UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

#14-1341

APRIL DeBOER, *et al.*,

Plaintiffs-Appellees,

-vs-

RICHARD SNYDER, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District
of Michigan, Southern Division, Hon. Bernard A. Friedman

PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONS **PAGE(S)**

STATUTES and COURT RULES **PAGE(S)**

REQUEST FOR ORAL ARGUMENT

Given the serious issues this case presents, Plaintiffs-Appellees respectfully request oral argument in this case.

COUNTER-STATEMENT OF QUESTION PRESENTED

DID THE DISTRICT COURT CORRECTLY HOLD THAT, IN EXCLUDING PLAINTIFFS AND ALL OTHER GAY AND LESBIAN COUPLES FROM THE RIGHT TO MARRY, THE MICHIGAN MARRIAGE AMENDMENT AND RELATED STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE, U.S. CONST., AM. XIV; AND DO THE AMENDMENT AND RELATED STATUTES ALSO VIOLATE THE DUE PROCESS CLAUSE, U.S. CONST., AM. XIV?

A. IN PROHIBITING PLAINTIFFS FROM MARRYING AND DECIDING FOR THEMSELVES WHETHER TO FORM A LEGALLY RECOGNIZED FAMILY, DO THE MMA AND RELATED STATUTES, M.C.L.A. §§551.1 - 551.4 AND 551.272, VIOLATE THEIR FUNDAMENTAL RIGHT TO MARRY THE PERSON OF THEIR CHOICE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF U.S. CONST., AM. XIV?

Plaintiff-Appellees answer "Yes".

Defendant-Appellants answer "No".

B. DO THE MMA AND RELATED STATUTES CAUSE SOCIAL, PSYCHOLOGICAL, FINANCIAL AND LEGAL HARM TO SAME-SEX COUPLES AND THEIR CHILDREN WITHOUT ANY RATIONAL RELATIONSHIP TO THE ATTAINMENT OF A LEGITIMATE GOVERNMENTAL PURPOSE, AND DID THE TRIAL COURT CORRECTLY CONCLUDE THAT

THESE PROVISIONS VIOLATE THE EQUAL PROTECTION CLAUSE OF U.S. CONST., AM. XIV?

Plaintiff-Appellees answer "Yes".

Defendant-Appellants answer "No".

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs-Appellees [herein "Plaintiffs"] concur in the statement of subject matter and appellate jurisdiction offered by Defendants-Appellants [herein "the State"].

COUNTER-STATEMENT OF FACTS

A. Introduction. April DeBoer and Jayne Rowse, both nurses, are in a long-term, committed relationship. They are "responsible and caring parents who are providing a stable and loving home for their children" (R168, Stipulated Facts, pg ID 4736; see also R151, Findings of Fact and Conclusions of Law, pg ID 3945). DeBoer individually adopted her daughter, "R", and Rowse individually adopted her sons "J" and "N" (*Id.*). R and J are special needs children. J was in Michigan's foster care system prior to being placed with DeBoer and Rowse, who were both licensed by the State to be foster parents. The other two children were surrendered at birth by their

mothers and adopted by DeBoer and Rowse after they were found to be qualified to adopt (R168, Stipulated Facts Regarding Plaintiffs, pg Id 4735-4736).[1]

DeBoer and Rowse initially brought this action as a challenge to M.C.L.A. §710.24, which permits married and single persons to adopt but precludes unmarried couples from adopting each other's children. DeBoer and Rowse would marry each other if they could, but they are prohibited from doing so by the Michigan Constitution and statutory law.

Prior to 1996, Michigan law defined eligibility to marry in gender-neutral terms. That year, however, M.C.L.A. §551.1, which identifies marriage as "inherently a unique relationship between a man and a woman", was enacted, and M.C.L.A. §§551.1 - 551.4 were amended to specify that the eligibility to marry is limited to "a man and a woman". P.A. 334.[2] In 2004, the possibility of legislation eliminating the exclusion of same-sex couples from the right to marry was foreclosed by enactment of the Michigan Marriage Amendment [MMA], Const. 1963, art. 1, §25, which provides:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in

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[1]In order to be qualified to adopt, DeBoer and Rowse were carefully screened, then found by the local circuit court to be suitable parents (R168, Stipulated Facts Regarding Plaintiffs, pg Id 4735-4736).

[2]Pursuant to 1996 P.A. 334, M.C.L.A. §551.272 prohibits recognition of marriages of same-sex couples validly performed in other jurisdictions.

> marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

B. Proceedings below. Following an initial district court hearing during which the judge, Hon. Bernard A. Friedman, suggested that their challenge was more appropriately directed at the MMA, Plaintiffs amended their complaint, adding a challenge to the MMA and related statutes on due process and equal protection grounds. Plaintiffs asserted then, as they do now, that the MMA and related statutes (1) violate their fundamental right to marry the person of their choice and (2) deny them the equal protection of the laws. The State argued that the right to marry does not extend to same-sex couples; with respect the Plaintiffs' equal protection claim, the district court characterized the State's rationales as "(1) providing children with 'biologically connected' role models of both genders that are necessary to foster healthy psychological development; (2) avoiding the unintended consequences that might result from redefining marriage; (3) upholding tradition and morality; and (4) promoting the transition of 'naturally procreative relationships into stable unions'" (R151, pg ID 3946).

After the court denied the State's motion to dismiss and the parties' cross-motions for summary judgment, the case proceeded to trial, where Plaintiffs' witnesses were psychologist David Brodzinsky, sociologist Michael Rosenfeld, demographer

Gary Gates, law professor Vivek Sankaran, historian Nancy Cott, and (via his expert report admitted into evidence by stipulation) historian George Chauncey.[3] The State called sociologist Mark Regnerus, economists Joseph Price and Douglas Allen and family studies professor Loren Marks.[4] Defendant Oakland County Clerk Lisa Brown, who sided with Plaintiffs below and is not appealing the trial court's decision, also testified.

Virtually all of the contested evidence at trial concerned the State's claim that there is a legitimate debate about child outcomes. Plaintiffs offered uncontradicted evidence as to (1) the history and on-going legacy of discrimination against gays and lesbians in the United States and in Michigan, (2) the history and evolution of marriage and eligibility to marry, (3) the harms suffered by the children of same-sex

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[3]Plaintiffs' evidence also included a January 28, 2013, Report of the Michigan Department of Civil Rights on LGBT Inclusion Under Michigan Law.

[4]The State also sought to call law student and philosophy graduate student Sherif Girgis as an expert witness but was unable to qualify him as an expert (R157, *Daubert* Hearing, Sherif Girgis, pg ID 4019-3985). Even if Girgis – who admittedly has no expertise in Michigan law regarding marriage or any other aspect of Michigan law – had not been found to be unqualified to be an expert witness, his proposed testimony would have been subject to objection as being based on a philosophical view of marriage rather than what the law of marriage is (R157, pg ID 4011-4015; R117, Plaintiffs' Motion *in Limine* to Exclude Testimony of State Defendants' Proposed Expert Witness Sherif Girgis, pg ID 2453-2465). The State does not challenge the trial court's decision rejecting Girgis' qualifications as an expert witness.

couples as a result of their parents' exclusion from the right to marry, (4) the demographics of gay and lesbian families in the United States and in Michigan, and (5) the harms suffered by children in Michigan's foster care system who remain in foster care solely because same-sex couples are prohibited from adopting jointly.

In light of the testimony presented and the district court's findings of fact, the State has now abandoned its "different outcomes" argument. The State does not even discuss the trial testimony as to *any* of the issues.

1. Disparate treatment of gays and lesbians. Gays and lesbians have long been subjected to disparate treatment in the United States (R169-1, Chauncey Report, pg ID 4744-4789). They have been classified as degenerates, censored and demonized. They have been excluded from federal government jobs and service in the armed forces (*Id.*). They have been the victims of hate crimes, targeted by police and harassed in the workplace (*Id.*). Until the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), gays and lesbians could be prosecuted and imprisoned for their consensual sexual conduct. The legacy of this discrimination persists to this day (*Id.*).

There is "a high prevalence of discrimination based on sexual orientation and/or gender identity/expression" in Michigan (R170-1, Michigan Department of Civil Rights Report on LGBT Inclusion Under Michigan Law, pg ID 4805). This discrimination particularly impacts parents and children, who must "contend with

numerous social and economic vulnerabilities due to a combination of societal stigma and ways in which current laws limit their economic security" (*Id.* 4865).

2. The definition of marriage in the law. Marriage is a civil contract. M.C.L.A. §551.2. Marriage in the United States is and has always been a civil matter, authorized and regulated solely by state authorities with respect to who may marry and the rights and obligations involved in the marital contract, subject to constitutional limitations (R149, Cott, pg ID 3775, 3782-3785). While religious authorities are free to maintain their particular views as to which marriages they will accredit or bless within their respective denominations, any such conditions have no bearing on the legality of a marriage, and religious authorities may not impose conditions on marriage beyond those imposed by law (*Id.* 3782, 3785-3786).

Historically and today, the state has had many purposes in licensing and fostering marriage, including facilitating the government's interactions with the populace and public order by organizing individuals into cohesive family units, developing a realm of liberty, intimacy and free decision-making by spouses, creating stable households and assigning individuals to care for one another and thus limiting the public's liability to care for the vulnerable (*Id.* 3776, 3780, 3785-3786, 3821-3822, 3792-3793).

The state and federal governments encourage and foster marriage through the

dignity and status accompanying the relationship and through multiple economic and other material benefits (*Id.* 3783-3784). "A legal parent-child relationship affords children access to important economic resources, including but not limited to health insurance, social security disability and survivor's benefits, and inheritance rights. Having legal ties to their parents is also enormously important to children's psychological well-being" (R171-1, Brodzinsky Report, pg ID 4934).

In Michigan, as in all other states, marriage is and always has been separate from procreation. The right to marry has never been dependent on an interest in or ability to procreate. Neither age nor sterility has ever been a bar to marriage (R146, Brown, pg ID 3501-3505), nor has inability to bear children been a ground for divorce. Historically and today, couples have entered into non-procreative marriages for love, companionship, economic partnership and to create a stable household (R149, Cott, pg ID 3781, 3800).

Michigan's county clerks may only issue marriages to opposite-sex couples, and they may not deny such licenses to couples on the basis of parenting skills or the unlikelihood of "good child outcomes," intent to have children or to cohabit as spouses, ability to procreate or likelihood to provide a safe and nurturing environment for children (R146, Brown, pg ID 3484-3485, 3506-3509). Clerks make no inquiry into and may not take into account such factors as whether persons applying for

marriage licenses are convicted pedophiles or are otherwise felons, had previously sexually assaulted children or had raised children who flunked out of school or became substance abusers, were monogamous or created stable households (*Id.* 3503-3505). The State's asserted rationales for the MMA and related statutes "play no part whatsoever" in a determination as to whether or not a couple is granted or denied a marriage license (*Id.* 3508-3509).

Today, marriage is a legal institution in which the contracting parties are legally equal and free to decide as to appropriate behavior toward one another without regard to gender. State laws mandating different marital roles and imposing different marital obligations and responsibilities on the basis of gender were long ago held to be unconstitutional (R 149, Cott, pg ID 3781, 3790, 3794-3797, 3821-3824).

There is no single "traditional" definition of marriage. The institution has evolved over time from one in which features once considered essential – the subordination of women, limited ability to divorce, exclusion of enslaved persons from the right to marry and restrictions on inter-racial marriages – have been eliminated in response to social, economic and ethical changes – despite some people's fears that the change would destroy the institution or be "unnatural" (*Id.* 3798-3799). Eliminating the exclusion of same-sex couples from the right to marry would be consistent with this historical trend (*Id.* 3777, 3781, 3787-3789, 3794-3803).

3. Child development and outcomes. The capacity to parent effectively is no way related to a person's sexual orientation. Successful child-rearing depends on the quality of parents' parenting, not the sexual orientation or gender of the parents. The key factors to predicting positive child outcomes are the quality of the parent-child relationship, the quality of the parents' relationship, the parents' parenting characteristics (*e.g.*, warmth, nurturing, emotional sensitivity, age appropriate rules and structure), educational opportunities, the adequacy of financial and other support resources, and good parental mental health (R143, Brodzinsky, pg ID 3186-3187).

The roles and parenting styles parents choose vary from family to family and from time to time within families, but both mothers and fathers are equally capable of fully meeting the needs of children, and both mothers and fathers do so (*Id*. 3191-3196).

These conclusions are confirmed by over thirty years of research utilizing multiple types of studies, including longitudinal studies and so-called convenience sample studies the results of which have been replicated over a wide demographic spectrum and many years. The research in this area includes not just studies of same-sex couple families over the past thirty years but also additional decades of research on all family types – two-parent heterosexual couple married families, single parent families, blended families and same-sex couple families (*Id*. 3188-3189, 3198-3221).

The research on which these conclusions rely is published in peer-reviewed journals (*Id*. 3198-3219), it is corroborated by clinical experience (*Id*. 3178-3181, 3220-3221), and it is supported by *all* of the relevant professional associations dedicated to children's health and well-being, including the American Psychological Association, the American Sociological Association, the American Medical Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the Child Welfare League of America, the National Association of Social Workers and the Donaldson Adoption Institute (*Id*. 3221-3224). There is no reasonable basis for questioning the consensus within the scientific communities as to the equivalent outcomes of similarly situated children raised by same-sex and opposite-sex couple parents (*Id*. 3219-3220; R144, Rosenfeld, pg ID 3277-3278).

While the State's witnesses, particularly Prof. Regnerus and Prof. Allen,[5] challenged this consensus, their own studies, properly interpreted, disprove their claims and support the consensus. Prof. Regnerus' New Family Structures Study [NFSS] purported to suggest that children raised by same-sex couple parents fare more poorly in life than do children raised by opposite-sex couple parents. However,

[5]The district court's analysis and rejection of the State's other experts, Loren Marks and Joseph Price, can be found at R151, Findings, pg ID 3950, 3957-3960. See also R139, Plaintiffs' Proposed Findings, pg ID 3018, 3037-3038, 3042-3044.

Regnerus compared children raised by intact, married opposite-sex couple parents with children raised by a parent who reported ever having had a romantic liaison with a person of the same sex, regardless of whether the other person ever lived with the child or the child even knew the other person (R151, Findings, 3954-3956). Controlling for family stability – universally recognized as a substantial factor in child outcomes – there is *no* difference in outcomes among children based on parents' sexual orientation (R164, Rosenfeld, pg ID 4323-4330). Regnerus' study included two children who had been *raised* by same-sex couples; both "appeared [to be] well adjusted" (R147, Regnerus, pg ID 3539).

Regnerus' study has been widely condemned in the social science community, including in the American Sociological Association's *amicus* brief in *Windsor* and *Perry*. The journal that published it sought and published an audit of it, and the audit concluded that the study should not have been published. During Regnerus' testimony below, the sociology department chair at the University of Texas - Austin, where he teaches, issued a statement condemning his study as fundamentally flawed conceptually and methodologically (*Id*. 3552-3553).

The genesis of Regnerus' study arose out of communications with anti-marriage equality advocates who let him know their "hopes for what emerges from the project" as well as their desire for results "before major decisions of the Supreme Court" (*Id*.

3590-3594).[6]

Taking all of these circumstances into account, the district court found that "Regnerus' testimony [is] entirely unbelievable and not worthy of serious consideration." (*Id*. 3956).

The district court also found that Prof. Allen's testimony lacks credibility. Based on a study he conducted utilizing 2006 Canadian census data, Allen testified that children in same-sex couple households are about 35% less likely to graduate from high school than are children living in opposite-sex couple married households (R148, Allen, pg ID 3741). However, when Allen controlled for parental education, marital status and residential stability, he, too, found *no* statistically significant difference in graduation rates, a conclusion expressed only in a chart in an appendix to his study and which he did not address or even note anywhere in the body of his report (*Id.* 3741-3743).

Allen and Prof. Price also critiqued a study by Prof. Rosenfeld demonstrating that children raised by same-sex couple parents progress in school as well as children raised by opposite-sex couple parents when controlling for parental income, education

[6]As the district court concluded, "[w]hile Regnerus maintained that the funding source did not affect his impartiality as a researcher, the Court finds this testimony unbelievable. The funder clearly wanted a certain result, and Regnerus obliged" (R151, Findings, pg ID 3957).

levels and family stability. In testifying as to his critique, however, Allen relied on diagrams he conceded were "metaphoric", not accurate and not meant to be accurate (*Id.* 3654-3655, 3722-3725). As noted by Rosenfeld, Allen's diagrams significantly distorted what the data actually showed (R164, Rosenfeld, pg ID 4297-4310).[7],

Judge Friedman "was unable to accord the testimony of" any of the State's experts "any significant weight" (R151, p 17, pg ID 3960); they

> clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields.

(R151, pg ID 3960).

4. Impact on children of exclusion of same-sex couples from the right to marry and the right to adopt jointly. "Social Security survivor benefits and government sponsored healthcare benefits are available to legally married couples, but not unmarried partners. Yet, by effectively foreclosing same-sex couples from obtaining these benefits, the MMA undermines the very aim of one of the central historical bases for civil marriage, namely, family stability" (R151, Findings, pg ID 3953; R149, Cott, pg ID 3784-3785). Further,

> [p]reventing same-sex couples from establishing legal ties for both partners through second parent or joint adoption can harm the child psychologically because of the ambiguous, socially unrecognized, and

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[7]Allen is also deeply biased against gays and lesbians, believing that "unrepentant" homosexuals "go to hell" (*Id.* 3747-3748).

> seemingly non-permanent relationship with the second parent. Such an arrangement can deprive the child of the emotional security, societal affirmation, sense of normality, identity, and social stability that comes with a full legal relationship with the second parent. They can also suffer unnecessary fear, anxiety, and insecurity related to possible separation from the second parent in the event of their parents' separation or upon the death of the biological or adoptive legal parent. And they are, in fact, at risk of losing an important attachment relationship if such circumstances occur. It is well established in the research that children can suffer profoundly from broken attachments to parental figures.

(R171-1, Brodzinsky Report, ¶26(a), pg ID 4934).

Excluding same-sex couples from marriage also denies these couples the stabilizing effect of marriage, which is also important to children, since family stability is strongly associated with positive child outcomes (R147, Regnerus, pg ID 3563-3564; R167, Marks, pg ID 4633-4636; R143, Brodzinsky, pg ID 3256-3257).

Wills and guardianships do not provide sufficient protection against children suffering the loss of a relationship with their non-legal parent. Even if the legal parent's will designates his or her partner as the child's guardian, a court is not legally required to honor it. The surviving partner has the burden of convincing a court that he or she should be appointed guardian, the guardianship must be renewed annually during the child's minority, and there is always the risk of a guardianship contest with relatives or anyone else claiming an interest in the child (R144, Sankaran, pg ID 3376-3387; R143, Brodzinsky, pg ID 3255-3256). A child of same-sex couple parents who

suffers the loss of his or her legal parent is also at risk of losing his or her relationship with his or her surviving non-legal parent.

Michigan's adoption law harms the thousands of children in Michigan's foster care system awaiting adoption because it deters lesbian and gay couples from coming forward to adopt them. The exclusion of same-sex couples from the right to adopt jointly leaves them in the vulnerable position of raising a family without secure legal family ties for both parents (R143, Brodzinsky, pg ID 3257-3261; R144,Sankaran, pg ID 3390-3392).[8]

Same-sex couples are far more likely to adopt children and serve as foster parents than are opposite-sex couples (R144, Sankaran, pg ID 3391; R143, Brodzinsky, pg ID 3261-3262),[9] and more likely to adopt children of color (regardless

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[8]There are 14,000 children in the Michigan child welfare system, 3,500 of whom have been freed for adoption but are still in foster care because of the lack of available families to adopt them. Many of these children are hard to place because of serious medical or emotional challenges or because they are older. These children are disproportionately children of color and are often sibling groups. Some "age out" of foster care without ever being adopted – 800 children last year in Michigan alone. Children who "age out" are at high risk of homelessness, illicit drug use, criminal activity and mental health problems (R144, Sankaran, pg ID 3388-3391; R143, Brodzinsky, pg ID 3257-3259).

[9]Nationwide,14% of same-sex couples with children report having an adopted child versus 3% of opposite-sex couples; same-sex couples care for foster children at twice the rate of opposite-sex couples (R145, Gates, Tr 2/27/14, 3433-3435).

of their own race) and children with medical problems, developmental delays and/or mental heath challenges – i.e., "special needs" children (R171-1, Brodzinsky Report, pg ID 4933). However, same-sex couples are far less likely to adopt in states where same-sex partners are not able to adopt jointly.[10]

5. The decision below. On March 21, 2014, Judge Friedman issued Findings of Fact and Conclusions of Law and Judgment (R151, pg ID 3944-3974; R152, pg ID 3975), concluding that the MMA's exclusion of same-sex couples from the right to marry is not "rationally related to the achievement of a legitimate governmental purpose" (*Id.* 3963), and that the MMA violates the equal protection clause "because the provision does not advance any conceivable legitimate state interest" (*Id.* 3961).

While not reaching Plaintiffs-Appellees' due process claim as unnecessary in light of his conclusion as to the equal protection claim, Judge Friedman noted that "the Supreme Court has repeatedly recognized marriage as a fundamental right" (*Id.*, 3961, n 5).[11]

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[10]In states permitting joint adoptions, 18% of same-sex couples with children have adopted children; in states where joint adoption is prohibited, only 7% have adopted (R145, Gates, Tr 2/27/14, 3433-3435).

[11]The claim in the State's Brief in this Court that, in declining to rule on the due process issue the district court "correctly assumed that same-sex marriage is an issue the people may address through legislation", Brief, p 24, is unsupported by anything stated or implied by Judge Friedman in his Findings of Fact and Conclusions of Law or anywhere else in the record of the case.

In arriving at his conclusion, Judge Friedman carefully addressed and then rejected each of the State's asserted rationales:

> *Optimal environment.* The "optimal environment" rationale lacks a rational basis because the right to marry is separate from procreation; eligibility to marry does not depend on "the ability to have children, a requirement to raise them in any particular family structure, or the prospect of achieving certain 'outcomes'". Moreover, "the MMA actually fosters the potential for childhood destabilization... [S]hould either of the plaintiffs die or become incapacitated, the surviving non-legal parent would have no authority ... to make legal decisions ... without resorting to a prolonged and complicated guardianship proceeding ..." (*Id.* 3965-3966). Further, "Michigan law does not similarly exclude certain classes of heterosexual couples from marrying whose children persistently have had 'sub-optimal' development outcomes" (*Id*. 3966). Finally, "the 'optimal environment' ... goal is simply not advanced by prohibiting same-sex couples from marrying... Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex ... [couples from marrying] increase the number of heterosexual marriages or the number of children] raised by heterosexual parents. ***There is, in short, no logical connection between banning same-sex marriage and***

providing children with an 'optimal environment' or achieving 'optimal outcomes'" (*Id.* 3966-3967; emphasis and bold added);[12]

Proceeding with caution. "[W]hen constitutional rights are implicated ... 'any deprivation of constitutional rights calls for prompt rectification.' ... 'The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.'" (*Id.* 3967-3968; cites omitted);

Tradition and morality. Since "tradition alone does not satisfy rational basis review" and "traditional notions of marriage are often enmeshed with the moral disapproval of ... same-sex relationships", "[t]he same Constitution that protects the free exercise of one's faith in deciding whether to solemnize certain marriages rather than others, is the same Constitution that prevents the state from either mandating adherence to an established religion ... or 'enforcing private moral or religious beliefs without an accompanying secular purpose.'... As a result, tradition and morality are not rational bases for the MMA" (*Id.*, 3968-3969); and

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[12]As Judge Friedman also found, "Taking the state defendants' position to its logical conclusion, ... only rich, educated, suburban-dwelling Asians may marry, to the exclusion of all other heterosexual couples... The absurdity of such a requirement is self-evident. Optimal academic outcomes for children cannot logically dictate which groups may marry" (*Id.* 3966).

Federalism. Noting the caveat in *United States v. Windsor*, 133 S.Ct. 2675 (2013), that states' authority over the regulation of domestic relations is subject to constitutional limitations, Judge Friedman reiterated the Supreme Court's admonition in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections" (*Id.* 3972).

In sum, as Judge Friedman stated in his conclusion:

> In attempting to define this case as a challenge to "the will of the people, ... state defendants lost sight of what this case is truly about: people. No court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex parents... Today's decision ... affirms the enduring principle that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail.

(*Id*. 3973).

SUMMARY OF ARGUMENT

While the regulation of domestic relations is generally entrusted to the states, state laws regulating marriage and family life must respect individuals' constitutional rights. Michigan's exclusion of same-sex couples from the right to marry the person of their choice infringes on the fundamental right to marry guaranteed by the due process clause and deprives Plaintiffs of a basic freedom central to human dignity and

autonomy. This exclusion also deprives same-sex couples of substantial rights afforded to similarly situated opposite-sex couples and harms children financially, legally, socially and psychologically. Plaintiffs do not seek a new right to "same-sex marriage". They seek, simply, the right to marry.

While heightened scrutiny should apply to the equal protection clause analysis because the marriage bans discriminate on the basis of sexual orientation, these laws fail under any standard of scrutiny. They are not rationally related to the achievement of any legitimate governmental purpose.

Marriage is a civil contract that is gender-neutral with respect to all of the parties' rights and obligations.

Marriage is separate from procreation, and "encouraging responsible procreation" is unrelated to the purpose of the exclusion since allowing same-sex couples to marry in no way affects the incentives for opposite-sex couples to marry. Opposite-sex couples may marry regardless of ability or willingness to procreate, and the bans do not prevent either same-sex or opposite-sex couples from having children.

The bans stigmatize and humiliate adults and children, reduce the stability of relationships and deprive children of the benefits and stability of having two married parents.

The State's "optimal environment" claim below – a claim the State has

abandoned in this Court – was properly found at trial to be entirely unfounded in fact.

Tradition alone is not a legitimate basis for the disparate treatment of similarly situated opposite-sex and same-sex couples.

The lack of any rational connection between the marriage bans and any legitimate state interest has led to the "emerging recognition", *Lawrence*, *supra*, 539 U.S. at 572, and the inevitable conclusion – the conclusion reached by every federal court to address the issue post-decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013) – that the primary purpose of these laws was and remains fear, prejudice or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves" – *i.e.*, constitutionally impermissible "discrimination". *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT, IN EXCLUDING PLAINTIFFS AND ALL OTHER GAY AND LESBIAN COUPLES FROM THE RIGHT TO MARRY, THE MICHIGAN MARRIAGE AMENDMENT AND RELATED STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE, U.S. CONST., AM. XIV; THE AMENDMENT AND RELATED STATUTES ALSO VIOLATE THE DUE PROCESS CLAUSE, U.S. CONST., AM. XIV.

A. IN PROHIBITING PLAINTIFFS FROM MARRYING AND DECIDING FOR THEMSELVES WHETHER TO FORM A LEGALLY RECOGNIZED FAMILY, THE MMA AND RELATED STATUTES, M.C.L.A. §§ 551.1 - 551.4 AND 551.272, VIOLATE THEIR FUNDAMENTAL RIGHT TO MARRY THE PERSON OF THEIR CHOICE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF U.S. CONST., AM. XIV.

The right to marry is unquestionably a fundamental right, as is the right of a married couple to decide between themselves whether or not to form a family. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia,* 388 U.S. 1, 12 (1967).

Marriage is the single most important legal and personal relationship between two persons. A core aspect of the "fundamental right of privacy" implicit in the Fourteenth Amendment's due process clause, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), "[m]arriage is a coming together for better or for worse, hopefully enduring

and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). It includes the right "to establish a home", to "bring up children" and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons". *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

While the "regulation of domestic relations" has long been entrusted to the states, it is axiomatic that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . ." *Windsor*, 133 S.Ct. at 2691, citing *Loving*.

The right to marry is so fundamental and its attributes and benefits so personal that it extends even to a prison inmate who might never be released from custody and might, therefore, never have an opportunity to build a home life or have sexual contact with his or her spouse. *Turner v. Safley*, 482 U.S. 78 (1987).

Marriage is a civil contract, M.C.L.A. §551.2, the regulation of which is and has been a matter of civil law throughout American history (R149, Cott, pg ID 3775). While religious authorities are free to determine for themselves which marriages their particular denominations will accredit or bless, their views are of no moment with respect to the law. Religious authorities are not free to impose any requirements on the law, nor may the law force any religious authority to accredit or bless a valid marriage that a particular denomination chooses not to accredit or bless (*Id.* 3785-

3786. As Judge Friedman aptly stressed below:

> Many Michigan residents have religious convictions whose principles govern the conduct of their daily lives and inform their own viewpoints about marriage. Nonetheless, these views cannot strip other citizens of the guarantees of equal protection under the law.

(R151, pg ID 3969; cites omitted).

See also Judge Heyburn's recent opinion in *Bourke v. Beshear*, ___ F.Supp.2d ___ (W.D. Tenn. 2014) [2014 WL 556729] at *10:

> Our religious beliefs and societal traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves, at issue here are laws that act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.

Marriage as an institution has substantially evolved over time from one in which features which were long considered essential – the subordination of women, racial restrictions and limited ability to divorce – have been eliminated in response to social, economic and ethical changes (R149, Cott, pg ID 3789-3797). That is, there is no single "traditional" definition of marriage. The changes in marriage over time have both altered the nature of the institution and expanded its availability to couples previously excluded from enjoyment of the right.

Historically, women and men were treated profoundly unequally in marriage. The doctrine of *coverture* treated a married couple as a single unit in which the woman was "covered" by her husband. At common law, a married woman had no right to control property, even property she had acquired prior to marriage. *Cf. Charlton v. Charlton*, 397 Mich. 85, 91 at n 2 (1976). In Michigan, *coverture* was partially abolished in 1855 but not finally abolished until 1963. 1855 P.A. 168; Const. 1963, art. 10, §1. Marital rape did not become a crime in Michigan until 1988. M.C.L.A. §750.520*l*. Gender-based differences in general were pervasive and were not eliminated as a matter of federal constitutional law until the mid-1970s. *Cf.*, *e.g.*, *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Orr v. Orr*, 440 U.S. 199 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). While these changes are now widely viewed as having improved and revitalized the institution, the unequal treatment of women and men in marriage had been "seen as essential to marriage for centuries" (R172-1, Cott Report, pg ID 4941).

Racial restrictions on eligibility to marry, although not changing the nature of the institution, were also long seen as essential to its preservation. Michigan abolished its anti-miscegenation law in 1883, *cf. Beech Grove Investment Co. v. Civil Rights Commission*, 380 Mich. 405, 434 (1968), but it was not until 1967 that the Supreme

Court struck down racial restrictions on the right to marry as violating both the due process and the equal protection clauses. *Loving*, *supra*.

In arguing that the fundamental right to marry does not extend to same-sex couples, State's Brief, pp 24-25 – an argument that echoes Virginia's failed argument in *Loving* that while the Lovings each had a fundamental right to marry, the right did not extend to a non-white person marrying a white person – the State confuses marriage as a matter of law with some persons' cultural, social or religious views.

While it is correct that, for many people, as a *social* matter, "marriage has always been linked to procreation", State's Brief p 4; see also citations at pp 39-40, as a matter of law marriage is and always has been separate from procreation. The State may lawfully provide incentives for couples to marry and/or procreate and/or adopt, as it does, but this interest is limited by the due process clause; it is uncontested that the State does not, never has and constitutionally could not intrude on the privacy of the marital relationship by requiring that a married couple attempt to procreate or adopt or have the capacity to do so.

In asserting that Plaintiffs seek a "fundamental right to same-sex marriage", State's Brief pp 19-25, and that the right to marry is a right only to marriage by opposite sex couples, the State mischaracterizes both what Plaintiffs seek and the nature of the due process interest at issue.

DeBoer and Rowse seek no redefinition of the right to marry. Like the plaintiff couples in *Whitewood v. Wolf*, ___ F.Supp.2d ___ (M.D. Pa. 2014) [2014 WL 2058105] at *2,

> [a]s plainly reflected in the way they live their lives, the plaintiff couples are spouses in every sense, except that the laws of the Commonwealth prevent them from being recognized as such.

What DeBoer and Rowse seek is simply an end to their exclusion from the fundamental right to marry. Like opposite-sex couples, same-sex couples who marry decide for themselves what family and religious traditions, if any, to follow and celebrate, how to divide household chores and who will work outside the home. Like opposite-sex couples with children, same-sex couples with children decide for themselves how to share parenting responsibilities, which schools their children will attend and how best to parent their children. The experiences of the thousands of married same-sex couples in the states already permitting them to marry demonstrate clearly that the nature of the marital relationship is not changed depending on the gender or sexual orientation of the parties any more than women's suffrage changed the nature of voting, the end of segregation at lunch counters changed the nature of eating in public or *Loving* changed the nature of marriage. What is changed by ending the exclusion of gay and lesbian couples from the right to marry is that they are no longer deprived of the same dignity and status accorded opposite-sex couples, and

their children are no longer harmed by their parents' relegation to second-class legal status.

The State's characterization of the nature of the right to marry as being only a right of opposite-sex couples to marry similarly misstates the nature of the right. Fundamental rights are not so narrowly defined:

> It is ... tempting ... to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified... But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*[.]

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847-848 (1992).

While the Court has not considered the application of the fundamental right to marry in the context of marriage by same-sex couples, it stressed in *Lawrence* that

> "*[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.*

539 U.S. at 574 (citation omitted; emphasis added). As Justice Scalia conceded in dissent in that case,

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct ... what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.?* Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

539 U.S. at 604-605.

Most recently, in *Windsor*, Justice Kennedy eloquently noted the evolving nature of marriage: Extending eligibility to marry to include same-sex couples "enhance[s] the recognition, dignity, and protection of [that class of persons] in their own community." 133 S.Ct. at 2692. A state's choice to authorize same-sex marriages "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Id.* at 2692-2693. "The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion." *Id*. at 2689.

The dignity, status and stability that are central to the marital relationship are the core of the right, but the material benefits denied to same-sex couples excluded from the opportunity to marry and their children are also substantial. Under current

Michigan law, Plaintiffs and other same-sex couples who wish to marry are deprived of myriad rights. "Loss of survivor's social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans." *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1, 11 (1st Cir. 2012). See also 29 U.S.C. §2901.101(13) (spousal rights under Family Medical Leave Act). DeBoer and Rowse also lose a host of additional rights and benefits as a matter of Michigan law.[13]

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[13] Rights and benefits lost to gay and lesbian couples under Michigan law include, but are not limited to, intestacy rights permitting a surviving spouse to inherit automatically from the deceased spouse's estate if there are no parents or issue, M.C.L.A. §700.2201-700.2205; authorizing a surviving spouse to an allowance or to occupy the homestead while the estate is being settled, M.C.L.A. §700.2205; authorizing a surviving spouse to file a wrongful death lawsuit when a spouse is killed, M.C.L.A. §600.2922(2)(a); receiving workers' compensation death benefits and retirement benefits when a working spouse is killed or retires, M.C.L.A. §420.3; access to dissolution laws regulating separation and divorce, including child custody, visitation and support, M.C.L.A. §552.23, M.C.L.A. §772.2(c), and *Harmon v. Davis*, 489 Mich. 986 (2011); assuming decision-making authority for the spouse's health decisions when the spouse cannot, including regarding life-sustaining procedures and organ donation, *In re Martin*, 200 Mich. App. 703 (1993); consenting to a post-mortem examination, M.C.L.A. §333.2855; making burial arrangements for a deceased spouse, M.C.L.A. §700.3206; receiving a spouse's veterans' benefits, M.C.L.A. §206.506; receiving crime victims' recovery benefits for a spouse who is a crime victim, M.C.L.A. §780.766(4)(h); and being treated as a family for workplace benefits. See, e.g. *National Pride at Work v. Governor*, 481 Mich. 56 (2008); *Id*. at 98-99, notes 44-49 (Kelly, J., dissenting).

Under Michigan law today, same-sex couples can lawfully love one another, live together and be committed to one another. They may lawfully be intimate with one another and plan their lives together, including deciding whether or not to form a family. As a result of the MMA and related statutes, however, they are second-class citizens when it comes to the human and material benefits of marriage and parenting. In fact, the only way April DeBoer or Jayne Rowse could even become eligible to adopt each other's child(ren) under current Michigan law is if the other dies.

Applying the language and rationale from *Loving* to the instant claim:

> To deny this fundamental freedom on so unsupportable a basis as the ... [sexual orientation-based] classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious ... discriminations [on the basis of sexual orientation]. Under our Constitution, the freedom to marry or not marry, a person of another ... [gender] resides with the individual and cannot be infringed by the State.

388 U.S. at 12.

For all of these reasons, the decision below was correct on due process grounds and should be affirmed on this basis. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n 20 (1979) (a reviewing court may affirm the result on different grounds where claim was presented and there is support in the record).

B. THE MMA AND RELATED STATUTES CAUSE SOCIAL, PSYCHOLOGICAL, FINANCIAL AND LEGAL HARM TO SAME-SEX COUPLES AND THEIR CHILDREN WITHOUT ANY RATIONAL RELATIONSHIP TO THE ATTAINMENT OF A LEGITIMATE GOVERNMENTAL PURPOSE, AND THE TRIAL COURT CORRECTLY CONCLUDED THAT THESE PROVISIONS VIOLATE THE EQUAL PROTECTION CLAUSE OF U.S. CONST., AM. XIV.

1. Standard of review. This Court reviews a district court's decision as to injunctive relief for an abuse of discretion. *Performance Unlimited, Inc. v. Questar Publishers, Inc*., 52 F.3d 1373, 1381 (6th Cir. 1995). The Court reviews the determinations underlying the district court's decision by the standard applicable to each determination – conclusions of law are reviewed *de novo*, and findings of fact are reviewed for clear error. *Cf.*, *e.g.*, *Ting v. A.T. & T.,* 319 F.3d 1126, 1134-1135 (9th Cir. 2003); *Liberty Coins, LLC v. Goodman*, ___ F.3d ___ [2014 WL 1357041] (6th Cir. 2014) at *4; Fed.R.Civ.P. 52(a).

To the extent that the State argues that the district court's findings of fact should be reviewed *de novo* rather than for clear error because these are legislative rather than adjudicative facts, on the facts of this case, this is a distinction without a difference, since virtually all of the facts are now undisputed: The State stipulated to the essential facts regarding the Plaintiffs; stipulated to the admission of and did not present any evidence challenging Prof. Chauncey's evidence of the history and legacy of

discrimination against and political powerlessness of gays and lesbians; did not present any evidence challenging Prof. Cott's testimony on the history of marriage; did not and does not refute Prof. Gates' testimony regarding the demographics of same-sex couple families; did not and does not dispute Clerk Brown's testimony regarding the eligibility requirements for a Michigan marriage license or Prof. Sankaran's testimony regarding the Michigan foster care system and adoptions and guardianships by same-sex couples; and, in this Court, by not citing in any way to the trial record, has abandoned its contention below that children do or may fare worse when raised by same-sex parents. Fed.R.App.P. 28(a)(9)(A); *Dunlap v. Michigan Dept. of Corrections*, 65 Fed.Appx. 971 (6th Cir. 2003).

2. Standard of scrutiny. While this Court has previously applied rational basis review to claims of discrimination based on sexual orientation, *cf.*, *e.g.*, *Equality Foundation v. City of Cincinnati*, 128 F.3d 289 (6th Cir 1997); *Davis v. Prison Health Services*, 679 F.3d 433 (6th Cir 2012), *Equality Foundation* pre-dates the ground-breaking decision in *Lawrence*, *supra*, and the discrimination at issue in this case meets the four-factor test warranting heightened scrutiny: (1) As a group, gays and lesbians have historically endured persecution and discrimination; (2) sexual orientation has no relation to aptitude or ability to contribute to society; (3) gays and lesbians are a discernible group with non-obvious distinguishing characteristics,

especially in the subset of those who marry a partner of the same sex; and (4) the class remains a politically weakened minority. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985). See also analysis in *Windsor v United States*, 699 F.3d 169, 181-185 (2nd Cir 2012) (applying heightened scrutiny), aff'd *United States v Windsor*, *supra*.[14]

Heightened scrutiny is also warranted here because the discrimination at issue involves children. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). See also *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Gomez v. Perez*, 409 U.S. 535, 538 (1973).[15]

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[14]The Supreme Court did not specify a standard of scrutiny in *Windsor*. However, as noted in *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1, 10 (1st Cir 2012): "Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications ... In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible."

[15]When the district court denied Plaintiffs' motion for summary judgment and determined that the constitutionality of the MMA and related statutes would be assessed on the rational basis standard, Plaintiffs moved to bifurcate the trial in order to preserve an opportunity to present additional evidence in support of the heightened scrutiny factors in the event the district court found that the MMA satisfied rational basis scrutiny (R100, Plaintiffs' Motion to Bifurcate, pg ID 2027). The district court granted the motion (R105, Order, pg ID 2069). Since judgment was entered in Plaintiffs' favor on the basis of rational basis scrutiny, the second phase never occurred. Plaintiffs have, however, preserved their argument that heightened scrutiny applies.

These provisions fail even on rational basis scrutiny, however.

In arguing that the MMA should be upheld, the State incorrectly asserts that, in finding the provision unconstitutional, the district court necessarily concluded that "not a single one [voter] had a rational reason for the vote". State's Brief p 4. This argument misstates both the court's findings and the applicable standard of review. Individually and taken together, *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence* and *Windsor* illustrate that the rational basis standard is not a "toothless one", *Mathews*, *supra*, 427 U.S. at 510; *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir 2002). A claim of rationality "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

In *Romer*, the Court struck down, on equal protection grounds, a Colorado constitutional provision adopted by a statewide referendum that prohibited the inclusion of sexual orientation in state and local anti-discrimination laws. In *Lawrence*, the Court struck down, on due process grounds, a state law prohibiting consensual sex by same-sex couples.[16] Most recently, in *Windsor*, the Court held unconstitutional, as violative of equal protection under the Fifth Amendment's due

[16]In *Lawrence*, Justice O'Connor concurred on the theory that the statutory discrimination against same-sex couples violated the equal protection clause. 539 U.S. at 578-586, O'Connor, J., concurring. While basing its decision on due process grounds, the Court also noted the link between due process and equal protection. 539 U.S. at 575.

process clause, §3 of the federal Defense of Marriage Act ("DOMA"),[17] which denied federal recognition of lawfully performed marriages of same-sex couples, for the reason that the statute advanced no legitimate federal interest.

That is, in order to pass constitutional muster, a classification must be *objectively reasonable* and bear a *reasonable relationship* to the realities of the subject addressed by the legislation:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass[.]

Romer, 517 U.S. at 632. See also *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Guzman v. United States Dept. of Homeland Sec.*, 679 F.3d 425, 432 (6th Cir. 2012).

A law fails on equal protection grounds where "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a reviewing court] can only conclude that the government's actions were irrational." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000); *Craigmiles*, *supra*, 312 F.3d at 229.

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[17]For all practical purposes, §3 of DOMA is identical to the Michigan marriage equality ban, as the former, like its Michigan constitutional and statutory counterparts, defines and recognizes only marriages between a man and a woman.

As *Romer* and *Windsor* in particular suggest, the Court increasingly looks to the context of a challenged classification in conducting the rational basis inquiry; certain factors may warrant a more in-depth look at both the law's purpose and the claimed fit between that purpose and the classification. The circumstances to be considered include whether the group targeted by the classification is traditionally disliked, whether important personal interests are at stake and whether the classification departs from past practices. In such circumstances, the usual expectations that classifications were drawn in good faith, for genuine purposes and not arbitrarily or to penalize a disfavored group are weakened.

When a classification targets historically disadvantaged groups, the Court has applied "a more searching form of rational basis review." *Lawrence*, *supra*, 539 U.S. at 580 (O'Connor, J., concurring); *Cleburne*, *supra*, 473 U.S. at 453, n. 6 (Stevens, J., concurring) (persons with mental disabilities; courts must exercise special "vigilan[ce] in evaluating the rationality of any classification involving a group that has been subject to a 'tradition of disfavor'"). See also *Romer*, *supra*, 517 U.S. at 634 (gay and lesbian persons); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("hippies"). In such cases, the Court has recognized that dislike of these particular groups might well be the precise motivation for the challenged measures, and it has more closely assessed the challenged measure. *Romer*, 517 U.S. at 634. See also

Massachusetts v. U.S. Dept. of Health & Human Services, 682 F.3d 1, 11 (1st Cir. 2012) ("Judges and commentators have noted that the usually deferential 'rational basis' test has been applied with greater rigor … [where] courts have had reason to be concerned about possible discrimination.").

Classifications may not be premised on "negative attitudes", *Cleburne*, 473 U.S. at 448, "fear," *Id.,* "irrational prejudice," *Id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). See also *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir 2006).

Moreover, where an asserted relationship is too attenuated, such as when a purported justification "ma[kes] no sense in light of how [the government] treated other similarly situated groups," *Garrett*, 531 U.S. at 366 n. 4, discussing *Cleburne*, 473 U.S. at 446-450; *Id*. at 449 (when an excluded group does not pose a "different or special hazard" from an included group with respect to the asserted purpose, it fails rational basis review), or when a law is so "riddled with exceptions" that the asserted purpose cannot "reasonably be regarded as [the law's] aim", *Eisenstadt v. Baird,* 405 U.S. 438, 449 (1972), it will not withstand rational basis scrutiny.

Laws that burden personal and family choices – as opposed to mere economic

regulation – also command closer attention, even where fundamental rights are not implicated. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring); *Eisenstadt,* 405 U.S. at 447-453; *Windsor*, 133 S.Ct. at 2696; *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 120 (1996).

A more probing scrutiny is also applied in assessing the constitutionality of laws that discriminate against children because of their parents' status. *Cf.*, *e.g.*, *Clark v. Jeter*, *supra*; *Levy v. Louisiana*, 391 U.S. 68 (1968) (invalidating provision denying children of unmarried parents the right to claim for wrongful death); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (invalidating provision denying "unacknowledged illegitimate" children the right to collect, under workman's compensation, upon father's work-related death); *Mathews*, *supra*, 427 U.S. at 505 ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'").

Finally, the scope of review is also informed by whether the law at issue is meaningfully different from prior legislative acts. For example, *Romer*'s rational basis analysis was mindful of the fact that the state constitutional amendment at issue was "unprecedented" and of "an unusual character." 517 U.S. at 633; see also *Windsor*, 133 S.Ct. at 2693.

For the reasons discussed below, the MMA and related statutes fail rational

basis analysis.

3. Argument. The undisputed evidence at trial established that gays and lesbians have historically been the victims of discrimination, stigmatization and abuse in the United States and in Michigan and that the legacy of that discrimination continues to this day. The MMA and related statutes, by their explicit terms, single out gay and lesbian couples in excluding them from eligibility to marry. The MMA in particular is historically unprecedented in Michigan; no other provision in the state's constitution enshrines discrimination into the state's basic law, let alone exclusion from enjoyment of a fundamental right. That is, these laws are based on impermissible "negative attitudes", *Cleburne*, "against people who appear to be different". *Garrett*, *supra*, 531 U.S. at 374, Kennedy, J., concurring.

The State's proffered justifications for the MMA are based on a manifestly false premise – that the question is whether there *should be* same-sex relationships and families headed by same-sex parents.[18] The assumption, however, denies reality. There *are* same-sex relationships, there *are* families headed by same-sex couple parents, there will continue to be same-sex couples and families, and these couples and these families are similarly situated to opposite-sex couples who are not excluded from

[18] *Cf.*, *e.g.*, Prof. Regnerus' testimony characterizing the issue as "a scientific question" (R165, pg ID 4426).

eligibility to marry. The MMA and related statutes are wholly unconnected to "the realities of the subject", *Heller*, *supra*, no matter the rationale offered.

(a) Encouraging responsible procreation. The irrationality of this rationale is manifest, since marriage and procreation are independent of one another. Opposite-sex couples may marry without procreating, and people – whether gay or straight – can procreate without marrying. Same-sex couples are, in all relevant respects, similarly situated to opposite-sex couples in relation to adoption, and a lesbian couple using assisted reproduction technology is, in all relevant respects, similarly situated to an opposite-sex couple in which the woman becomes pregnant through the use of assisted reproduction technology as a result of the man's sterility or other inability to procreate.

This rationale also necessarily but incorrectly implies that the law favors children naturally born into a family over those adopted. To the contrary, once a child is adopted, "there is no distinction between the rights and duties of natural progeny and adopted persons". M.C.L.A. §701.60(2).[19]

It is also a perversion of logic to assert – and no evidence presented at trial supports such an assertion – that *opposite-sex couples* are in any way whatever

[19]See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977) ("Adoption is recognized ... as the legal equivalent of biological parenthood.").

encouraged toward "responsible procreation" by excluding *same-sex couples* from the right to marry.

The State is not only completely wrong as to these fundamental facts, it is also wrong in arguing that, since much legislation involves line-drawing, the exclusion of same-sex couples from the right to marry is just another example of the normal legislative process. State's Brief, pp 46-48. Where, as here, the disparate treatment of similarly situated groups is entirely unrelated to the achievement of a legitimate governmental purpose, *Kimel*, *supra*, it is constitutionally impermissible.

(b) Promoting the "optimal environment" for children. As is overwhelmingly clear from the trial record, there is no rational connection between the exclusion of same-sex couples from marriage and the State's claimed interest in providing children with biologically connected role models of both genders. While the State incongruously argues that a rational voter could believe this to be so, it has, for good reason, abandoned the position that there is, in fact, a rational basis for an "optimal outcome" argument.

No other group in society is required to establish any level of parenting competency in order to be eligible to marry. Groups whose children are known to have less favorable outcomes in life – including those who are economically disadvantaged and those who have previously been married – are entitled to marry

(R164 Rosenfeld, pg ID 4288-4291; R150, Price, 3822-3825), and it is inconceivable that the State would or constitutionally could attempt to limit their right to marry as a result.

Second, on the basis of the testimony presented at trial, the district court correctly court found that it is the quality of parenting, not the gender of the parent, that matters, that there is a well-founded, broad-based social science consensus both that same-sex couple parents are as competent as their opposite-sex couple counterparts and that, as to all matters relating to child development, children raised by same-sex couple parents have comparable outcomes with those of similarly situated children raised by opposite-sex couple parents.

Third, the evidence presented at trial demonstrated that there is no rational basis for a belief that a child needs both a mother and a father, living in the same household, for healthy adjustment. This argument presumes standardized gender-based roles in opposite-sex marriages and is as factually antiquated as it is legally unsound.[20] Stereotypical assumptions about men and women and their respective societal roles are constitutionally impermissible justifications for laws or governmental action. *Cf.*,

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[20]When this argument was raised by the DOMA defendants, the district court in *Windsor* observed that DOMA's ban "[a]t most ... has an indirect effect on popular perceptions of what a family 'is' and should be, and no effect at all on the types of family structures in which children in this country are raised." *Windsor*, *supra*, 833 F.Supp.2d at 405.

e.g., *United States v. Virginia*, 518 U.S. 515, 541-542 (1996) (government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'"); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing impermissible sex stereotyping about women's roles "when they are mothers or mothers to be"); *Caban v. Mohammed*, 441 U.S. 380, 388-389 (1979) (rejecting the notion of "any universal difference between maternal and paternal relations" in parental roles); *Stanley v. Illinois*, 405 U.S. 645 (1972) (state law presumption that unmarried fathers are unfit violates due process and equal protection clauses).

Fourth, this rationale also fails because, as the district court noted, if child outcomes were determinative, only wealthy, educated, suburban-dwelling never-married Asians would be allowed to marry, since their children consistently perform best academically (R151, pg ID 3966).

Finally, the "optimal environment" justification fails here because notwithstanding the MMA,

> . . . there are thousands of same-sex couples currently raising thousands of children in Michigan, and these numbers have steadily increased over the past 20 years. Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. . . There is, in short, no logical connection between banning same sex marriage and providing children with an "optimal environment" or achieving "optimal outcomes."

(*Id*. 3966).

(c) The MMA and related statutes substantially harm children and families. Far from creating the "optimal environment" for children, Michigan's marriage and second-parent adoption bans have a demonstrable destabilizing effect on children and families. As detailed above, these laws deny children of same-sex couple parents the dignity, status and security enjoyed by the children of opposite-sex couple parents as well as exacting a harsh practical toll by depriving them of multiple substantial material benefits (*Id*. 3953; R171-1, Brodzinsky Report, pg ID 4934). It was, in fact, undisputed at trial that marriage has a stabilizing effect on couples and on families;[21] in countries and jurisdictions where marriage is available to same-sex couples, couple stability has seen a marked improvement (R151, Findings, pg ID 3949).

Moreover, the district court found that in this particular case

> . . . should either of the plaintiffs die or become incapacitated, the

[21]See, *e.g.* R167, Marks, pg ID 4632-4636, agreeing that (1) children are most likely to enjoy family stability when they are born into a married family, (2) marriage, and a normative commitment to marriage, foster high-quality relationships between adults as well as between parents and children, (3) marriage has important bio-social consequences for adults and children, (4) unmarried child-bearing increases poverty for both children and mothers, (5) marriage reduces poverty and material hardship for disadvantaged women and their children, and (6) children who live with their own two married parents enjoy better physical health, on average, than do children in other family forms. In addition, Marks could offer no research-based reason why the foregoing conclusions would not apply to same-sex couple families (*Id.* 4724).

> surviving non-legal parent would have no authority under Michigan law to make legal decisions on behalf of the surviving children without resorting to a prolonged and complicated guardianship proceeding. And in the event that a state court were to award guardianship of the surviving children to the non-legal parent, the guardianship would have to be renewed annually and would remain susceptible to the challenge of an interested party at any time. This, as Brodzinsky testified, places such children in a legally precarious situation and deprives them of "social capital."

(*Id.* 3965-3966).

(d) Proceeding with caution/unintended consequences. The State also argues that courts "should proceed with caution" before making a change in what it refers to as the "traditional" definition of marriage. While the State's witnesses testified that the social science research regarding same-sex couple families is in its "infancy" and that it is too soon to tell whether or not same-sex parent couples are good for children, the State has essentially abandoned this argument in this Court, too, also for good reason. As detailed above, the social science research is not remotely in its "infancy"; there have been approximately 150 studies of same-sex couple families spanning nearly thirty years and an even greater number of studies of all other family structures over an even greater period of time; these studies utilize a variety of methodologies, and they consistently replicate the same result: Children fare just as well when raised by same-sex couple parents (R143, Brodzinsky, pg ID 3188-3224).

As the district court observed in rejecting this rationale:

> The state may not shield itself with the "wait-and-see" approach and sit idly while social science research takes its plodding and deliberative course. Were the Court to accept this position, "it would turn the rational basis analysis into a toothless and perfunctory review" because "the state can plead an interest in proceeding with caution in almost any setting." *Kitchen v. Herbert*, No. 13-217, 2013 U.S. Dist. LEXIS 179331, at *77 (D. Utah Dec. 20, 2013). Rather, the state must have some rationale beyond merely asserting that there is no conclusive evidence to decide an issue one way or another. See *Perry* [*v. Schwarzenegger*, 704 F.Supp.2d 921,972 (N.D. Cal. 2010)] (quoting *Romer* for the proposition that "[e]ven under the most deferential standard of review . . . the court must 'insist on knowing the relation between the classification adopted and the object to be attained.'"). Since the "wait-and see" approach fails to meet this most basic threshold it cannot pass the rational basis test.

(R151, pg ID 3968).[15]

(e) Tradition and morality. As also discussed above, the institution of marriage has experienced major evolution over time, and it is factually incorrect to assert the existence of a single "traditional" definition of marriage. A key aspect of the "tradition" of marriage as a matter of law has been its capacity to evolve from one of profound inequality between the partners to one of equality of the partners and to expand its availability to those previously excluded from eligibility to marry – *e.g.*, enslaved persons and inter-racial couples – in response to changing social, political,

[15]It is also noteworthy that additional large scale research on the topic is highly unlikely, as neither the government nor any large university is likely to fund it in light of the overwhelming social science consensus regarding child outcomes (R167, Marks, pg ID 4673; no such studies being funded or in progress).

economic and ethical conditions (R149, Cott, pg ID 3777, 3781, 3787-3789, 3794-3803). Even if there were a single "traditional" definition of marriage, however, "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller,* 509 U.S. at 326; *Williams v. Illinois*, 399 U.S. 235, 239-240 (1970). Likewise, fear of gays and lesbians and moral disapproval of homosexuality fail to state a rational basis as a matter of law.

Whether Michigan voters approving the MMA in 2004 were motivated by "malice or hostile animus" or a desire to continue "tradition" or an "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring), these are not permissible bases for unequal treatment of same-sex couples.

(f) Federalism. The State also argues that domestic relations, including the authority to define marriage, fall within the exclusive province of the states. However, it continues to exaggerate this authority. While the state obviously has extensive power in this area, "laws defining and regulating marriage, of course, must respect the constitutional rights of persons", "[t]he states' interest in defining and regulating the marital relation [is] subject to constitutional guarantees . . ." *Windsor*, 133 S.Ct. at 2692.

Finally, while Michigan's ban on same-sex marriage would fail rational basis analysis even if it were only a statutory ban, its unprecedented status as a *constitutional* enshrinement of exclusion and discrimination is especially offensive to the equal protection clause. Speaking for the Court in *Romer*, Justice Kennedy stressed the particular repugnance of the comparably discriminatory Colorado constitutional amendment struck down in that case:

> ... disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."...
>
> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance... Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

517 U.S. at 633 (citations omitted). For the reasons discussed below, *Schuette v. Coalition to Defend Affirmative Action, et. al.*, 134 S.Ct. 1623 (2014), does not undermine this essential aspect of *Romer*.

Because Michigan's same-sex marriage ban is a part of its constitution – the

only clause in that document enshrining discrimination in the fundamental law of the state – the State has foreclosed its legislature from ever enacting marriage equality as social attitudes change. The MMA literally forces supporters of gay and lesbian rights – the targets of more restrictive ballot initiatives than any other group in American history (R169-1, Chauncey Report, pg ID 4744-4789; R66-1, Brief of *Amici Curiae* Constitutional Scholars, pg ID 1326) – to seek change only through the very costly referendum process. As in *Romer*, the Michigan constitutional ban on marriage equality further denies Plaintiffs and all other same-sex couples the equal protection of the law for this reason, too.

The State misreads Justice Kennedy's three-justice plurality opinion in *Schuette*. Beyond the fact that the opinion is not the opinion of the Court, it does not in any way support an argument that laws passed by referendum trump constitutional protections. The plurality opines that voters may constitutionally choose to foreclose one among multiple constitutionally permissible remedies for past discrimination; the opinion does not even purport to suggest that voters may enact a constitutionally discriminatory provision.

Distinguishing *Reitman v. Mulkey*, 387 U.S. 369 (1967), *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the opinion is explicitly limited to situations in which "[t]he constitutional

validity of some of those choices regarding racial preferences is *not* at issue". 134 S.Ct. at 1635 (emphasis added). The opinion also goes on to stress that permitting voters to choose among constitutionally permissible options is "not inconsistent with the well-established principle that *when hurt or injury is inflicted ... by the encouragement or command of laws or other state action, the Constitution requires redress by the courts.*" 134 S.Ct. at 1637 (emphasis added).

Nothing in the Court's decision or the plurality opinion is properly read as undermining the "well-established principle" that a discriminatory law – whether enacted by a state's legislature, a city council or voter referendum – is subject to the limitations of the Constitution:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, *supra*, 319 U.S. at 638.

Stated another way, as Justice Kennedy did most recently for the Court in *Hall v. Florida*, ___ U.S. ___ (2014), [2014 WL 2178332 at *16], "The States are laboratories for experimentation, but *those experiments may not deny the basic*

dignity the Constitution protects" (emphasis added).

4. Propriety of trial court fact-finding. The State seems to be suggesting, for the first time in this Court, that if a controversial social issue is brought before a court, trial court fact-finding is impermissible. State's Brief p 36 ("The district court also acted as if debatable questions of social science were issues it could resolve through factual findings.").

This argument is not only quixotic in light of the history of this case, it is legally incorrect. The district court found that there was a genuine issue of material fact necessitating a trial due to the State's claims during summary judgment litigation that its experts – Prof. Regnerus *et al.* – would demonstrate that the "no difference" consensus was reasonably subject to question by competent social scientists (R69-1, Brief, pg ID 1624-1625; R79, Reply Brief, pg ID 1908). The State continued to make this claim throughout the trial, in its argument for "judgment on partial findings" (R 149, pg ID 3835-3838), and in its closing argument (R158, pg ID 4068-4069). In a complete reversal, the State now distances itself from the wholly discredited Prof. Regnerus, failing even to refer to him in its brief in this Court. Having engaged actively in the trial process – at great expense to both sides – and without having raised this permutation of the argument before, the State's claim rings utterly hollow.

The State's argument asks this Court to ignore not just the trial record but also well-settled law regarding judicial fact-finding in constitutional litigation. The State argues that there is a presumption in favor of legislative enactments and that legislators (or the electorate) need not provide proof of "legislative choices" on the record. The State quotes repeatedly but incompletely from *F.C.C. v. Beach Communications*, 508 U.S. 307, 312-315 (1993). However, as the Court noted in that case, this so-called presumption applies only in the absence of "*some reason to infer antipathy*". *Id*. at 314 (emphasis added). As Prof. Chauncey explained in his report, there is ample reason to infer antipathy against homosexuals in this country. See also R66-1, *Amici Curiae*, pg ID 1315-1320. Moreover, there is specific reason to infer antipathy in the passage of the MMA; as with DOMA, it excludes same-sex couples and no one else from the right to marry. That is its "essence". *Windsor*, 133 S.Ct. at 2693.

Further, even where a presumption of constitutionality applies, the presumption is rebuttable. A litigant may and often does present evidence challenging the purported "rational relationship" between the enactment and its alleged purpose, and appellate courts regularly rely on such trial court records.[16]

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[16]*Cf.*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 227-234 (1982) (relying on record of district court trial at which plaintiffs offered studies and expert demographic

As one state appellate court has observed:

> Difficult as it may be to determine legislative facts for making social and legal judgments about the constitutional rights of homosexuals, the courts have been asked to do so, they are obligated to do so, and they are as equipped as any institution to do so.

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testimony regarding characteristics of undocumented foreign-born school children to attack State's purported rationales; *Doe v. Plyler*, 458 F.Supp. 569, 577-578 (E.D. Tex. 1978)); *City of Cleburne, supra*, 473 U.S. at 442-445 (relying on extensive legislative fact-finding from district court, including expert testimony from psychologist as to defining characteristics of the "mental retardate", to hold that ordinance requiring a permit for homes for mentally disabled people did not withstand rational basis scrutiny; *Cleburne Living Center v. City of Cleburne, Texas*, 726 F.2d 191, 197-198 (5th Cir. 1984)); *Turner v. Safley*, *supra*, 482 U.S. at 78 (examining trial court record in concluding that prison correspondence restrictions were "reasonably related to legitimate security interests" but restrictions on inmates' right to marry were not); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra* (relying on trial record, including medical and sociological evidence, and district court's factual findings, in considering whether state law posed an undue burden on a woman's right to choose to terminate a pregnancy); *Romer*, *supra* (substantial trial record available to the Court, including testimony of twenty witnesses and trial court's detailed analysis of evidentiary support for asserted state interests in ballot initiative; *Evans v. Romer*, 1993 WL 518586 [unreported] (Dist. Ct. Colo.) at ** 4-13); *Atkins v. Virginia*, 536 U.S. 304, 316-318 (2002) (in deciding whether execution of mentally retarded persons violates Eighth Amendment, relying, *inter alia*, on (a) trial court's credibility assessment and findings regarding testimony of defendant's expert clinical psychologist on questions involving mental retardation, (b) "consensus" on this topic, including official position of the American Psychological Association and (c) additional social science research); *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005) (relying on social science research and facts found by trial court to show that "juveniles have less control, or less experience with control, over their own environment" and that "[t]he personality traits of juveniles are more transitory, less fixed" to support conclusion that capital punishment for crimes committed while a minor is unconstitutional).

Dean v. District of Columbia, 653 A.2d 307, 330 (D.C. App. 1995).

Here, this Court has the benefit of *both* the abundant relevant social science research *and* an extensive trial court record that was the product of the adversarial process, demonstrating that the presentation of legislative facts at trial through expert witnesses can effectively "focus the court's attention on the most relevant concerns, present the range of informed opinion on the subject, and both identify and critique the most probative literature," resulting in the court's "sharpened, presumably reliable insight into complicated matters that, without such help, would be much more difficult for the judge to understand." *Dean*, 653 A.2d at 327-328.

For all of these reasons, the trial court appropriately conducted a trial in this matter and its well-supported (and almost completely uncontested) findings of fact should be accepted by this Court.

5. *Baker v. Nelson* does not bar Plaintiffs' claims. En route to rejecting state bans on marriage by same-sex couples and recognition of the marriages of same-sex couples validly performed in another jurisdiction, every marriage and marriage-recognition case decided post-*Windsor* has found that a federal challenge to these bans at issue is not barred by *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed* 409 U.S. 810 (1972), for the reasons that "doctrinal

developments" since 1971 render that summary affirmance dismissal order devoid of precedential force (R151, Findings, pg ID 3970, n. 6; see also R46, Response, pg ID 821-824). See*, e.g.*, *Wolf v. Walker*, ___ F.Supp.2d ___ [2014 WL 2558444] (W.D. Wisc. 2014); *Whitewood v. Wolf*, *supra*; *Geiger v. Kitzhaber,* ___ F.Supp.2d ___ [2014 WL 2054264] (D. Or. 2014) at *17, n.1; *Latta v. Otter,* ___ F.Supp.2d ___ [2014 WL 1909999] (D. Idaho 2014) at *7–10; *De Leon v. Perry,* ___ F.Supp.2d ___ [2014 WL 715741] (W.D. Tex. 2014) at *10; *Bourke v. Beshear*, ___ F.Supp.2d ___ (W.D. Tenn. 2014) [2014 WL 556729]; *Bostic v. Rainey,* 970 F.Supp.2d 476, 468-470 (E.D. Va. 2014); *Kitchen v. Herbert,* 961 F.Supp.2d 1181, 1194–1195 (D. Utah 2013); *Bishop v. United States ex rel. Holder,* 962 F.Supp.2d 1252, 1277 (N.D. Okla.2013). For the reasons stated in these decisions, *Baker* is no bar to this Court's consideration of the issues presented in this case.

CONCLUSION AND RELIEF REQUESTED

A core strength of the American legal system, and a central aspect of its tradition, is its capacity to evolve in response to "emerging recognition", *Lawrence*, 539 U.S. at 572, that attitudes and laws which were accepted in the past should now be recognized as, in fact, being hurtful and discriminatory. The lengthy, unbroken string of post-*Windsor* decisions striking down state law provisions preventing same-sex couples from marrying and/or precluding state recognition of same-sex couples'

marriages validly entered into in another state vividly illustrates the point stressed by the Court in *Lawrence* that

> ... those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment ... knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.

539 U.S. at 578-579. The MMA and related statutory provisions are such laws.

As a people and as a legal system, we now have the emerging recognition that, as the Court said of DOMA in *Windsor*, laws excluding same-sex couples from the right to marry discriminate against those couples and

> *... humiliate[] tens of thousands of children now being raised by same sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.*

Windsor, 133 S.Ct. at 2694 (emphasis supplied).

The MMA and related statutes violate both due process and equal protection, regardless of the standard of scrutiny applied, and the district court properly found that, in Judge Jones' words in *Whitewood*, *supra*, "it is time to discard them into the ash heap of history". 2014 WL 2058105 at *15.

For all the reasons stated above, the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This principle brief complies with the type-volume limitation of F.R.App.P. 32(a) (7)(B) because this brief contains 13,884 words excluding the parts exempted by F.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of F.R.App.P. 32(a)(5) and the type requirements of F.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14 point Times New Roman using Corel Wordperfect12.

Dated: June 9,2014 *s/Carole M. Stanyar*

CERTIFICATE OF SERVICE

CAROLE M. STANYAR hereby certifies that on the 9th day of June 2014, she served a copy of Appellees' Brief on Appeal, and this Certificate of Service, upon Assistant Attorneys General Kristin Heyse, Tonya Jeter, and Joseph Potchen and upon counsel for Ms. Brown, Andrea Johnson and Michael Pitt, ECF filers.

s/Carole M. Stanyar

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R. No.	Description	Page ID
44	State's Brief in Support of Motion to Dismiss Count II	767-769
46	Plaintiffs' Response to Motion to Dismiss Count II	821-824
66-1	Brief of *Amici Curiae* Constitutional Scholars	1315-1326
69-1	State's Brief in Support of Motion for Summary Judgment	1611-1625
79	Reply Brief to Response to State's Motion for Summary Judgment	1908
100	Plaintiffs' Motion to Bifurcate Trial	2027
105	Order Granting Plaintiffs' Motion to Bifurcate	2069
117	Plaintiffs' Motion *in Limine* to Exclude Testimony of State Defendants' Proposed Expert Witness Sherif Girgis under *Daubert*	2453-2465
139	Plaintiffs' Proposed Findings	3018-3044
143	Transcript, 2/25/14, Brodzinsky	3186-3262
144	Transcript, 2/26/14, Rosenfeld	3277-3278
144	Transcript, 2/26/14, Sankaran	3376-3392
145	Transcript, 2/27/14, Gates	3433-3435
146	Transcript, 3/3/14, Brown	3484-3509
147	Transcript, 3/4/14, Regnerus	3539-3594
148	Transcript, 3/6/14, Allen	3654-3748
149	Transcript, 2/28/14, Cott, motion for partial judgment	3775-3824, 3835-3838

150	Transcript, 3/5/14, Price	3822-3825
151	Findings of Fact and Conclusions of Law	3944-3974
152	Judgment in favor of Plaintiffs	3961-3975
157	Transcript, 3/3/14, *Daubert* Hearing, Sherif Girgis	3985-4019
158	Transcript, 3/7/14,Colloquy	4068-4069
164	Transcript, 2/25/14 Rosenfeld	4288-4330
165	Transcript, 3/3/14, Regnerus	4426
167	Transcript, 3/5/14, Marks	4632-4724
168	Stipulated Facts Regarding Plaintiffs (Trial Exhibit # 53)	4735-4736
169-1	[Plaintiffs'] Chauncey Report (Trial Exhibit # 51)	4744-4789
170-1	[Plaintiff's] Michigan Department of Civil Rights Report on LGBT Inclusion Under Michigan Law, Jan. 28, 2013, (Trial Exhibit # 50) filed by Plaintiffs	4805-4865
171-1	[Plaintiffs'] Brodzinsky Report (Trial Exhibit # 100)	4933-4934
172-1	[Plaintiffs'] Cott Report (Trial Exhibit)	4941