interest of the
22 state would have looked like when divorce was so limited?

23 A. Well, the acts were an act of desertion, for instance,
24 because that would obviate the state's requirement of wanting
25 the couple to stay together and be an economic unit and form a

1 stable household. That was a basic. Or cruelty and extreme
2 cruelty became grounds later in the 19th century. And there,
3 again, the notion was that this marriage couldn't serve social
4 order if one spouse was deeply abusing the other spouse. It
5 could be broken up.

6 Also, the very availability of divorce in the United
7 States -- and the United States was ahead of its mother
8 country, England, and I think every other country, as far as I
9 know -- in allowing legal divorce, because many societies have
10 not cared if couples broke up. But legal divorce was a way for
11 the state to control what happened when a couple broke up.

12 It actually was a response to many desertions by men
13 of their spouses and that left the woman unsupported, it left
14 her children unsupported. The state wanted to authorize
15 divorce in order to set up post-divorce arrangements that were
16 economic. It's another register of just how far marriage was
17 seen by the state as an economic arrangement.

18 But what, what happened in no-fault divorce was really
19 that the couple got to decide how their enacting of marital
20 roles did or did not satisfy their own requirements.

21 The requirement that the spouse had to be shown to
22 have faulted what the state wanted was removed. Of course,
23 fault grounds still exist in Michigan as well as other places,
24 but a couple can, themselves, come to court and say our
25 marriage is irretrievably broken down.

1 And that is another way in which the state has more
2 than ever before stepped out of defining marital roles or the
3 satisfaction, how marital roles should be satisfied by the
4 couple who consent to join. And it reinforces the great
5 importance in understanding of marriage, both at the social
6 level and at the political and legal level in the United
7 States, that the most important thing about marriage is
8 consent, that the parties are free to consent to one another,
9 and that they join this bond with its obligations freely.

10 Q. Thank you. Now, in addition to these profound changes --

11 A. Oh, yeah, I didn't mention race. Right.

12 Q. I wasn't forgetting.

13 In addition to these profound changes in the
14 relationships between men and women, and within marriage, and
15 in the conditions for exiting marriage, I think the third key
16 area of change in the evolution of the institution of marriage
17 over the course of American history has been with respect to
18 race, you indicated. Is that correct?

19 A. Yes.

20 Q. And if you could indicate for the Court, please, what that
21 evolutionary process has been from the perspective of the
22 historian?

23 A. Well, there have been numerous ways in which states have
24 legislated marriage eligibility laws that have tried to prevent
25 certain marriages from taking place. I mean, have prevented

1 them from taking place legally. And they have to do with the
2 ability of a white person to marry a person of another race.

3 As it's frequently said, interracial marriage bans,
4 but I want to emphasize that these bans only concerned marriage
5 to a white person. There have never been laws in any state
6 that prevent an African-American from marrying a
7 Chinese-American or a Native-American.

8 These laws were about retaining, prospectively
9 retaining the purity of the white race. And these laws started
10 as early as the colonies of Virginia and Maryland in the 17th
11 century, and then multiplied in many states both before, and
12 particularly after the civil war and after slave emancipation.
13 Slavery kept most of the African-American population quite
14 subordinated. And southern states, at that time in fact, many
15 of them didn't even have such marriage laws because slaves were
16 not free to marry at all. They could not consent to marry.
17 They did not have the rights of a free person, civil rights.

18 But after the civil war, they multiplied. And as the
19 population of the United States became more various,
20 particularly with immigrants from Asia, China, and then Japan,
21 Philippines, there were laws in most of the Western states to
22 prevent intermarriage.

23 And this shows the way in which marriage laws are not
24 -- well, they can be quite discriminatory and defy the notion
25 that laws should protect the population equally. But over

1 time, all of these laws were dismantled. Again, it did take a
2 long time.

3 Q. If I could ask you specifically with respect to Michigan.
4 Did Michigan ever have an anti, so-called antimiscegenation
5 law?

6 A. Yes, it did, in the 19th century.

7 Q. And do you recall when it was abolished in Michigan?

8 A. Yes. It was, it was abolished in the 1880's, in 1883 I
9 think it was, which is unusually early. And that's a credit to
10 Michigan.

11 Many states that had such bans did dismantle them, but
12 more kept them. As late as 1930, there were 30 states that had
13 such bans. And the first overturning by a state supreme court
14 on grounds of equal protection was the California case of Perez
15 in 1948. And it took until 1967, 300 years after these laws
16 were instituted, for the U.S. Supreme Court to be willing to
17 judge on it, and to say they were discriminatory; they were not
18 about any sort of symmetrical kind of operation of the laws on
19 blacks and whites equally, which have often been a defense of
20 them.

21 So we have left behind laws that discriminate between
22 kinds of couples who are eligible to marry, with the exception
23 of couples of the same sex as compared to --

24 Q. One last point on race. That very famous 1967 case, the
25 name of it was?

1 A. Oh, *Loving vs. Virginia*. The couple's last name was
2 Loving.

3 Q. Now, having discussed these key changes in the institution
4 of marriage over time, with respect to each of these categories
5 of change, are there common attributes to the processes of
6 change that, as an historian, you have noted? Or you can note.

7 A. Well, I would say that the direction of these changes has
8 been quite similar toward emphasizing that the couple make a
9 free choice of the partner that they want to marry. Certainly,
10 the movement against racially discriminatory laws emphasizes
11 that. That consent is the basis of the marriage. The divorce
12 changes, suggests that. And in other words, if you consent,
13 consent has to be continuing.

14 And perhaps most dramatically, importantly, that
15 marriage has moved to being an institution where the spouses do
16 not have gender-assigned roles. That in law, marriage is
17 gender neutral as to what both spouses are required to do and
18 the rights they get. So that that has been a crucially
19 important part of the evolution, and that has characterized the
20 move from, really from the time of the nation's founding to
21 today with particularly rapid moves in the 20th century.

22 And I would say another feature of these changes, more
23 of a social feature than a legal feature is that they've always
24 been responded to with a great deal of alarm and opposition.

25 Q. And what does that look like?

1 A. Well --

2 Q. Is there any consistent pattern in what the opposition has
3 looked at?

4 A. Well, I would say it's stronger and weaker at times. But
5 often, the alarm raised by opponents has been that this change
6 will desecrate the institution of marriage, will eviscerate it
7 of its real meaning, will rob it of its essential bases.

8 And the alarmists have not succeeded in preventing the
9 change from happening, although perhaps have succeeded in
10 delaying it.

11 And so that, the fact that there have been alarms in
12 opposition, that these have been loud squawks, but that the
13 proponents of change that will enable marriage to respond to
14 changing needs, so that it can be consistent with current
15 trends in ethics, and in economics particularly, that's
16 especially true about the husband and wife matters, these,
17 these kind of dialect of opposition and direction of change
18 have characterized all these kinds of changes.

19 Q. Have there been a consistent theme throughout these changes
20 of opposition, including claims that this particular change,
21 whether it's to promote gender equity within the relationship,
22 or to remove racist restrictions, the change is unnatural?

23 A. That the change what? Oh.

24 Q. That they are making these changes would be unnatural?

25 A. That's been particularly true of the opponents to removing

1 antimescegenation bans.

2 The laws about racial discrimination were often,
3 almost consistently defended as what was God's plan to keep the
4 races apart, or was the natural plan, that is nature wouldn't
5 have made people look different if nature expected these people
6 to marry. So those were common themes in defending the
7 cross-racial bans.

8 And I will say, too, that the legislators and judges
9 who ruled to retain such bans or to multiply them, in fact, in
10 the part of the legislators, they knew that such relationships
11 existed. What they meant to do, really, by denying them the
12 legal imprimatur of the state's authorization was to demean
13 them, was to say in effect all such relationships are illicit.

14 And that was an important way they intended with these
15 laws to try to, if not eliminate, at least reduce such
16 relationships by putting that kind of social obloquy on them,
17 as well as by, by refusing to authorize them legally.

18 Q. Taking a look at the overall effect on the institution of
19 marriage of the combination of these changes over time, from
20 your perspective as an historian, what has been the overall
21 effect on the institution of marriage of these profound changes
22 that you've discussed?

23 A. I think it has been unquestionably to make it a more
24 equalitarian institution, that is between the two spouses to,
25 as I said, to make it now one in which the spouses can choose

1 their own designation of roles, who wants to do what. It is
2 gender neutral as far as the law is concerned. And also, to
3 make it an institution that more deeply and profoundly, given
4 various legal decisions, et cetera, to emphasize that it is a
5 matter of choice and consent between the couple. And that
6 nonetheless, to continue the tradition that the state is
7 honoring this couple's decision to be together and to create a
8 household that in which they have made a commitment to one
9 another, to remain together as far as possible. Of course,
10 divorce is much more visible today than ever before.

11 Q. With respect specifically to the, to demonstrating the
12 capacity to change over time as conditions change, can you
13 address the impact on the institution of, of the, specifically
14 of the capacity to change?

15 A. Well, I would say that an important characteristic of
16 marriage in its lastingness has been its resilience and the
17 fact that it is a civil matter that legislators and judges can
18 adjust the features of marriage as social change and economic
19 change and ethical change occurs. This has been very crucial
20 to keeping marriage vigorous and appealing, particularly for
21 young people who are most typically those who we expect to
22 think about marriage.

23 Q. Thank you. Just several more questions, Professor. In
24 those jurisdictions in which same-sex marriage has been
25 legalized in the past decade in the United States, from the

1 perspective of an historian, has opposite-sex marriage suffered
2 in any way?

3 A. Not that I am aware. Certainly, I, as a Massachusetts
4 resident, I have witnessed ten years of same-sex marriage being
5 available. And marriage, as a whole, is on extremely healthy
6 terms in Massachusetts. There's been no evidence that
7 opposite-sex couples have declined to marry. Massachusetts has
8 one of the lowest, if not the lowest divorce rate in the
9 nation.

10 And overall, I would say that among the younger
11 population, one sees the opposite, interestingly enough. I
12 have heard young man/woman couples say that they are reluctant
13 to marry because their friends who are gay or lesbian can't
14 marry the partner of their own choice, and they feel somewhat
15 guilty entering and, therefore, you know, taking up and
16 recognizing an institution that their friends can't equally
17 enjoy.

18 So I, I don't -- haven't seen any evidence that there
19 is harm to marriages between men and women.

20 Q. Do you have any reason from your perspective of, excuse me,
21 from your perspective as an historian, to believe that if
22 same-sex couples are allowed to marry in this state, that
23 marriage as an institution in this state would be affected one
24 way another, other than by opening it to additional loving
25 couples?

1 MS. BRYA: I would like to object, your Honor, as it
2 calls for speculation.

3 THE COURT: As an historian, based upon her experience
4 and her training and her research, she may answer.

5 THE WITNESS: Thank you, your Honor.

6 Well, I can't specifically predict, but certainly, the
7 history shows that changes made in marriage to bring it up to
8 date have only been beneficial for the institution and have
9 enabled it to, as I said, remain appealing to young people and
10 vigorous and appropriate to the social and economic setting.

11 MR. MOGILL:

12 Q. Thank you. And last question, Professor. Given everything
13 --

14 THE COURT: It may be the question.

15 MR. MOGILL: Or maybe not. Going to be a couple more
16 questions.

17 (Laughter in the courtroom.)

18 THE COURT: You have a team. Both sides have a team.

19 MR. MOGILL: If I can have a second here.

20 THE COURT: Of course.

21 (Brief pause.)

22 THE COURT: You may confer, if you want to talk.

23 BY MR. MOGILL:

24 Q. I want to ask you a couple follow-up questions on areas
25 we've already covered, just to get a little bit more detail.

1 You talked about restrictions with respect to race and
2 I'd like to explore that a little bit further, if we could,
3 please, and ask you this:

4 Has there been a time in our country's history when
5 the federal government used policy with respect to marriage to
6 confer or deny citizenship on the basis of race?

7 A. Not so much on the basis of race with respect to the
8 federal government.

9 Q. Well, national origin, I'm sorry.

10 A. Well, there have been several ways in which the federal
11 government has intervened in marriage, although regulation of
12 marriage is constitutionally at the state level. But there
13 have been federal policies that have put certain requirements
14 on marriage for various groups.

15 I was struck looking at the history how far these are
16 often groups of color, for instance. The federal government
17 would not credit the Indian marriages in Native-American areas
18 when they were conquered, and forced Native-Americans to marry
19 by state standards.

20 The federal government would not credit the proxy
21 marriages of Japanese immigrants at the turn of the century.
22 And with respect to many Asians who were excluded from American
23 citizenship until after the second World War, from naturalized
24 citizenship, there were marital disincentives for American
25 women to marry Chinese or Japanese, actually any Asian who was

1 ineligible for citizenship.

2 There was quite a substantial period of time when
3 American women, whether their genealogy went back to the
4 Mayflower or not, if an American woman married her -- a
5 foreigner, a man born elsewhere who did not have American
6 citizenship, that American woman lost her citizenship. And
7 this is one of the more extreme aspects of coverture. That is,
8 she -- this was in the early 20th century, however, not that
9 long ago. That because a woman was covered by her husband's
10 identity, she was assumed to be covered by his national
11 identity. And if she married a German or a British person, she
12 lost her American identity.

13 And that became extremely fraught during World War I,
14 when American women, who were wives of state German nationals
15 lost all their property, it was taken from them. And this was
16 because of the way marriage was understood as an asymmetrical
17 bargain. And also because the federal government in its
18 requirements, these were part of the immigration requirements,
19 were discriminating against certain kinds of marriages. This
20 was a large disincentive for American women about marrying
21 foreigners.

22 So the federal government has been involved in
23 numerous ways, indirectly, given that it does not have the
24 power to regulate marriage. These events have been done
25 through generally immigration and naturalization policy.

1 Q. Has tax policy also played a part in the federal
2 government's role?

3 A. Yes. There, I don't know whether this is relevant here,
4 the whole question of a foundation of the married filing
5 jointly. Well, do you really want me to explain this?

6 Q. I think just briefly to, to point it out would, I would
7 like to --

8 A. I think this is relevant today with respect to people's
9 migration from one state to another state, particularly as the
10 states begin to vary in their granting or not granting of
11 same-sex marriage.

12 That is in the origin of Federal income tax, when it
13 became onerous, and people really wanted to avoid it during
14 World War II. At the time, everyone was taxed individually.
15 There was no other setup.

16 However, in community property states, because there,
17 the marital property was considered distributed to both
18 partners, then a, in a one-earner family, the earner could
19 consider, I mean usually the husband, could consider the wife
20 the owner of half of his income, and those two people, since
21 there was a graduated tax, they would each be taxed at a lower
22 level than the husband alone would be.

23 So people actually started moving from common law
24 states to community property states to, this was mostly in the
25 West, to avoid -- I mean, to gain that tax advantage.

1 Q. Tax advantage, uh-huh.

2 A. And it became a great quarrel among the states. So the
3 U.S., it was a huge reason why the federal government then
4 instituted the marrying -- married filing jointly category to
5 prevent this kind of fracas.

6 Q. Ameliorate the --

7 A. Yeah.

8 Q. With respect to the, the state's interest in the
9 institution of marriage, has a biological link between parents
10 and children ever been a necessary foundation for marriage or
11 the sole reason why marriage has been deemed a public good?

12 A. No.

13 Q. Has the notion of providing an optimal context for raising
14 only biologically-related children been a prime mover in the
15 state's structure of marriage?

16 A. The history of marriage would deny that quite emphatically.

17 Q. Thank you. And finally, Professor, given -- no? Not quite
18 finally.

19 (Laughter in courtroom.)

20 Given everything that you have discussed about
21 marriage as a public institution, is Michigan's ban on same-sex
22 marriage consistent with trends in contemporary marriage law?

23 A. No. I would say the trend is moving toward gender equality
24 and gender neutrality between the spouses have laid a path
25 toward same-sex marriage, as has been recognized in an

1 increasing number of states. And Michigan's constitutional
2 amendment obstructs that, that trend from continuing here.

3 MR. MOGILL: Okay. Thank you, Professor. And that's
4 the end of my questions.

5 THE COURT: You may cross-examine.

6 MS. BRYA: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MS. BRYA:

9 Q. Good morning, Professor Cott.

10 A. Good morning.

11 Q. I'm going to ask you a series of questions. The questions
12 can be answered with yes or no answers. So I'm going to ask
13 that you limit your answer to yes or no.

14 THE COURT: And if you can't answer it yes or no,
15 Professor, just say you can't answer yes or no.

16 THE WITNESS: Thank you, your Honor.

17 THE COURT: And then counsel will be able to move
18 forward.

19 BY MS. BRYA:

20 Q. For purposes of this case, Professor Cott, you are only
21 being presented as an expert in the history of marriage in the
22 United States, correct?

23 A. Yes.

24 Q. You're not a legal expert, correct?

25 A. I can't answer that yes or no.

1 Q. You can't answer that yes or no, whether or not you're a
2 legal expert?

3 A. That is, in my study of history, law has been a very
4 important element since I consider it relevant not only in the
5 legal arena, but in the social and political arena. So I do
6 consider myself an expert on a considerable amount of the legal
7 history of the United States. Whether that equates to your
8 definition of a legal expert, I, I cannot say.

9 Q. Professor Cott, do you recall your deposition being taken
10 on January 10th, 2014?

11 A. I do.

12 MS. BRYA: Your Honor, may I approach the witness?

13 THE COURT: You may.

14 MR. MOGILL: Let me know which page, please?

15 MS. BRYA: Yes.

16 THE COURT: And you can refer counsel to the page.

17 MS. BRYA: Yes, I will, your Honor.

18 THE COURT: Thank you.

19 BY MS. BRYA:

20 Q. It is page 9, line 19. The question was, "Do you consider
21 yourself a legal expert, Dr. Cott?" The answer was, "A legal
22 expert? No."

23 A. I see that. And I -- did you want me to respond to that?

24 Q. No. You don't need to respond to that. Thank you.

25 You're not an expert in religion; is that correct?

- 1 A. Except insofar as I study religion as a part of history.
- 2 Q. So you're not an expert in religion?
- 3 A. Correct.
- 4 Q. You believe that the State of Michigan should recognize
5 same-sex marriage, correct?
- 6 A. I think that is consistent with the trend that has been
7 shown in the history of marriage.
- 8 Q. So yes, you believe that they should?
- 9 A. I don't deal in "shoulds."
- 10 Q. So you don't have an opinion on whether or not they should,
11 the State of Michigan should recognize same-sex marriage?
- 12 A. I'm only willing to say that I see it as consistent with
13 the trend. I am not a moral preceptor as what "should" means.
- 14 Q. Do you, do you support Michigan recognizing same-sex
15 marriage?
- 16 A. I think it would be consistent with the trend and,
17 therefore, it seems like the right direction to go, yes.
- 18 Q. You've acted as an expert in numerous cases across the
19 country regarding same-sex marriage, supporting the position of
20 allowing for same-sex marriage; is that correct?
- 21 A. I wrote expert reports, yes.
- 22 Q. And for those cases in which you provided expert reports,
23 you were supporting the position of same-sex marriage?
- 24 A. Yes, indeed.
- 25 Q. In the *Perry* case in California, you received over \$30,000

1 in compensation for your work as an expert, correct?

2 A. Yes.

3 Q. You agree that the states have the right to regulate
4 marriage, correct?

5 A. Yes.

6 Q. And you believe that it's okay for the state to prohibit
7 marriage between two people based on consanguinity, correct?

8 A. Yes.

9 Q. And you believe it is okay for the state to prohibit
10 marriage between two people because of the age of the
11 individuals wishing to marry, correct?

12 A. The, the tender age, yes.

13 Q. And you believe it's okay for the state to prohibit bigamy,
14 correct?

15 A. Yes.

16 Q. And you believe the right to marry and the free choice of a
17 marriage partner are profound exercises of the individual
18 liberty, central to the American polity and way of life,
19 correct?

20 A. Yes.

21 Q. You believe that the freedom to marry means freedom to
22 marry the person of your choosing, correct?

23 A. I didn't hear the word, freedom person?

24 Q. Freedom to marry means the freedom to marry the person of
25 your choosing, correct?

1 A. Yes.

2 Q. But you believe that a marriage that goes beyond two
3 partners within our political value system represents fraud or
4 coercion, or another value that's outside the political
5 universe; is that correct?

6 A. Yes.

7 Q. You believe that laws against consanguine marriages demote
8 and discredit relationships between a father and a daughter,
9 correct?

10 A. Not all relationships, just marital relationships.

11 Q. You agree it discredits marital relationships between a
12 father and a daughter?

13 A. Yes. Correct.

14 Q. And you believe laws against bigamous marriages demote and
15 discredit those relationships, correct?

16 A. Yes.

17 Q. And you think it's okay for the state to demote and
18 discredit some relationships such as a father/daughter or
19 bigamous relationships, correct?

20 A. Yes.

21 Q. You believe that Michigan's marriage law confines gay or
22 lesbian people to second-class citizenship; is that correct?

23 A. Yes, with respect to marriage.

24 Q. Don't bigamy laws confine fundamentalist Mormons to
25 second-class citizenship because fundamental Mormons believe

1 that bigamy is acceptable?

2 A. No. I don't think so.

3 THE COURT: Do you want to explain that? Did you
4 want? It kind of looked like you want to. And I'd like to
5 hear the answer, if you have one.

6 (Laughter in courtroom.)

7 THE WITNESS: Well, fundamentalist Mormons are not a
8 recognized group in society. There may be individual
9 fundamentalist Mormons, but they are going against their
10 church's proscription, which prohibits bigamy. Therefore, they
11 are -- they don't really deserve the name of Mormons. And
12 given that they, in wanting polygamist marriages, they are both
13 rebelling against their church and doing something that's
14 illegal.

15 I, I don't see why one would talk about demoting or --
16 it just seems irrelevant to a kind of made-up category,
17 fundamentalist Mormons. It's almost an oxymoron, actually.

18 BY MS. BRYA:

19 Q. The Michigan Marriage Amendment limits marriage to a man
20 and a woman, so it prohibits bigamy, correct?

21 A. Yes. Well, in effect, but not literal, but in effect it
22 does.

23 Q. And the Michigan Marriage Amendment addresses the gender of
24 the person who can marry, not the sexual orientation of the
25 person; is that correct?

1 A. That is correct.

2 Q. You don't believe people who do not support same-sex
3 marriage do so based on some type of animus, do you?

4 A. I do not believe that's necessarily the case, right.

5 Q. You're familiar with the phrase gender binary; is that
6 correct?

7 A. Gender what?

8 Q. Binary?

9 A. Never heard it before. Is that is a word? Bio nearing?

10 Q. B-I-N-A-R-Y.

11 A. B-I-N -- oh, gender binary?

12 Q. Yes.

13 A. Oh, okay.

14 Q. I'm sorry. Maybe my accent --

15 A. I thought you said bioengineering. I thought, oh, is that
16 what they are doing in Michigan?

17 (Laughter in courtroom.)

18 Gender binary, yes.

19 Q. I think the accents maybe caused it to come out funny.

20 And by that phrase, that means the classification of
21 sex and gender into two different forms, correct? Masculine
22 and feminine?

23 A. Mh-hm.

24 Q. The consequences of same-sex marriage on the gender binary
25 are, of masculine and feminine, is unclear, correct?

1 A. How could I disagree with that.

2 Q. I'm sorry. I didn't hear you.

3 A. How could I disagree with that. Yes, in the longer run,
4 it's unclear.

5 Q. And you agree that having a gender matters in the respect
6 that human beings do not appear as neutral individuals,
7 correct?

8 A. Not so far. Things are changing, though, with transgender.

9 Q. So you don't think that gender matters?

10 A. Oh, I do think that gender matters in many ways.

11 Q. Okay. One of the purposes of marriage in the United States
12 has been to create stable families to provide for, excuse me,
13 child dependents, correct?

14 A. Yes, as well as other dependents. Yes.

15 Q. And another purpose of marriage is to legitimize children,
16 correct?

17 A. To create a legal relationship, yes.

18 Q. And you believe the state can see marriage as a way to
19 concern itself with procreation, correct?

20 A. Yes. Although, procreation is such a vague word. I've
21 thought about that again, that is, procreation obviously takes
22 place without marriage. It doesn't require marriage at all,
23 but --

24 Q. But the state can see marriage as a way to concern itself
25 with procreation, correct?

1 A. Yeah. Concern itself. It takes cognizance of procreation,
2 yes.

3 Q. And procreation is a legitimate state interest, correct?

4 A. Do you mean, by procreation, do you mean the increase in
5 population? What exactly do you mean that procreation is a
6 state interest? I, I don't quite understand. I mean, I would
7 like it to be a bit more precise.

8 Q. The ability, the ability to have children. Procreation,
9 being a state, being a state interest. The state concerning
10 itself with the ability of people to have children, to continue
11 a population. Yes.

12 A. The state is certainly interested in having a population,
13 yes, that I can say is a state interest, and a national
14 interest.

15 Q. So you think the state can be interested in procreation and
16 it's a legitimate state interest?

17 A. I, actually, I've come to think about the overuse of that
18 word, that procreation itself, that just means the ability to
19 reproduce. And is the state interested in the ability to
20 reproduce? I'm not sure.

21 Q. I'd like to direct your attention to the deposition
22 transcript that's in front of you again.

23 Counsel, it's on page 134 and 135.

24 Just let me know when you're there.

25 Your comment was, "I think the state can be interested

1 in procreation and the state can see marriage as a way to
2 concern itself with procreation. Is that legitimate within the
3 state's interest? Yes. Yes."

4 A. Yes. I've re-thought the meaning since then that
5 procreation itself is vague, as far as I can see.

6 Q. You agree that the incentive given by the State of Michigan
7 for marriage was to support stable and enduring unions between
8 couples who have the capacity to procreate, so they can support
9 one another and children that are created by them?

10 A. No. I don't think that the State's view was only about
11 couples who have the capacity to procreate, or else they
12 wouldn't have licensed postmenopausal marriages.

13 Q. You don't agree that the incentive given by the State for
14 marriage was to support stable and enduring unions, so they
15 could procreate and support one another and their children?

16 A. I would have to take out the middle of that sentence to
17 fully agree with it.

18 Q. I would like to draw your attention to your deposition
19 testimony on page 108 and 109.

20 THE COURT: You may look at it, Professor. I think
21 you have a copy, if you care to.

22 BY MS. BRYA:

23 Q. Line 23, the question is:

24 "Do you agree that, at least in part, the incentive
25 given by the State for marriage were to create stable and

1 enduring unions between couples who have the capacity to
2 procreate, so they would support one another and any children
3 created by them?

4 Answer: Yes, in part, certainly."

5 A. Okay. "In part" was crucial in that sentence.

6 Q. You believe that the institution of marriage has lasted
7 because it has been flexible over time, correct?

8 A. Yes.

9 Q. In Michigan, however, marriage is only -- has always been
10 defined as between one man and one woman; is that correct?

11 A. Yes. Well, I don't think it was actually defined before
12 1996 as such, but it was understood to be that.

13 Q. You don't believe a biological connection between parents
14 and children is irrelevant to a child's well-being, do you?

15 A. It could be irrelevant. There's so many natural parents
16 who abuse their children. Sometimes it's a disadvantage.

17 Q. Professor, I'd like to call your attention to your
18 deposition testimony on page 107, line 18.

19 The question was, "Do you think a biological
20 connection between parents and children is irrelevant to the
21 social well-being of children?"

22 The answer: "No, I would never say it's irrelevant."

23 A. But as I -- you're taking that out of context, because my
24 comment there was, went on to say that's a general question and
25 the issue is what states were interested in, in marriage.

1 Q. You agree that different sexes bring different
2 contributions to parenting, correct?

3 A. It looks that way, yes, from social science, psychological.

4 Q. And you agree that there are different benefits to
5 mothering versus fathering, correct?

6 A. There may be. I, I am not a psychological expert.

7 Q. In your opinion, you agree that there are different
8 benefits to mothering versus fathering?

9 A. Very likely.

10 MS. BRYA: If I can just have a moment, your Honor?

11 THE COURT: Of course.

12 (Brief pause.)

13 MS. BRYA: Your Honor, I have no further questions for
14 this witness.

15 Thank you, Dr. Cott.

16 THE WITNESS: Thank you.

17 THE COURT: Any redirect?

18 MR. MOGILL: If I could just have a moment, Judge?

19 THE COURT: Of course.

20 (Brief pause.)

21 REDIRECT EXAMINATION

22 BY MR. MOGILL:

23 Q. Professor, on cross-examination you were asked, we'll start
24 here, whether you consider yourself a legal expert. And you
25 were pointed to a particular question and a particular answer

1 on page 9 of your deposition transcript.

2 THE COURT: You have to move closer to the microphone.
3 Thank you.

4 MR. MOGILL: I'm always forgetting. I apologize,
5 Judge.

6 THE COURT: That's okay. I'm glad they told us.

7 THE WITNESS: Page 9?

8 BY MR. MOGILL:

9 Q. Yeah.

10 A. I, I did say there in answer so you're not a legal expert,
11 I have used legal history for many of my articles and much of
12 my research. I might be called legal historian, but I'm more
13 modest in my claim on that score.

14 Q. Yeah. So --

15 A. And then she went on and pressed, so you don't consider
16 yourself a legal expert, and I said legal expert, no. Since I
17 assumed that, that she meant was I a lawyer, which I am not.

18 Q. Okay. The question that was asked of you ignored what you
19 had said --

20 A. Yes.

21 Q. -- about three lines before; is that correct?

22 A. Yes.

23 Q. Describing your particular legal experiences.

24 Are there harms, Professor, that a state might be
25 concerned with about bigamy and polygamy?

1 A. About what?

2 Q. Bigamy and polygamy?

3 A. Yes. There are harms of coercion and particularly
4 inequality among the members of the marriage. I think
5 reciprocity has always been a very important feature of
6 marriage, as it's been understood in the Anglo-American
7 tradition, including through the history of the United States.

8 And while, as I said, that reciprocity was, was
9 hierarchical and asymmetrical in terms of the specific role in
10 earlier years, it was definitely about a bargain, a
11 partnership, a pairing. And so that persists now while, while
12 marital roles are gender neutral. But there was never a place
13 for that really for more than two, in that reciprocal
14 arrangement.

15 Q. Thank you. Now, you were asked a number of questions on
16 cross-examination about any interest the state may have in
17 procreation. And yet, of course you testified that
18 procreation, or even a desire to procreate or adopt has never
19 been part of what's required for a valid marriage. On its
20 face, those points may form a paradox.

21 Could you explain, so that it becomes clear, why it is
22 that even though marriage does not require procreation or a
23 desire to procreate in order to be valid, that the state has an
24 interest in procreation?

25 A. Well, I think, as I said, that a very, very important

1 feature of marriage is its economic being, that is it is about
2 creating groupings, households presumably of mutual support.
3 And the first place that it occurs and the obligation occurs is
4 between the two spouses. But historically, and still today of
5 course, responsibility for dependents is also lodged in the
6 head of household or in the two heads now.

7 And so the state's interest in procreation, insofar as
8 it goes is, number one, about its own population, having
9 population. That is, sexual intimacy between men and women is
10 going to occur. The state is aware of that. And that marriage
11 is, is -- ascertains that for a legal relationship to be set up
12 between parents and children, that, that, biological children,
13 that is, that marriage is, is, you know, one way to accomplish
14 that.

15 But marriage, as an institution overall, is much more
16 capacious than that. It is about the couple supporting each
17 other, as the state has said, and it is about any others in the
18 household, whether biological or not biological, whether the
19 marriage is one of people who are 55 and each have children
20 from before, who they bring into their household. That's
21 been -- you know, it's the economic concern that has been
22 major.

23 And the truth is, too, just with respect to
24 procreation, that historically and today, states have always
25 made unmarried parents responsible for the children they

1 procreate. So the state's interest in economic stability in
2 order in keeping people off the public dole extends to
3 unmarried parents of biological children. But it is more
4 inclusive when we're talking about marriage and the marital
5 household. And that's one way in which it has been seen as a
6 lynchpin of social order more generally, and a more extensive
7 economic benefit to the society at large.

8 Q. Would it be fair to say then, that with respect to the
9 interest of the state in procreation, that it is linked not to
10 an obligation or even expectation that a particular couple will
11 attempt to procreate, but to the economic consequences for the
12 couple and society in the event of procreation?

13 A. Yes. I think certainly in the history of marriage law,
14 that supporting children has been very central, but actually
15 bearing them has been pretty much invisible.

16 Q. The last question I want to ask you goes to a question that
17 you were asked about mothers and fathers bringing different
18 attributes.

19 Again, is there anything in the law of marriage in
20 Michigan or any other state now, or in the past, that imposes a
21 gender role obligation with respect to parenting any children
22 in that household?

23 A. No. In fact, this has been -- you can see this in divorce
24 law, for instance, since the state doesn't require anything in
25 particular inside a marriage, you can see the state's

1 expectations better when a marriage breaks up.

2 And while in the longer past when a marriage broke up,
3 typically the father was actually the guardian and the provider
4 for the children, the mother got nothing with respect to the
5 children several hundred years ago. And then during the 19th
6 century, it kind of divided with ideas that, well, the mother
7 perhaps should be given the custody of very young children, and
8 the father is still the provider.

9 But now, both parents are equally responsible for both
10 care of the children and economic support of them. So that is
11 the starting point for divorce negotiations about custody and
12 payment.

13 I was going to say one other thing. Oh, yeah. At the
14 time that I wrote my book, "Public Vows," during the '90s, I
15 was most interested in the ways in which marriage historically
16 had shaped male and female gender roles. It was a major
17 interest of mine when I wrote the book. And one could see that
18 historically it had dictated a great deal about what men were
19 supposed to be and what women were supposed to be.

20 But in the past 20 years or so, and actually since the
21 '70s, one could say that the law has not dictated particular
22 roles to a man and woman as husband and wife. And so the, the
23 centrality of that to the way marriage works in society and for
24 the state has really dropped out, so that marriage is still a
25 freely chosen contractual partnership, that is about mutual

1 support in an emotional way, as well as economic way, and
2 support for dependents, and one that is more, and more freely
3 chosen and no bars to eligibility of the sorts that were judged
4 discriminatory.

5 So that the relationship of marriage to gender has,
6 has been on a historical trajectory toward a kind of neutrality
7 toward that formation. There are certainly plenty of avenues
8 in our society that reiterate differences between men and
9 women. Most all of them do. But marriage as a, as a valid
10 civil contract does not, actually, in the law or in its
11 requirements.

12 Q. And just by way of illustration, it's correct, is it not,
13 that there is nothing whatever in marriage that creates either
14 a requirement or even an expectation as to who is going to do
15 the laundry, who is going to cook or shop or do the dishes,
16 change the diapers, take out the garage, fix a broken lamp or
17 anything else; is that correct?

18 A. That is absolutely right. Nobody applying for a marriage
19 license has ever been asked about what roles the two parties
20 will take on.

21 MR. MOGILL: If I could just have one second, please,
22 Judge.

23 THE COURT: Of course.

24 MR. MOGILL: No further questions.

25 THE COURT: Okay. Thank you, Doctor. You may step

1 down.

2 (Witness excused, 10:30 a.m.)

3 THE COURT: Any other witnesses by the plaintiff?

4 MR. MOGILL: We have no further witnesses to call. We
5 do have a couple of housekeeping matters, if it please the
6 Court, before we rest.

7 THE COURT: Okay. If you have no other witnesses,
8 we'll do the housekeeping.

9 And as to the defense, it's my understanding that the
10 defense is going to start off allowing Clerk Brown to testify
11 and place her case in first, and then the State defendants will
12 proceed. Is that right?

13 MS. HEYSE: That is correct, your Honor.

14 THE COURT: Okay. Tell me who your first witness will
15 be.

16 MS. HEYSE: It will be Sherif Girgis.

17 THE COURT: Okay. And how long do you anticipate that
18 testimony to be, about?

19 MS. HEYSE: We're guessing about a half a day.

20 THE COURT: About a half day?

21 MS. HEYSE: Yup.

22 THE COURT: Okay. And then Clerk Brown, how long do
23 you anticipate?

24 MS. JOHNSON: Very briefly, your Honor.

25 THE COURT: Okay. Like half a hour or so?

1 MS. JOHNSON: Yes.

2 THE COURT: Okay. And then who is your next witness?

3 MS. HEYSE: Our next witness will be Dr. Regnerus.

4 THE COURT: Okay. So we should start with Dr.

5 Regnerus probably in the afternoon?

6 MS. HEYSE: As soon as -- he will be here. So as soon

7 as --

8 THE COURT: Okay. That's fine.

9 MS. HEYSE: -- Mr. Girgis is done, Dr. Regnerus, we'll
10 have him ready to go.

11 THE COURT: Good. And then approximately? Just I'm
12 trying to get --

13 MS. HEYSE: For Dr. Regnerus?

14 THE COURT: We have all week.

15 MS. HEYSE: I mean, more than likely half a day on my
16 side. I'm not sure how long plaintiffs will take.

17 THE COURT: And then your next witness, just so I know
18 after that?

19 MS. HEYSE: Dr. Joseph Price.

20 THE COURT: Okay. Okay. We'll go from there.

21 MS. HEYSE: We do have a motion that we would like
22 heard after housekeeping.

23 THE COURT: Yes. Absolutely. Okay.

24 What's the housekeeping?

25 MR. MOGILL: Whoever. We have --

1 THE COURT: The microphone, yes.

2 MR. MOGILL: Yeah. As of the time we broke yesterday,
3 the Court had wanted to take a look at both our proposed
4 exhibit, the report of the Michigan Department of Civil Rights.

5 THE COURT: Yes.

6 MR. MOGILL: On LGBT inclusion.

7 THE COURT: I have looked at that one.

8 MR. MOGILL: And it's my understanding there was an
9 objection to relevancy that we're prepared to address, if the
10 Court has any concerns.

11 And similar, a objection had been raised with respect
12 to the testimony, the, excuse me, the admission of the report
13 of Professor Chauncey in lieu of his live testimony.

14 THE COURT: I did know there was -- I thought it was
15 stipulated that everybody stipulated to his reports. I'm
16 sorry.

17 MS. HEYSE: We, we did stipulate to its admission,
18 your Honor, but we still believe it's not relevant to these
19 proceedings. So we would like to at least preserve that
20 argument.

21 THE COURT: But had Professor Chauncey come and
22 testified, you would have objected to the relevancy of his
23 testimony, but not to his credentials or what he had to say?

24 MS. HEYSE: Correct, your Honor.

25 THE COURT: Since he was unavailable, through no fault

1 of his own, I know he was supposed to be here, I will accept
2 the reports. And I really read it last night, so I can't say I
3 didn't read that report. And I will consider relevancy in
4 rendering my opinion.

5 MS. HEYSE: Thank you, your Honor.

6 THE COURT: And your objection is noted and preserved.

7 MR. MOGILL: With respect to --

8 THE COURT: As to the Michigan Department of Civil
9 Rights document entitled report --

10 MS. HEYSE: Your Honor, perhaps it would be more
11 appropriate for me to make my objection before.

12 MR. MOGILL: It's just a title page.

13 THE COURT: You can make an objection, but I assume
14 you'll object -- go on and make your objection. But I think I
15 know what your objection is, and I think I'm going to sustain
16 it. But let me put it on the record.

17 MS. HEYSE: Okay. Thank you, your Honor.

18 Your Honor, we have two objections to the admission of
19 this document. First, obviously on relevancy grounds. We
20 don't believe that this document is relevant to the issues in
21 this case. It doesn't deal with same-sex marriage, and in
22 fact, deals with inclusion of sexual orientation for purposes
23 of civil rights here in Michigan. It would not inform this
24 Court on any of the State's justifications. So for that
25 reason, we don't believe it's relevant to these proceedings.

1 We also have some hearsay objections to this. It does
2 have some hearsay within hearsay that we would, if it was to be
3 admitted, we would ask to be stricken from the document.

4 THE COURT: Okay. Any further argument by Plaintiff?

5 MR. MOGILL: This is a report, what we have
6 requested --

7 THE COURT: I had a chance last night also. I can't
8 say I read it, because I did not. I read Dr. Chauncey, but did
9 not read this report.

10 MR. MOGILL: Okay.

11 THE COURT: But I looked through it and skimmed it.

12 MR. MOGILL: All right. This is a report prepared by
13 an arm of the State, the Michigan Department of Civil Rights.
14 It addresses specifically issues of discrimination against gay,
15 lesbian, bisexual and transsexual individuals in the state of
16 Michigan. In particular, there is within that report, a
17 finding by the State --

18 MS. HEYSE: Your Honor, I apologize. I would object
19 to them putting up --

20 THE COURT: I sustain it.

21 MS. HEYSE: Thank you.

22 THE COURT: If it's not in evidence, you can't argue
23 it. You're arguing its admissibility, not what it has to say.

24 MS. HEYSE: I would ask also that counsel to --

25 MR. MOGILL: I think I'd be to allude to what it says

1 in order for the Court to understand the relevance.

2 THE COURT: You don't have to allude to it. You can
3 tell me generally what it says.

4 MR. MOGILL: Fine.

5 THE COURT: Though I looked at it.

6 MR. MOGILL: The report goes into detail.

7 MS. HEYSE: Your Honor, if I could ask that it be
8 removed?

9 THE COURT: Yeah. That's fine. I skimmed it last
10 night anyhow. I can't say that I didn't see it.

11 MR. MOGILL: The report goes into detail about the
12 history of discrimination within Michigan against LGBT
13 individuals. It goes into detail about the economic
14 disadvantages suffered by LGBT individuals. It does so as a
15 result of a very lengthy, detailed and comprehensive study,
16 again, by an agency of the State.

17 The standard for relevance under Federal Rule of
18 Evidence 401 is, of course, broad. And within the Sixth
19 Circuit, issues of relevance are to be -- the standard for
20 relevance is extremely liberal as indicated by the Sixth
21 Circuit in *V & M Star Steel vs. Centimark, C-E-N-T-M-A-R-K,*
22 *Corporation, 678 F3d 459 at 468,* a 2012 case.

23 And the standard, again, is evidence having any
24 tendency to make the existence of any fact that is of
25 consequence to the determination of the action more probable or

1 less probable than it would be without the evidence is
2 relevant. And that's from *Robinson vs. Runyon*, at 149 F3d 507,
3 page 512, a 1998 Sixth Circuit case.

4 And the third legal point I'd like to address, even if
5 the evidence is insufficient to prove the ultimate point for
6 which it is offered, it may not -- a court may not exclude the
7 evidence if it has the slightest probative value, DS -- DXS --
8 start over again. *DXS, Inc. vs. Siemens, S-I-E-M-E-N-S,*
9 *Medical Systems, Inc.* 100 F3d 462 at 475. That's a 1996, Sixth
10 Circuit case.

11 The history of discrimination, the history and fact of
12 disadvantages suffered by same-sex couples, by LGBT individuals
13 in this state is relevant to the Court's evaluation of whether
14 or not there is a rational basis for the Michigan Marriage
15 Amendment and the parallel statutes.

16 This report, again, prepared by an agency of the
17 State, which is the official body whose policy is at issue
18 here.

19 I think that for the same reasons that Professor
20 Chauncey's testimony is relevant for the Court's consideration,
21 this report gives a good detailed local complement to that, and
22 respectfully request that the Court receive it in evidence.

23 THE COURT: Okay. Counsel, it looks like you'd like a
24 couple words.

25 MS. HEYSE: Sure.

1 THE COURT: That's fine. You're entitled to the last
2 word, since it's your motion -- since it's your objection.

3 MS. HEYSE: Thank you, your Honor. I appreciate that.

4 Given the purpose under which Plaintiffs want to
5 submit this document to prove history of discrimination, it
6 would be cumulative, given the admission of Dr. Chauncey's
7 report. So for that reason, in addition to those I've already
8 articulated, we would ask that the Court exclude this evidence.

9 THE COURT: Okay.

10 MS. HEYSE: Thank you, your Honor.

11 THE COURT: Thank you.

12 I will preserve the objection. And I agree with
13 counsel, my skimming of it appears to be cumulative. But the
14 mere fact that something is cumulative doesn't make it not
15 admissible. And I think, again, I don't want to leave either
16 side with the impression of how much weight I'm going to give
17 it and so forth, but I think it is admissible. And the Court
18 will accept it as whatever exhibit, I forgot.

19 MR. MOGILL: Thank you.

20 THE COURT: Any other housekeeping matters?

21 MS. STANYAR: Yes, Judge. I've been remiss. We have
22 been assisted here in the courtroom, and I just want to
23 identify the people.

24 THE COURT: Please. My curiosity was piqued.

25 MR. MOGILL: One other housekeeping detail.

1 THE COURT: Absolutely.

2 MR. MOGILL: I apologize. I've lost track as to
3 what's been admitted and not. Obviously, throughout the
4 testimony of several witnesses, we have had demonstrative
5 exhibits. We are not offering them as evidence, but we are --
6 I want to make sure they are admitted into the record as
7 demonstrative exhibits.

8 THE COURT: I think we talked about that. They are
9 not evidence, but I have been provided copies and so forth, not
10 as evidence, just what was demonstratively indicated.

11 MR. MOGILL: Okay. I wasn't sure if we had formally
12 taken care of that.

13 THE COURT: I think we talked about it.

14 MR. MOGILL: Okay.

15 THE COURT: I'm glad you cleared it up.

16 MR. MOGILL: I want to, again, thank you.

17 MS. STANYAR: So I'd like to acknowledge Stephanie
18 Augustyniak, who has provided a tremendous amount of assistance
19 here.

20 THE COURT: Tell me, are you a lawyer?

21 MS. AUGUSTYNIAK: No, I'm not. I've just been
22 assisting the lawyers in this case.

23 THE COURT: Paralegal, student?

24 MS. STANYAR: Not a student.

25 THE COURT: Just help?

1 MS. AUGUSTYNIAK: Interested party.

2 THE COURT: Super. Great. Glad to have you.

3 MS. STANYAR: From almost the inception, she's helped
4 a lot.

5 THE COURT: Great.

6 MS. STANYAR: Wyatt -- and then we have the U of M law
7 students. Wyatt Fore, who has helped us a lot with the
8 demonstrative exhibits.

9 THE COURT: Great. We've seen him.

10 MS. STANYAR: We have Abbye Klamann.

11 THE COURT: U of M also?

12 MS. STANYAR: Yes.

13 THE COURT: Okay.

14 MS. STANYAR: And Derek Turnbull. And we'll have more
15 next week.

16 THE COURT: Okay. I know you've -- they are not
17 sitting here today. I know you had some folks sitting back at
18 your table today. Were they assistant attorney generals and
19 some students too, also?

20 MS. HEYSE: They weren't assistant attorney generals.

21 THE COURT: Good. Next time they are in, introduce
22 them. I saw them there, I was going to do the same thing. I
23 was going to somewhere down the line ask them. Today is
24 Friday, so.

25 MS. HEYSE: I should note one of them was my division

1 chief, so he wouldn't be happy if I didn't note.

2 (Laughter in courtroom.)

3 THE COURT: Yes. If they come in again, please. As I
4 said, I just thought I'd get a chance during the trial to meet
5 them and so forth.

6 MS. HEYSE: Thank you, your Honor.

7 THE COURT: Good. Okay.

8 MS. STANYAR: And we introduced one more yesterday.
9 That was Alanna McGuire, and she's been helping us this week,
10 too.

11 THE COURT: There we go. Super.

12 Okay. Plaintiff, based upon that, rests at this
13 point?

14 MR. MOGILL: Yes, we do.

15 THE COURT: Okay. And my understanding is, counsel,
16 you've indicated that you have a motion?

17 MS. HEYSE: We do, your Honor.

18 THE COURT: You may turn the podium, so I can see you.
19 If it's a motion, you don't have to strain, and I don't have to
20 strain.

21 MR. POTCHEN: Your Honor, now that Plaintiffs have
22 rested, we would like to make a motion for judgment on partial
23 findings pursuant to Federal Evidence 52(c) or Rule 52(c).

24 The Plaintiffs have failed to meet their burden of
25 proof showing that when the people of Michigan lacked -- that

1 they lacked any rational basis when they passed the Marriage
2 Amendment. They failed to negate every conceivable reason for
3 the Marriage Amendment. And that's what's required under the
4 rational basis test.

5 Under rational basis review, a court does not judge
6 the perceived wisdom or fairness of a law, but asks only
7 whether there is any reasonably conceivable state of facts that
8 could provide a rational basis for the classification. And
9 that's *Heller vs. Doe*, 509 U.S. 312, at pages 319 and 320.

10 They have -- I'll look at two examples, your Honor, of
11 where they have missed it. The first example is that by
12 passing the Marriage Amendment, the people of Michigan
13 acknowledge the importance of moms and dads in raising
14 children.

15 While he tried to downplay it in his testimony,
16 Professor Brodzinsky had to agree that moms and dads interact
17 differently with their children and admitted that moms and dads
18 are important.

19 Even Professor Cott, this morning, acknowledged that
20 genders play different roles or that genders are simply
21 different. And Professor Brodzinsky also agreed that having a
22 mother and father raising their children together is not a bad
23 goal. Thus, it was rational for the people of Michigan to
24 retain the definition of marriage, which seeks to encourage the
25 raising of children by their moms and dads.

1 Now, to be clear, the state has never said that
2 same-sex couples cannot raise children. They can. Michigan
3 agrees that there can be many kinds of effective parents in
4 family structures. But Plaintiffs have not proven that there
5 is zero value in having a child being raised by their mom and
6 dad.

7 The people of Michigan are entitled to promote an
8 ideal, something that recognizes that moms and dads are
9 important. And Plaintiffs have failed to show that the
10 people's goal is irrational.

11 A second point: It was also rational for the people
12 of the State of Michigan to encourage a cautious approach when
13 considering a change in the fundamental institution of
14 marriage.

15 Professors Brodzinsky and Rosenfeld admitted that
16 same-sex marriage is relatively new in this country. And in
17 Michigan, marriage has never been defined as something other
18 than between a man and a woman. And Plaintiffs' witnesses
19 conceded that no comprehensive study has been done on children
20 actually raised by same-sex married couples.

21 And all the witnesses who discussed the studies agreed
22 that the majority of research regarding outcomes of children
23 raised by same-sex couples has been done by small convenience
24 samples. And while he attempted to qualify it, Professor
25 Brodzinsky admitted that these small samples were not

1 representative of same-sex parents as a whole.

2 So those are two examples of where Plaintiffs have not
3 negated every conceivable reason for the Marriage Amendment.

4 And, therefore, we would request you grant our motion.

5 Thank you.

6 THE COURT: Thank you.

7 Response?

8 MR. MOGILL: May it please the Court. First of all,
9 the standard is not what Mr. Potchen indicated. As this Court
10 ruled --

11 THE COURT: You've got to get closer. And move it a
12 little bit closer, because I think it probably should be there.
13 I know, as lawyers we're not used to microphones. We're used
14 to --

15 MR. MOGILL: Back in the old days.

16 THE COURT: -- walking around, talking.

17 MR. MOGILL: Mr. Potchen is wrong about the standard.
18 This Court accurately identified the standard in its opinion
19 denying the cross motions for summary judgment when it
20 indicated, "The rational justification of the MMA," being the
21 Michigan Marriage Amendment, "must be rooted in the realities
22 of the subject being addressed." And I'll skip the cites.
23 "And when a provision of law adversely affects a group that has
24 endured historic patterns of disadvantage, courts make a more
25 careful assessment of the justifications than the light

1 scrutiny offered by conventional rational basis review."

2 That was a very important finding that you made and
3 conclusion that you drew. And I think, with all due respect, I
4 think it makes it very clear from the outset why the State's
5 claim just doesn't hold any water.

6 The fact of the matter, though, is that even if the
7 Court were to look beyond the inaccuracy of the State
8 defendants' claim, what you have seen this week in this
9 courtroom is an overwhelming record establishing the utter lack
10 of a rational basis for Michigan's ban on marriage equality.

11 What you have not heard from the State, and it's very
12 telling from the State defendants, and Mr. Potchen's argument,
13 is any mention of the multiple decisions of other Federal
14 district courts in the last several months, each of which has
15 utterly rejected the State's claims of a rational basis for
16 comparable bans in Utah, in Oklahoma, in Virginia, and Texas.

17 THE COURT: But none of which has taken any testimony,
18 to my knowledge. We've been following very closely.

19 MR. MOGILL: That's right.

20 THE COURT: This is -- they were all decided without
21 any -- I should say without. I'm sure, you know -- without,
22 without the evidence that's --

23 MR. MOGILL: That's right. And --

24 THE COURT: And I think they're different.

25 MR. MOGILL: My point is, the record in this case

1 makes the correctness of those decisions even stronger.

2 While those decisions were made based on submissions
3 to the Court, without the witnesses coming in and testifying
4 live and being subjected to cross-examination, the evidence
5 presented before this Court underscores and strengthens those
6 findings manyfold.

7 There is utterly no rational basis, given the
8 realities of what the marital relationship is as a matter of
9 law, not as what -- not with respect to what some people would
10 like to think it is as a matter of their own personal, private
11 or religious beliefs.

12 There is not anything that would support a rational
13 basis for distinguishing between opposite-sex couples and
14 same-sex couples in terms of eligibility for the right to marry
15 based on the record before this Court.

16 THE COURT: Okay. Thank you.

17 I'll take the motion under advisement. I will deal
18 with it in my opinion. I think it's too important to, to talk
19 about it at this point. So we will continue the trial. I will
20 deal with it in my opinion.

21 Any other matters we should talk about before we
22 adjourn for the weekend? Okay. We will stand adjourned.

23 (Off-the-record discussion.)

24 THE COURT: We'll stand in recess.

25 THE CLERK: All rise.

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(Proceedings adjourned at 10:50 a.m.)

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CERTIFICATE OF REPORTER

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

s/ Christin E. Russell

CHRISTIN E. RUSSELL, RMR, CRR, FCRR, CSR

Federal Official Court Reporter