IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TIMOTHY B. BOSTIC, TONY C. LONDON, CAROL SCHALL, and MARY TOWNLEY, Plaintiffs, v. JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, and GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court, Defendants.	CIVIL ACTION NO. 2:13 cv 395

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

February 4, 2014

BEFORE: THE HONORABLE ARENDA WRIGHT ALLEN
United States District Judge

APPEARANCES:

GIBSON DUNN & CRUTCHER LLP
By: Theodore B. Olson
and
BOIES, SCHILLER & FLEXNER LLP
By: David Boies
Counsel for the Plaintiffs

HUNTON & WILLIAMS LLP
By: Stuart Alan Raphael
Solicitor General of Virginia
With Mark Herring, Attorney General

POOLE MAHONEY PC
By: David Brandt Oakley
Counsel for George E. Schaefer, III

ALLIANCE DEFENDING FREEDOM
By: David Austin Robert Nimocks
Counsel for Intervenor Clerk,
Prince William County, Michelle McQuigg.

(Hearing commenced at 10:01 a.m.)

THE CLERK: Civil number 2:13 CV 395, Timothy B. Bostic, Tony C. London, Carol Schall and Mary Townley, plaintiffs, versus Janet M. Rainey, in her official capacity as State Registrar of Vital Records, and George E. Schaefer, the III, in his official capacity as Clerk of Court for Norfolk Circuit Court, defendants, and Michelle B. McQuigg in her official capacity as Prince William Clerk of Circuit Court, Intervenor-defendant.

Are counsel for the plaintiffs ready to proceed?

MR. OLSON: We are.

THE COURT: All right. It's good to see you.

THE CLERK: Are counsel for defendants ready to proceed?

MR. RAFAEL: We're ready.

THE COURT: Mr. Shuttleworth.

MR. SHUTTLEWORTH: Yes, ma'am. I would like to introduce Theodore Olson and David Boies. They are both members of the Supreme Court United States bar and they are going to be arguing today.

THE COURT: All right. Good to meet you both. Welcome to our court.

MR. OLSON: Good morning, Your Honor. Thank you.

MR. BOIES: Good morning. Thank you.

MR. RAFAEL: Good morning, Your Honor. Stuart

Rafael. I'm Solicitor General of Virginia. With me is Mark Herring, the Attorney General.

THE COURT: All right. Good to have you both as well.

MR. OAKLEY: Good morning, Your Honor. David Oakley. I represent the Norfolk Circuit Court Clerk George Schaefer in his official capacity.

THE COURT: All right. Good to meet you as well.

MR. NIMOCKS: Good morning, Your Honor. My name is Austin Nimocks. We represent the intervenor clerk, Prince William County, Michelle McQuigg.

THE COURT: All right. Good to meet you as well. If we could start with counsel for the plaintiff, who's going to be arguing first?

MR. OLSON: Thank you, Your Honor. Theodore B. Olson.

THE COURT: All right, Mr. Olson.

MR. OLSON: If it pleases the court, I will take 10 minutes of our allotted time, and Mr. Boies will address the preliminary injunction issue for the remaining 10 minutes of the opening part of our presentation.

THE COURT: That will be fine.

MR. OLSON: Thank you, Your Honor.

THE COURT: You're welcome.

MR. OLSON: Virginia erects a wall around its gay

and lesbian citizens excluding them from the most important relation in life because of their sexual orientation and labels their intimate personal relationships as second rate, interior, unequal, unworthy, and void.

We believe that there are four fundamental issues before you today: What right is being denied; to whom is it being denied; what is the standard of review in examining the denial of that right; and what is the Commonwealth's justification for its discriminatory laws.

First, marriage. Marriage is a fundamental right. The United States Supreme Court has said that 14 times according to my count, going back to something like 1888. It has said that in the context of miscegenation, Loving versus Virginia. Persons in prison, deadbeat spouses, divorce, contraception, maternity leave, custody, family occupancy all across the board. Every time the United States Supreme Court has dealt with the issue of marriage it has said -- it states that it is a fundamental right vital to Americans. Fundamental -- a fundamental importance to all citizens. And what the court has said is that that is a right of privacy, a right of liberty, a right of association, a right of spirituality and a right of self identification. It is fundamental to the core of the individual and the individual's identity in life.

You will hear possibly on behalf of the defense of

the Commonwealth that the Commonwealth has some justification with respect to procreation or other things. But the point that the Commonwealth misses when it makes those arguments or those speaking on behalf of the Commonwealth when they make those arguments, it is that it's the right of the individual. It is not the right of the state. That is the country that we live in. We have rights as individuals which are fundamental and cannot be taken away.

Now that is what has been taken away from gay and lesbian citizens in the United States. It has been denied to those gay and lesbian citizens because of their status. What the Supreme Court has said in the Christian Legal Society, in the Lawrence case, and in the Windsor case most recently is that gay and lesbian individuals, a person's sexual orientation, makes them a member of a class. It defines them as a status.

So what the Commonwealth of Virginia is doing is taking away this fundamental right from a group of individuals because of who they are. This is something that is fundamental to them as individuals. And the purpose and affect of that, according to the Supreme Court in the Windsor case, is to impose a disadvantage, a separate status, a stigma. It denies them equal dignity because of who they are. So those are the first two points. It is a fundamental right to our citizens, vital to our identity and it's being

taken away from these individuals, the plaintiffs here and others like them in Virginia, because of who they are.

What the Supreme Court has said that these are characteristics that are fundamental to an individuals, their sexual orientation just like their gender, just like race, just like other things that we have identified and put in categories where we discriminate historically from time to time against individuals because of who they are. That is not American. That is not consistent with the due process clause of the constitution or the equal protection clause of the constitution.

The next point is how must that be evaluated. What standard does the court apply to evaluate the taking away of a fundamental right from a group of citizens because of their class, because of their status. We submit that that requires the strictest of scrutiny.

The Zablocki case, which is cited in the briefs, one of the marriage cases, specifically says that when -- and that case was dealing with people who hadn't paid child support. The Supreme Court said that that requires heightened scrutiny because of marriage is the fundamental right. And the United States Court of Appeals for the Fourth Circuit in the Waters versus Gaston County specifically addressed that issue. That was a decision that involved nepotism and the court was evaluating whether nepotism and

the restriction against nepotism was something that should be overturned.

And the court, specifically citing the Zablocki case, said nepotism wasn't related to marriage so it didn't require strict scrutiny. And then cited the Zablocki case as stating that restrictions substantially interfere with fundamental rights must be subjected to strict scrutiny. That's what the Fourth Circuit said.

Now strict scrutiny requires a careful examination of whether the state has the compelling governmental interest to withdraw a right and whether the right being withdrawn is necessary narrowly tailored to accomplish that compelling governmental interest. We submit it's not even close. I don't think anyone ever argued that the restrictions that Virginia's applying to marriage satisfies strict scrutiny. We submit that it would not even be close.

And that leads us to the fourth question: What is the justification by the Commonwealth of Virginia for taking away this right? We hear words like procreation. But the Supreme Court itself has said that procreation has never been a standard for getting married. In the argument on the marriage cases last March in the United States Supreme Court, Justice Kagan asks specifically a number of questions about this and said people over a certain age are not going to have children.

The District Court in the Perry case, that came from California, the Proposition 8 case, the Judge said -- in response to our opponent was arguing about procreation, he said I performed a marriage last week between two people were in their 80s. They are not going to have children.

Procreation has never been a condition. You don't have to establish that you are going to procreate, that you want to procreate, or you're capable of procreating in order to get married. So that can't be a justification.

Then we hear arguments based upon something called responsible procreation. The State wants to have marriage for people of opposite sexes so that they will channel their sexual activity into the institution of marriage. But there's two points with respect to that. It's not the state's right to impose a restriction on marriage because it wants to accomplish some social objective. The state could decide tomorrow we don't want procreation or we don't care about responsible procreation and change the rules. No because it's an individual right. It goes to the heart of who the individual is, their liberty, spirituality, and so forth.

The Romer case by the United States Supreme Court said that even in the context of a rational basis standard, the objective must be tied to the ends that are being sought by the statute. It must be -- what is sought by the statute

must attain those means, the ends or the objective or the aim of the statute itself. There is no connection between something called responsible procreation, whatever that might be, and what Virginia has set out to do.

Allowing gays and lesbians to get married and have that fundamental right does not discourage heterosexuals from getting married. It doesn't discourage heterosexuals from having children. It can't possibly do that.

So what we have in this statute and this stricture of statutes and legislation and constitutional provisions is exactly what the Supreme Court was talking about in Windsor. The purpose and effect of the statute is to put gay and lesbian citizens into a second class status. Their marriage or their relationship is second tier. It can't be called marriage. And the Virginia statute goes far beyond that because it prohibits any relationship, any legal contract between individuals of the same sex who aren't married that might approximate or might be anything like marriage or might have the same effect of marriage. Virginia goes further than California ever went in the Proposition 8 case or where a number of other states have gone. Virginia prohibits relationships between individuals that attempt to attain anything like maybe a division of property or something like that that is remotely like marriage.

I will reserve the balance of my time and then for

rebuttal and turn it over to my colleague David Boies, and just finish by summarizing. This is taking away a fundamental right from individuals because their immutable characteristics because of who they are. It is subject to very strict scrutiny, but whether with strict scrutiny or rational basis the final point is that justification which has been offered by the state does not begin to give a good valid reason for why this is being done. In fact, the purpose and effect as the Supreme Court said in the Windsor case, and might have been talking about Virginia, is to demean, humiliate and put our citizens into a separate subordinate status.

THE COURT: All right. Thank you very much.

MR. OLSON: Thank you, Your Honor.

THE COURT: Mr. Boies.

MR. BOIES: May it please the court, my name is David Boies.

THE COURT: Good to see you again.

MR. BOIES: Your Honor, every court to consider this issue has held that laws that prohibit gay and lesbian citizens from marrying the person they love seriously harms them and seriously harms the children that they are raising. Even where there has been as it was in the Ninth Circuit a dissenting opinion, the dissent did not take issue, and indeed I submit to the court it is impossible on the state of

the record before this court, to take issue with the seriousness of that harm.

Whether or not that harm violates the constitution has been argued primarily based on whether the state has a justification for this classification. Because there can be no doubt that depriving gay and lesbian citizens of the right that the United States Supreme Court has talked about as the most important right in a person's life, basic to their concept of liberty and privacy, spirituality, there is simply no basis of which I believe it can be seriously argued that this does not seriously harm them. And the record before the court, that we put before the court, demonstrates that that harm goes to the children that gay and lesbian couples are raising as well. That these children are seriously harmed by the -- and this is evidence that comes not just from experts that we have identified but experts from the various defendants that have identified throughout the country. Seriously harms the children by depriving them of the stability and the recognition and legitimacy that marriage conveys.

So in looking at a motion for preliminary injunction we begin with a proposition that we have here serious irreparable harm.

Now in the Rainey brief, at page 20, they say that in a constitutional case the traditional four factors that

the court considers in determining whether a preliminary injunction should issue, actually claps into the first factor of likelihood of success on the merits. Whether or not that is true, and we are prepared to accept that that is true, but whether or not that is true, we believe the case from preliminary injunction hearing is compelling.

First, there is clearly irreparable harm. The plaintiffs and the child they are raising are -- one of the couples is raising clearly evidence of irreparable harm.

As the Fourth Circuit held just last year in Centro Tepeyac against Montgomery County, 722 F.3d, and particularly at pages 190 and 191, that where you have a constitutional violation at issue the irreparable harm is clear, and the need for a preliminary injunction is particularly important. And here, the likelihood of success on the merits as Mr. Olson has identified is again clear. So you have likelihood of success on the merits and you have irreparable harm.

And as the Fourth Circuit again said in Centro Tepeyac against Montgomery County, where you have constitutional rights at issue there is no harm to the state in issuing an injunction. Indeed, as the court says in page 191, what that does is it improves the system because the State's function is to provide rights and protect the rights of its citizens. And so where the court issues a preliminary

injunction it validates important constitutional rights. That is something where the state, contrary to having an adverse interest, actually has a positive interest once the court concludes, if the court does, that there is a likelihood of success of merits.

And I suggest if you look at what the court's have done in -- and I understand these are not binding decisions but they are very well written and we would urge the court persuasive decisions in Utah, in Oklahoma, in the SmithKline Beecham case, unanimous Ninth Circuit case holding heightened scrutiny applies, in the Supreme Court's decision in Windsor, in the District Court in California's decision in Perry, in the Ninth Circuit opinion in Perry, which while vacated is not authoritative is still persuasive we submit to the court. All of those go to the likelihood of success on the merits. And so you have likelihood of success on the merits, you have irreparable injury, you have a balance of hardships tilting decidedly in favor of the plaintiffs, and you obviously have the public interest in preserving the constitution.

Now what do you have on the other side, if anything? At the other side all you have is a desire to preserve the status quo. And what we have done in our preliminary injunction is we've narrowly tailored to protect the rights of these four plaintiffs. We have narrowly tailored so that there could be no argument that there is any disruption to

the state, that there is any interference with administrative functions. This is not a situation in which we are asking in a preliminary injunction to enjoin the statute statewide. We are asking that as part of our permanent relief, and if and when we ever get there, we urge the court that that preliminary relief -- that that permanent relief should not be stayed, but at this point in terms of our preliminary injunction, which is important to protecting the vital irreparable rights of these plaintiffs, we are asking only for a preliminary injunction that affects these four plaintiffs. And we have done that consciously in order to prevent any kind of argument that this is going to disrupt the statewide system. We have done this consciously to provide any argument that says this is going to require us to rework all of our tax tables, or change all of our forms. All we are asking is that these four plaintiffs who have come to court seeking this relief get that relief and get it now.

We also would ask the court in considering the motion for preliminary injunction to take into account the extent to which these plaintiffs have for a long period of time already been deprived of these rights. And that the message that the Commonwealth of Virginia sends to people when they enforce this law is a message that says these are second-class citizens. These are people who it is appropriate for the state to discriminate against based on

their status. These are not people who belong in our society. And I would ask -- I would ask -- I would say to the court as the Ninth Circuit said of the Windsor decision that when the government sends this message and continues to send this message, it is a terribly disabling harmful message. Harmful not only to the plaintiffs but harmful to our broader society because when we discriminate based on status, we discriminate and we harm not only the people that we discriminate against, we undermine the culture of this country. The culture of this country is a culture of equality, openness, privacy, and liberty. We are a country that doesn't have common ancestry. We don't have common language today. We don't have common ancestral lands. What binds us together as a country is our culture. That is a culture of equality and open opportunity and nondiscrimination. And as we have -- as we have over the last many, many decades, we move one barrier of official discrimination after another. We have become more true to that culture.

What we are asking to the court to do today is take the next step with respect to these plaintiffs and give them immediate preliminary injunction relief.

If there is an argument, and we saw some argument in the papers, that somehow there may be a danger that this could get reversed on appeal and that would put their

marriage in jeopardy, that is a risk that the plaintiffs take. That is not a risk for the state. The plaintiffs are prepared to take that risk. The plaintiffs ask this court urgently to allow them to do that. Thank you.

THE COURT: All right. Thank you very much. All right. Counsel for Defendant Rainey.

MR. RAFAEL: Good morning, Your Honor. Stuart Rafael.

THE COURT: Mr. Rafael, good to see you. You may proceed.

MR. RAFAEL: Your Honor, I wanted to cover four issues today: The fundamental rights analysis, the equal protection analysis, the fact that we agree with the plaintiffs that the marriage ban cannot satisfy a rational basis scrutiny, let alone heightened or strict scrutiny, and I want to end by talking about what I think the Virginia Attorney General brings to this issue in this case.

So let me start with the fundamental rights analysis. The main flaw we think, Your Honor, and the argument that has been made in support of the ban on the same-sex marriage is the argument that there is no traditional right to same-sex marriage. That's the same argument that was made in Brown versus Board and the same argument that was made in Loving versus Virginia.

In Brown versus Board, the Virginia, my predecessor,

stood here and said there is no traditional right to integrated schools. In fact, when Virginia approved the Fourteenth Amendment, the same legislators who did that mandated segregation in schools. There is no traditional right to integrated schools. And then in 1967, my predecessor stood here and told the court and ultimately the Supreme Court that there was no traditional right to interracial marriage because Virginia had banned interracial marriage since colonial days.

So we know from these cases they teach that tradition is not the basis for determining whether the right that is at issue here, the equality of principle, the equality of right principle, whether that right applies in this case.

I think, Your Honor, that the court in Obergefell, the District Court of Ohio in their recent decision that we cited, really nailed it when it said that in individual cases regarding parties to potential marriages with the wide variety of characteristics. The Supreme Court consistently describes a general "fundamental right to marry" rather than a right to interracial marriage, the right to inmate marriage, or the right of people owing child support to marry. The issue is the right to marriage and how that applies to the class at issue in this case.

I also noticed in preparing for the argument today

that the court said something quite similar to this in the Lawrence versus Texas case. You recall Lawrence versus Texas reversed the Bowers versus Hardwick decision. Lawrence held that state laws prohibiting consensual homosexual intercourse violate the Fourteenth Amendment. And in analyzing what the court did wrong in Bowers it said that the court had defined the right too narrowly. This is from the Lawrence discussion at page 566 to 67. The court began its substantive discussion in Bowers as follows: "The issue presented is whether the federal constitution confers a fundamental right upon homosexuals to engage in sodomy." And the court went on to say that statement we now conclude discloses the court's own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward just as it would demean a married couple where it said that marriage is simply about the right to have sexual intercourse.

The rational in Lawrence was that persons in a homosexual relationship may seek autonomy for these purposes just as heterosexual persons do. And it's very interesting, if you look Evans and you look at -- Romer versus Evans, you look at Lawrence, and you look at Windsor, Justice Kennedy was the deciding vote in all three of those cases and Justice Scalia was the dissent in all three.

In Romer, which struck down Colorado's constitutional amendment voted by majority of Colorado people, that amendment said that laws that discriminated against -- that prevented discrimination on the basis of sexual orientation could not be enacted by local government. The Supreme Court struck that down in an opinion by Justice Kennedy and Justice Scalia wrote a dissent.

Well we know from Bowers that the state can prohibit homosexual intercourse, and if it can do that it can disapprove of homosexuals too. Well of course Bowers was overruled in Lawrence. Lawrence comes along. Justice Kennedy writes the opinion there striking down Texas's ban on sodomy laws. And at that point Justice Scalia writes a dissent well if you can't have laws based on immorality like this, then there is going to be no basis to prohibit laws against same-sex marriage. And he was right.

And the same thing happened in Windsor. When the Supreme Court struck down section three of DOMA, Justice Scalia again in dissent said well if you can't have laws based on immorality, then we know what's next. And we think that he got -- we think that he was correct in his prediction and we think that Justice Kennedy got it right each time because the principle at issue is the ancient principle of equality of right.

Let me turn to the next point which is I think that

this case is legally, legally is indistinguishable from Loving. Now prior government counsel for Rainey argued that Loving was distinguishable because racial discrimination was the main purpose of the Fourteenth Amendment, and we are not dealing with racial discrimination here. But as we point out in our papers, that exact rational was rejected specifically by the Supreme Court in the Zablocki case where it said that interracial marriage had not been recognized by the founders and yet it was struck down as unconstitutional in Loving.

I would point out, Your Honor, that Zablocki has not been cited by our predecessors as counsel for Rainey and I don't believe it's been cited by either Clerk McQuigg or Clerk Schaefer.

The arguments that were made by Virginia's counsel in Loving are the same arguments that have been made in support of the same-sex marriage ban here. That it's a matter of state's rights to determine who should be married. That it was the intent of the framers that they would not be interracial marriage.

And then lastly they pointed to the latest in eugenics evidence in 1967 that suggested that the children of same-race marriages were developmentally disadvantaged compared to the children of same-race marriage. At oral argument in 1967 Virginia's Attorney General condensed those down to two points. One, the tradition point, the framers

never thought that the Fourteenth Amendment would apply to interracial marriage. We know the Supreme Court didn't agree with that point. Then he argued secondly that there was a rational basis for bans on interracial marriage because the legislature might find from the social science evidence that the children of those marriages were worse off. The court would have none of it.

I actually listened to the oral argument on oyez.org of the argument that was made in the Loving case, and it really is illuminating. Chief Justice Earl Warren pressed Virginia's counsel about the lack of a limiting principle in what he was arguing. He said well could the state prohibit marriage between interreligious couples and his answer was I think the evidence in support of the prohibition of the interracial marriage is stronger than that for the prohibition of interreligious marriage.

It's scary to contemplate that somebody could actually justify this type of discrimination. And as of course the court is aware the Supreme Court was unpersuaded.

Now if you think about it, even assuming for argument sake that the children of same-sex couples raised in that -- in a same-sex couple environment, even assuming for the sake of argument that some of those children might be worse off than children raised by quote natural parents, opposite-sex marriages, that cannot possibly justify the type

of sweeping categorical prohibition at issue in this case. It is no better than the unconstitutional presumption in the Stanley versus Illinois case that unwed fathers could never ever be good parents so those fathers had to see their children taken away from them if the mother -- the natural mother died. The Supreme Court would have none of it.

In this case neither our predecessors nor counsel for McQuigg or Schaefer are arguing I believe that the children of same-sex couples are at some kind of disadvantage compared to the children of opposite-sex couples. The amici professors who you offered leave to argue here, even they don't make that argument. What they say in their papers at -- this is Document 64 at pages 3 to 4. They say that a claim that another parenting structure provides the same level of benefit should be rigorously tested and based on sound methodology and representative samples. And they go on to say at page four, what is clear is that much more study must be done on these questions. Really? I mean we have to study that issue and then based on that we are going to allow the state to prohibit an entire category, a class of citizens from marrying? That just can't be right. It just can't be right. It's the same argument that the Supreme Court rejected in Loving and in Stanley.

Let me turn if I can to the other main error I think in the position of those in favor of the ban on same-sex

marriage, and that's the assumption that marriage is about procreation only. That's really a major flaw. You cannot square that position with the Supreme Court's decision in the Griswold and Turner cases. Again cases not even cited by prior government counsel here.

Griswold upheld the right not to procreate. It struck down Connecticut's law that prohibited married couples from having contraception. And the court went on to say in words far more eloquent than I could have written. That marriage is about the coming together for better or for worse, in intimacy to the degree of being sacred, a harmony in living, a bilateral loyalty, as noble a purpose as any involved in prior decisions.

And the court in Turner upheld the right to marry even by prison inmates who couldn't consummate the marriage. And again talked about these beautiful eloquent things about what marriage is: An expression of emotional support, public commitment, spiritual significance, an expression of personal dedication, but the court went on to say it's about more than that too because there are lots of economic and legal benefits that go along with being married that prisoners have a right to enjoy. All of those same considerations apply equally to same-sex couples who wish to marry. And we cited former Attorney General Robert McDonnell's opinion from 2006 that lists all the things that same-sex couples can't get in

Virginia. Leaving off things like being a wrongful death beneficiary, spousal privilege, but most importantly the right to adopt children. I mean what more important right is there than that? And same-sex couples can't exercise it.

Let me touch on the equal protection analysis. As we pointed out in our papers that we think that apply strict scrutiny because this is a determination on a basis of a fundamental right. You don't really need to decide the doctrinal questions under the equal protection clause about whether, you know, this is gender discrimination or whether heightened scrutiny applies to discrimination based on sexual orientation, but we think you certainly could decide those things.

We disagree with our predecessor who argued that Baker versus Nelson controls the decision here. Clerk Schaefer in her latest paper argues that Windsor had an opportunity to reverse Baker but said nothing about it. I would take -- I would actually draw the opposite inference. The fact that none of the justices said anything about Baker versus Windsor, it's actually -- Baker versus Nelson is actually quite amazing in light of the fact that the parties argued it vigorously in their papers. The only time it came up in front of the Supreme Court was at oral argument in the Hollingsworth case where the Charles Cooper, counsel arguing to defend Prop 8, relied on it and Justice Ginsburg said,

Mr. Cooper, Baker versus Nelson was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny, and the same-sex intimate conduct was considered criminal in many states in 1971, so I don't think we can extract much from Baker versus Nelson. And that's why, Your Honor, we didn't see it in any opinion in Windsor or Perry.

There is no response from any of the clerks or from our prior counsel on the fact that there have been major doctrinal developments since that case.

Clerk McQuigg in her recent filing, document 116, argued that the Agostini versus Felton line of cases applied. Case that says when the Supreme Court decides something in a full written opinion and you think it's been erased, you know, a lower court shouldn't act contrary to that until the Supreme Court says you can. That line of cases does not apply in my judgment to summary dispositions like you had in Baker versus Nelson. The Supreme Court has given us a decision, a rule of decision in the Miranda -- Hicks versus Miranda case and actually points to the idea that you can have doctrinal developments that undermine a summary affirmance. And of course the two most recent courts that have looked at this in Utah and Oklahoma agree that Baker versus Nelson was no longer controlling.

Let me turn if I can to the argument that the ban

here satisfies rational basis review. We don't think it does. Neither prior government counsel nor McQuigg nor Schaefer tries to defend the ban under heightened or strict scrutiny. I think that omission is telling. I think it's a concession. I think the court can take that as a concession that if heightened scrutiny applies, the ban is clearly unconstitutional. The only basis for the defense has been it satisfies the rational basis test. And I think the way the argument has been made is it is wrong. Because what the argument you have heard from our prior government counsel was the state just has to come up with some reason to justify opposite-sex marriage. And if we have any good reason for that, and it doesn't matter that we don't let anybody else get married. That just can't be right. Because the reason they have come up with is this responsible appropriation optimal child rearing rational but as Mr. Olson pointed out that would justify barring marriage by the infertile, elderly or by people who have no interest in having children. We are going to subject those laws to rational basis review? Those would be totalitarian laws everybody would agree. So it just can't be right that that hassles muster under rational basis review.

Moreover, the main case that Court Clerk McQuigg relies on, Johnson versus Robison, I think demonstrates that it's not enough simply to come up with a reason for the group

you're favoring. You have to come up with a reason for disfavoring the other group. In that case it was conscientious objectives. Veterans of the military got educational benefits but conscientious objectors didn't. And the Supreme Court said there is a good reason for offering these benefits to veterans because it makes them willing to serve. Conscientious objectors aren't going to serve either way, so there is a good reason they don't need to get those benefits. At least the court looked at a rational basis for denying the excluded class. Here, they don't do that. It's a little bit like the Romer case where Colorado tried to justify its ban, its constitutional amendment prohibiting laws against discrimination against homosexuals. They had two grounds for that. Number one, they said we want to protect the right of heterosexuals to associate, and number two, we want to -- the court said protect -- limit the -- or protect the state's resources in enforcing antidiscrimination laws.

Justice Kennedy thought that those reasons fail even rational basis review. He said the breath of the amendment is so far removed from these particular justifications that we find it impossible to crack. And you should have the same conclusion about the arguments that Virginia's prior counsel made in this case.

I do want to take issue with one thing that my

friends for the plaintiffs have argued. I don't think the court -- we agree with them on the merits. But I don't think the court should issue an injunction that's not stayed. I think the better course would be to follow the lead of the Federal District Judge in Oklahoma who looked at what the Supreme Court did in the Utah case. Right, in Utah the District Court issued the injunction without a stay. That was appealed to the Tenth Circuit. The Tenth Circuit let the injunction stand. The Supreme Court without opinion set it aside. You know, we're going to wait until this goes up. When the Oklahoma judge issues the injunction in that case, the court took note of what the Supreme Court had done and issued a stay right away. I think that's the better course here. It's not enough to say that this case is limited to these four plaintiffs because if you issued a rule saying that Virginia's ban is unconstitutional and limited it to these four plaintiffs, tomorrow you would have 100 or 1,000 or 10,000 people banging on your door saying that they are entitled to that same rule as well.

From the state standpoint, if you had -- we think this issue is ultimately going to go to the Supreme Court and the Supreme Court is ultimately going to agree, but if it didn't, it would be a very difficult thing to undo marriages that took place in the interim. What would you do with the children who are adopted by same-sex couples in the interim

if the marriage is subsequently set aside? What would you do with insurance benefits that were paid based on spousal status if that status were set aside? What would happen to property that passes by intestate succession if the marriage were later set aside? And Utah faced all kinds of problems when it went through this roller coaster of marriages and then having them stayed. It was -- it's a huge mess there because of what happened. So we think that the court would be well advised to follow the Oklahoma court's lead.

Now I would point out that Virginia's position here, Your Honor, is that we are going to continue to enforce this ban until we are told not to because we think that that's the right thing to do procedurally. It's very similar to what the Obama administration did in the Windsor case. And I think that that creates the ideal vehicle for getting this case ultimately decided by the Fourth Circuit and the Supreme Court.

This is not an Attorney General detail. The Attorney General is not rolling over and agreeing the law is unconstitutional. We want both sides of this argument to be fully heard. And you're going to hear from the clerk's counsel, I imagine a very vigorous defense of the law, but only the US Supreme Court can decide this issue. It's got to get there and this is a great vehicle for it to do that.

Let me end by just saying what I think that the

Virginia Attorney General brings to bare here. Number one, we are not going to make the mistake that our predecessor's made in Loving. They could have not defended Virginia ban on interracial marriage and they chose to defend it. We think that the law is clearly on our side here. We think the majority of the Supreme Court is going to go our way on this and that therefore the Attorney General made a courageous decision not to defend the Virginia constitutional provision because in our judgment it clearly conflicts with the US constitution.

The second thing we bring to bare is the history of Virginia on this. Predecessors have stood here in Brown versus Board and Loving, the VMI case, and in all of those cases -- we point this out in the conclusion of our submission. All of those cases were really controversial when they were decided. Really controversial. We look back now and we wonder, gosh, how could they have been so controversial, but at the time they were really controversial. They weren't controversial because of the legal principle. The legal principle is an ancient one, a quality of right. They were controversial because of the perception about how that principle applied at that time in history. And I'm confident that we are going to look back maybe even two years from now on today and say well of course that was the right outcome. It's kind of like what John

Kennedy said to a friend after he approved the 1963 Civil Rights Act after the violence in Birmingham and the march on Washington, and he said sometimes you look at what you do and you ask why didn't I do it sooner.

Thank you, Your Honor.

THE COURT: Thank you very much. Mr. Oakley.

MR. OAKLEY: Good morning, Your Honor.

THE COURT: Good morning.

MR. OAKLEY: May it please the court, I am David Oakley. I'm here representing Norfolk Circuit Court Clerk George Schaefer in his official capacity. He's been brought into this lawsuit because two of the plaintiffs in this case, Mr. Bostic and Mr. London, came to his office and -- this was shortly after the decision in Windsor -- and sought a marriage application. They are two men. And because of that under Virginia's existing laws, the statutory and under Virginia's constitution, George Schaefer's office could not issue that marriage license, and that's why he's being brought into this case. And I do believe he probably is a proper party for that reason. His office is in charge of enforcing -- enforcing Virginia marriage laws to the extent that he is issuing these licenses.

And what I would like to start off with is what this case is about for George Schaefer and what it's not about. This case is about the constitutionality of the definition of

marriage as only being between one man and one woman, and that's -- and whether or not that definition is constitutional under the due process and equal protection clauses of the Fourteenth Amendment. In other words, can he constitutionally continue to refuse issuing marriage licenses to same-sex couples. And this case is also about the process and respect for the process of passing our laws due to the general assembly and enforcing our laws and eventually as we are doing here testing the constitutionality.

What this case is not about for Clerk Schaefer, it's not about whether or not the plaintiffs have love for each other, whether or not they are in a committed relationship, whether or not they can adopt children, whether or not they can raise children. This case is not -- for George Schaefer it is not about whether the Commonwealth has to recognize civil unions or marriages that are entered into in other states. Those sorts of allegations are not made against Clerk Schaefer in his official capacity.

And that leads me into the issue of standing, the Plaintiffs Shaw and Townley. Plaintiffs Schall and Townley they were married in California and that's -- and part of their claim is that the Commonwealth of Virginia does not recognize their California marriage.

Well they have made no allegations that Clerk Schaefer has committed any act or omission which affects

them. He has not done anything to create any injury, Plaintiffs Shaw and Townley. They haven't sought to have their marriage recognized by his office. They haven't sought to get a marriage license from his office. And they have filed this as Section 1983 claim for a violation of their civil rights. And one of the most basic premises of the 1983 claim is that you have to have someone who's acting under color of state law that denies you a civil right. And the way that this has been alleged with Plaintiffs Shaw and Townley, Clerk Schaefer simply hasn't done that. He's not denied them of any civil right, so therefore we ask that the claims brought by Miss Shaw and Townley be dismissed as they pertain to Clerk Schaefer.

And it's important for a couple of reasons.

First, it's possible that this court could decide that Virginia's definition of marriage is constitutional. It passes rational basis review. And that would still leave the question open well what do we do about the recognition portion of the Virginia constitution? Does Virginia still have to -- does Virginia have to recognize a California marriage or a New Jersey marriage? And George Schaefer is not involved in that portion of the argument.

And also, secondly, it's an important issue because Miss Schall and Miss Townley, they are seeking their attorney's fees against Clerk Schaefer and to the extent they

haven't stated a claim against him, they should not be entitled to those attorney's fees.

As I said, this case really it's about the process. The voters of Virginia they elect their legislators in the General Assembly. 2004 the General Assembly passed a bill saying that a marriage is -- confirming that a marriage is only between a husband and a wife, a man and a woman. And then in 2006, the process continued and there was a constitutional amendment under the Marshall-Newman Amendment which was voted on by both the legislature and approved by 57 percent of the voters that again confirming the definition of marriage is only between a man and a woman. And that legislative process is to be respected. It allows for more open and public debate, and it really is the better avenue to create -- to effectuate a great social change like this when you're changing the basic understanding of concept what is marriage. It's always been between man and a woman. Throughout history -- and Miss Rainey in her original brief she filed in support of her motion for summary judgment brought by prior counsel, they went to great length to show the long history of marriage is only being between a man and a woman.

And one of the -- another lesson that we can take from Windsor is that -- in this case the plaintiffs -- if you decide in favor of the plaintiffs -- actually I take that

back. If you decide against the plaintiffs, if you determine that the definition of marriage is constitutional, then you're not taking away a right that the plaintiffs already have. But once plaintiffs have that right to same-sex marriage, then taking it back away from them is very difficult. And as we found out in Windsor, the individual state -- certain states had provided the right to same-sex marriage but then the federal government took that right away in the eyes of the federal law because of the federal definition of marriage under DOMA.

And the Windsor court goes on to talk about how it truly is a state's right to define marriage, and in their concepts of federalism throughout the Windsor case, and they say the states have a historical right and have always defined marriage. And it really is best to leave that to general assembly and to the voters so that that legislative process can continue. And that legislative process indeed is continuing.

I checked the other day and I believe there are seven different resolutions before the General Assembly that are pending today to unwind the Marshall-Newman Amendment and allow for same-sex marriage. And if it truly has been a shift in political opinion, and if you read the newspapers, maybe there has been a shift and maybe the Marshall-Newman Amendment would not pass today. And if that is the case,

it's more appropriate to allow the General Assembly and the voters to make that decision.

But until that law is changed, until either the legislature or there is a binding court precedence saying otherwise, Clerk Schaefer has to continue to follow laws as well as all the other circuit court clerks across the Commonwealth.

He is an independent elected state official. His office is created by the constitution of Virginia. He is considered a constitutional officer much like a sheriff. And he is not controlled by the state government. He is not beholding to the state government and just like he is not beholding to the local government, the City of Norfolk. He has specific duties that he has to carry out and those are all prescribed by statute but he also takes note that he's sworn to uphold the constitution.

And in light of the binding precedent that we do have, and there is nothing to show that same-sex marriages are entitled to anything other than rational basis review, so these laws are presumed constitutional. Virginia's definition of marriage is presumed constitutional. So Clerk Schaefer is bound to continue to follow that law, to enforce that law, because we are a nation and Commonwealth of laws. And if state officials and state officers could have the ability to go around and just decide which laws they wanted

to enforce, we would have anarchy. And there are serious repercussions if Clerk Schaefer decides that he is not going to follow the laws. If he had issued a license, a marriage license to Mr. London and Mr. Bostic or any other same-sex couple, he is subject to penalties. He could be put in jail. He could be taken out of office.

And with all due respect with the Attorney General's new position on this issue, that change in position does not affect Clerk Schaefer. He is an independent officer and he is entitled -- I believe he is required to continue to defend the constitutionality of these laws and continue to enforce this definition of marriage in Virginia.

And the idea of the concept, the definition of marriage, it does go back a long ways and all of the binding precedent that is out there says that same-sex couples are not -- for constitutional reasons are not viewed as a suspect classification.

There is -- there are several cases from the United States Supreme Court that deal with the idea of marriage and what -- and the idea of marriage it is a fundamental right. I believe all of those cases that specifically say marriage is fundamental right. They do so in the context of marriage between a man and a woman.

Loving v Virginia which is cited by the plaintiffs and by the attorney general now is a basis for this -- for

their arguments. Loving v Virginia was obviously between a man and a woman. And one of the cases that continues to be binding is Baker v Nelson.

Baker v Nelson is the case which challenged Minnesota's -- challenged Minnesota's definition of marriage which was interpreted to be only between a husband and wife, a man and woman. And two men attempted to get a marriage license. And they were denied such license by their local court clerk. They appealed it all the way to the Minnesota Supreme Court, who analyzed it under several different constitutional provisions but specifically Fourteenth Amendment under due process and under equal protection. And they found that the institution of marriage as a union of a man and woman, uniquely involving the procreation and rearing of children within the family, is as old as the book of Genesis. This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislature.

And what's really interesting about that case, which eventually was appealed to the US Supreme Court and summarily dismissed, is that all of this happened in the wake of Loving v Virginia. So that idea of a fundamental right to marriage was fresh in everyone's mind at that point in time both in

the Minnesota Supreme Court and eventually when it went up to the United States Supreme Court and the Minnesota Supreme Court in Baker, specifically addressed Loving and said it was inapplicable in that situation.

It appears that for the most part everybody here agrees that a summary dismissal like that is binding precedent on the merits. It is a decision on the merits but where we appear to disagree is whether or not there has been a doctrinal change coming from the United States Supreme Court sufficient to ignore Baker.

And the line of cases that I think are cited most often are Romer v Evans, Lawrence v Texas, and United States versus Windsor.

Romer v Evans is sufficiently different than the definition of marriage that we are dealing with here today. Romer v Evans was a case where they passed a statute in Colorado saying you couldn't have any protection for homosexuals whatsoever essentially and the Supreme Court found that was discrimination against homosexuals as a class undertaken for its own sake. Well in this case we are not dealing with discrimination only against homosexuals and it's against same-sex couples and that's a different classification.

So I want to talk in a little bit about how are we going to define the class here. And I believe the Romer v

Evans was sufficiently different from the case at bar to show that it was not a doctrinal change but another interesting fact from Romer v Evans they didn't analyze that case that under rational basis review not strict scrutiny. There was no finding that homosexuals were a suspect class or a had fundamental right in that case. It was a solely limited to rational basis review.

And same goes for Lawrence v Texas. That was also cited under rational basis review and that dealt with criminal penalties. The only criminal penalties that are issued here is the potential that George Schaefer could go to jail if he violated the law. There are no criminal penalties at issue here for the same-sex couples that are seeking marriage licenses.

And finally in United States versus Windsor, that was a very narrow holding. The majority opinion at the end of the case they wrote was specifically limited to the facts of that case, and that it didn't necessarily make any sort of other doctrinal changes, and because they limited the holding -- and also because the idea of federalism was implicit or explicit throughout that case. It was the Supreme Court recognized that the federal government was invading something that was historically left to the states, the definition of marriage, and by allowing certain states to define marriage as including same-sex couples, and then the

federal government going in and taking that right away, the federal government was overstepping its bounds.

And they -- one of the other lessons from Windsor is they define that class very narrowly to only be those same-sex couples who had a valid marriage that was recognized in their state and then lost that recognition when it came to federal law. For those reasons I believe that there has not been an explicit doctrinal change by the Supreme Court. If anything, they have been consistent. They have continued to review these cases under rational basis review.

I think Windsor, Justice Scalia says a lot of things in his dissent and one of the things that he touches on is well what is the -- what is the level of scrutiny that we are applying here. And he says that well obviously it's not strict scrutiny. It's not intermediate scrutiny. It's maybe not necessarily our traditional idea of rational basis review. It's not heightened scrutiny. And unfortunately the Windsor court didn't explicitly say what level of scrutiny they were providing, but as Justice Scalia said, the lower courts are free to distinguish away.

And there have been many, many cases that have been cited in both the briefs that I've submitted and the briefs submitted on behalf of Clerk Rainey and -- Miss Rainey and Clerk McQuigg where Baker v Nelson has been followed by district courts from around the country. And obviously there

are -- there are cases going both ways. Some follow it, some -- and the case out of -- recent case out of Oklahoma, both of those have gone the other way so there is a split in the decisions that have come out, but Baker v Nelson has continued to be followed.

And so since we are dealing with rational basis review, there is no fundamental right to marriage between same-sex couples. The only fundamental right to marriage is as it is traditionally known, between one man and one woman, a husband and a wife. But we do, if we are going to look at this under rational basis review, we do have to identify the class. And following the lead on Windsor, we need to define this class as narrowly as possible. And that class should be same-sex couples who are seeking to have a marriage license in the Commonwealth of Virginia.

The class here it's not -- it's not all homosexuals. Not all homosexuals desire to be married. It is solely limited to those same-sex couples that want a Virginia marriage license. And so if we are going to talk about rationale basis review, a standard for rationale basis review is that rationale basis review will sustain a law, and according to Romer v Evans, if it can be said to advance a legitimate government interest, even if the law seems unwise or to the disadvantage of a particular group, or if the rationale for it seems tenuous. And it is the plaintiff's

heavy burden here to disprove and show that there is absolutely no conceivable rational legitimate reason for this law, for Virginia's definition of marriage.

It doesn't have to be -- the legitimate policy reason doesn't necessarily have to be in the legislative record. It doesn't necessarily have to be supported by empirical evidence. The -- it's truly not the government who's defending a law under rational basis. It's not the government's duty to absolutely prove what that policy is but we will talk about some of the reasons that have been put out there but it's just some possible conceivable reason that could have been relied upon by the legislature.

And there are certainly a lot of reasons that have been put out there for the -- there are posed as the legitimate reason for this definition of marriage. And my client on a personal basis may or may not agree with any or all of them but he's been sued in his official capacity, and just because he doesn't agree with the justification, Your Honor, you don't have to agree with the justification as long as it was legitimate.

Some of the reasons that have been put out there are first marriage as has been traditionally defined is longstanding and the plaintiffs certainly make the case that well just having a longstanding reason or longstanding law, law of antiquity, that in itself is not enough to affirm the

agreement under rationale basis for review. And I concede that is true. That by itself is not enough but when you have a law like this, really an idea that's been accepted by society for so many years, unwinding that shouldn't be done. It can't be arbitrarily set aside unless there is a very strong case. Certainly the antiquity of the law is something even though it may not be determinative by itself is something the court should seriously consider.

Another idea that is often put out there is the idea of promoting natural procreation. We also hear a lot about promoting stable families, having children raised in a two-parent household. Some people even go so far as to say it needs to be the natural parents.

There is also the idea that by disallowing -- by keeping this traditional definition of marriage you're discouraging people from going out and abusing the idea of marriage, going out and getting married solely to qualify for benefits, tax benefits, death benefits, health care, whatever else that they would not otherwise qualify for.

Some people have put forward the argument that it prevents the weakening of traditional family values and a lot of people also argue that marriage as an institution is not as strong as it once was and by allowing same-sex marriage you continue to erode that marriage is an institution. And those are ideas that are certainly out there. Those are

purposes they have been put forth as legitimate reasons.

And another idea that's out there is really it's a combination of a lot of those factors, the idea of natural procreation, family stability and also maintaining a physical responsibility because there is a simple biological difference between same-sex couples and opposite-sex couples. Opposite sex couples are the only ones where there is a possibility of an accidental marriage and it certainly could be the government's legitimate interest to prefer that if there is an accidental marriage, that it should be -- or if there is an accidental pregnancy, it should be in the relationship of the marriage. And that would prevent children from being born out of wedlock and promote the idea that they are raised in a two-parent household because presumably it would be more stable. There is the possibility of dual income, things of that nature. And it's just not simply possible for a same-sex couple to have an accidental pregnancy. And the plaintiffs talk about well how does excluding same-sex couples further this policy. Well you could flip that argument around and say well how would including them further that policy. And the answer is well including them in that there would not further the policy because they simply could not have an accidental pregnancy and including them would only increase the burden that -- the cost to the government because they would then be qualifying

for certain benefits that they wouldn't otherwise get.

Also this distinction is drawn as narrowly as it could be. Under rational basis review a law can be over inclusive and to the extent that this law allows people who can't procreate either because of their age or for whatever reason, because of infertility, then they are still allowed to marry, but just because it is over inclusive does not mean it is unconstitutional.

And I would like to change gears a little bit and talk about the requirement for preliminary injunctive relief. Under the Winter versus Natural Resources Defense Council there is a four-part test on whether or not a preliminary injunction should be granted, and the first is likelihood of success on the merits. And plaintiffs put together a very good argument and I'm sure they are very confident that they are going to ultimately be successful. But if you just look at the split decisions across the country, the question of whether or not they eventually are going to succeed on the merits is certainly up in the air.

And I join in with the Solicitor General's argument in opposition to the preliminary injunction. I don't want to repeat his argument too much but I just want to emphasize that a preliminary injunction, it is an extraordinary remedy and it's to be rarely granted, and especially in a situation where the preliminary injunction requires something which

would require my client to take some sort of affirmative action rather than just keeping the status quo. If the preliminary injunction were granted Clerk Schaefer would have to actively go out and issue these marriage or at least a marriage license to Mr. Bostic and Mr. London and potentially if other cases are filed many other people.

And so what we are asking the court to do here today is to defer to the legislative process and the reasoning and the open debate that it went on when the 2004 bill was passed and when the Marshall-Newman Amendment was passed in 2006, and recognize it that they were just simply reaffirming the traditional concept of marriage is only being between a man and a woman. And we ask this court to recognize that this definition of marriage passes constitutional scrutiny under rational basis review. Thank you.

THE COURT: All right. Thank you, Mr. Oakley, very much. Mr. Nimocks.

MR. NIMOCKS: Good morning, Judge Allen. May it please the court, again my name is Austin Nimocks, and I have the privilege of representing Michelle McQuigg, the Clerk of Prince William County.

Your Honor, until very recently it was an accepted truth for almost anyone who ever lived in any society in which marriage existed that there could only be marriages between participants of a different sex. These are the words

of the New York high court just a few years ago in looking at a case virtually identical to this one. And that notion was affirmed by the Supreme Court this last June when the Supreme Court in the Winter case uttered that it seems fair to conclude that until recent years --

THE COURT: Mr. Nimocks.

MR. NIMOCKS: Yes, ma'am.

THE COURT: I don't mean to interrupt you but can you lower your voice. I can hear you just fine.

MR. NIMOCKS: I will be happy to.

THE COURT: All right.

MR. NIMOCKS: Until recent years many citizens had not even considered the possibility that two persons of the same sex may aspire to occupy the same status and dignity of that of a man and woman in lawful marriage.

Your Honor, I believe it is against this backdrop that this case and the extreme novelty of same-sex marriage must be considered. And this court should identify I believe a clear starting point for the question before the court. And I believe that the starting point is this, that we have marriage laws in society because we have children, not because we have adults.

The fact that marriage laws are contingent upon age and consanguinity restrictions underscores the fact that we have marriage laws because we have children, and it harkens

to its essentially procreated dynamic central to marriage from the foundation of time. This is why the Supreme Court multiple times has said that marriage and procreation are fundamental to the very existence and survival of the race.

And beyond the Supreme Court when the court looks at renowned jurists or philosophers like Joseph Story or Montesquieu or even the ancient philosopher Bertrand Russell who said that but for children there would be no need of any institution concerned with sex. The starting point for this law and the laws of Virginia since the 1600s regarding marriage is that we have marriage laws because we have children.

And just last year the Virginia Supreme Court reaffirmed these abiding principles in the State of Virginia in a case L.F. versus Breit, B R E I T, at 285 Virginia 163. Where the Virginia Supreme Court just a year ago said that we have consistently recognized that the Commonwealth has a significant interest in encouraging the institution of marriage. The high court of Virginia went on to say that a governmental policy that encourages children to be born into families with married parents is legitimate. In fact it is laudable and to be encouraged. And they concluded by saying we reject the notion that children have a purported right or interest in not having a father. The issue in the case was whether a father had parental rights. To the contrary

Virginia case law makes clear that it is in a child's best interest to have the support and involvement of both a mother and a father. That is the public policy that has animated the marriage laws in Virginia now for over 400 years and it has not changed. It has not changed because every child has a mother and a father. And we know from statistics produced by the federal government that -- I think it's around 99 percent, from the most recent statistics produced that by the CDC, that 99 percent of the children born in this country are the products of sex between men and woman. Meaning that 99 percent of the children who are born have a known mother and father that can be pointed to and identified in that regard.

That is the starting point for the law and the analysis before this court. Therefore, Judge, it is immanently reasonable and constitutional for Virginians to accept for now hundreds of years that it is better -- all other things being equal, for children to grow up with both a mother and a father. That is something that is not just reasonably conceived by a legislature or by the people of Virginia, but in fact as a proven track record.

Intuition and experience suggest that a child benefits from having before his or her eyes every day living models of what both a man and a woman are like. Again quoting the New York high court.

Your Honor, marriage is not constitutional because it's ancient. It's ancient because it is rational and it is animated the laws in this country and in this Commonwealth since the very beginning. Obviously there are exceptions to the rule. Things happen. People die. Life goes on, and not every child will be raised by a mother and a father. But all other things being equal that ideal is not unreasonable for the people to strive for.

More importantly celebrating the diversity of the sexes is a legitimate government action, which is exactly what marriage does. Recognizing that every child has a mother and a father, encouraging through those marriage laws, the mom and dad responsible for children to come together, and in enduring union to raise the children that they are responsible for bringing into the world, is imminently reasonable and celebrates the diversity of the sexes, men and women, recognizing that mother's and fathers are uniquely different and brings something different to the table of parenting and our communities.

That's why the Supreme Court of the United States I believe has said multiple times that the sexes are not fungible. A community made up exclusively of one is different from a community composed of both. The subtle interplay of one on the other is among the imponderables. Inherent differences between men and women we have come to

appreciate remain cause for celebration. And that is exactly what the marriage laws of Virginia do. They celebrate the diversity of the sexes, the diversity of men and women, and of mothers and fathers and their importance to children.

What the plaintiffs are asking this court to do is to strike down the marriage laws that have existed now for 400 years, rationally so, and make a policy in this state that mothers and fathers don't matter. That it is unreasonable as a matter of constitutional principle for the citizens of Virginia to enact a policy that says we believe that mothers and fathers are important and are important components of the family and necessary for children. The citizens of Virginia have consciously chosen for hundreds of years to celebrate the unique complementary and fundamental differences between men and women, and we have elected to celebrate in our most fundamental institution the diversity of the human race, moms -- excuse me, men and women.

While times have changed over the last several hundred years, Your Honor, what cannot be disputed is that humanity as a gender species has not changed. How children come into the world by and large has not changed. The fact that children have moms and dads has not changed and that is why it is imminently rational for the citizens of Virginia to continue to believe in and uphold marriages to union of one man and one woman. Certainly they could change their

minds if they chose to do so. That's why we have legislatures and that's why we have ballot boxes. And they would be entitled, as the Supreme Court has recently recognized, to make a change if they so chose in that definition as many states have chosen to do so, but it is not unconstitutional for them to choose not to make that change and to continue to uphold marriage.

Your Honor, it is that celebration of the diversity of the sexes I believe that animated our nation's first female Supreme Court Justice Sandra Day O'Connor to conclude in the Lawrence case, talking about the impact of that decision, that there are "other reasons that exist to promote the institution of marriage beyond moral disapproval of an excluded group."

In that very case, Lawrence against Texas, upon which the plaintiffs rely heavily, the court expressly excluded the application or potential application of that holding to marriage laws saying that it does not apply to any relationship that the government must be compelled to recognize with regard to same-sex couples. Lawrence ergo did not create a change in the legal principle surrounding Baker versus Nelson.

And that's the point I want to go to now is Baker versus Nelson. That decision controls I believe the question before this court. I believe the question before this court

is very simple, Your Honor, in looking at Baker versus Nelson because Baker court addressed the very questions before this court, whether there is a fundamental right to same-sex marriage, whether same-sex couples have a right under the equal protection clause of the Fourteenth Amendment to receive a marriage license issued by a court.

And the Supreme Court has made it very clear that with regard to summary dismissals like Baker versus Nelson and they said this in Hicks versus Miranda, that it is the Supreme Court and only the Supreme Court that can release lower courts from the precedential value of a summary affirmance of dismissal like Baker versus Nelson.

I quote from Hicks, that the district court should have followed the second circuit's advice that the lower courts are bound by summary decisions by this Court until such time as this court informs them that they are not. It is the sole prerogative of the Supreme Court and no other court to indicate when its summary affirmances or dismissals are no longer binding. The Supreme Court to this point has not.

And that's why I believe multiple federal courts around the country continue to uphold and adhere to Baker. The First Circuit in looking at the case that went through the First Circuit against the Defense of Marriage Act expressly affirmed that Baker does operate to limit the

arguments to ones that do not presume or rest on a constitutional right to same-sex marriage, acknowledging Baker's precedential value. That was in Massachusetts versus HHS in 2012.

The Second Circuit exactly or made a similar finding talking about the question on section three of DOMA. It's sufficiently distinct from the question in Baker as to the state's rights with regard to marriage laws.

The District Court of Connecticut, the Northern District of California, the Central District of California, the District of Hawaii, and the District of Nevada are all cases that have used recently Baker versus Nelson I believe is precedent for closing the question that the plaintiffs ask this court to decide. I believe that this court's job is much easier than the states -- excuse me, than the plaintiffs would like it to be as far as that concern.

Looking beyond Baker though at the fundamental rights question that has been raised by Mr. Olson, Your Honor, we respectfully disagree that there is in fact a fundamental right here to same-sex marriage.

Fundamental rights as this court is well aware are those that are deeply rooted in this country's history and traditions. There can be no argument that marriage between same-sex couples is deeply rooted in this country's history and tradition. Every single case that the United States

Supreme Court has issued and that Mr. Olson referenced or alluded to in his argument about marriage is a case involving opposite-sex couples. Marriage is as it is always been understood between one man and one woman.

The Glucksberg case has instructed that when we are talking about fundamental rights, the rights need to be carefully described. And the Supreme Court went on to say that even though its fundamental rights are due process jurisprudence is unable to be specific as to every single thing, concrete examples are things that they have relied on to animate what is and what is not a fundamental right and the concrete examples were used.

There are no concrete examples of same-sex marriage in the history of this country or elsewhere in the world that can be used to demonstrate that it is in fact deeply rooted in the history and traditions of this country.

And then I think finally the Windsor case from last June when the Supreme Court acknowledged that it was only until recent years that citizens even considered the possibility of same-sex marriage forecloses any reasonable argument that same-sex marriage is part of the fundamental right to marriage that is deeply rooted. When the Supreme Court itself says it's only in recent years that we have actually started to have this argument and this debate.

So I don't believe there is any question, Your

Honor, that there is a fundamental or that there is not a fundamental right to marriage.

Notwithstanding all of that, I think that this court can simply look at Baker against Nelson the same way that other federal courts around the country, district courts and circuit courts alike, and that is dispositive of the issue, both the fundamental right question and the equal protection question. I don't think that the argument that heightened scrutiny applies, is applicable here.

If you look at cases involving classifications regarding sexual orientation, the Romer case for example, the Lawrence case, both of those cases are rational basis for this.

The Fourth Circuit acknowledged in the Veney case that the Romer case in fact was a rational basis case. And the Fourth Circuit decision in Veney I think does foreclose the issue of heightened scrutiny as it pertains to this court. That the only basis that could be or standard of review for this court in looking at this question would be rational basis. And so as far as rational basis is concerned, as this court is well aware, anything that can be conceived as rationally supporting or animating the marriage laws. And as I've already articulated, we believe those exist.

Marriage laws have never required people to intend

to procreate to enter into marriage. They have never required that a proclamation of procreation or continued procreation.

Again, Judge, marriage laws exist because we have children. It is when people come together, if they have children, if they have children, marriage exists to provide structure and stability for the benefit of the child, giving them every opportunity possible to know, to be loved by and raised by a mom and dad who are responsible for their existence. That is why. And when we are drawing classes as it pertains to equal protection, the government is not required to draw classes with a razor-like precision. Over inclusiveness or under inclusiveness does not damage, fatally damage the classification in this case, and so the classification is very simple. It is potentially procreative couples versus all other non potentially procreative couples. That is eminently rational to do. It is rooted in many years of practice proven true. And when we know that children again come into this world because of sex between men and women, the state is eminently reasonable in trying to tie those children as best it can or encourage without being coercive those children to enter into a union with a loving mom and dad, specifically the mom and dad that are responsible for bringing them into this world.

Beyond the Veney case, Your Honor, as far as the

question of heightened scrutiny is concerned because there is no fundamental right -- obviously we don't believe heightened scrutiny applies, but even looking at the prongs of heightened scrutiny, the plaintiffs are unable we believe to satisfy any of the prongs or requirements of heightened scrutiny.

The plaintiffs in their briefing don't even really address I think substantively the political power question. They don't even address the standard, the appropriate standard for whether there is political power is whether there is the ability to catch the attention of the law makers.

And I don't mean to make light of the circumstance, but the fact that the Attorney General is taking their side of the case is immanent evidence, not only the ability to catch the attention of the lawmakers but to have the lawmakers arguing on their behalf in court.

The plaintiffs, gays and lesbians not only in Virginia but around the country have immense political power and the ability to have their agenda, the issues about which they are concerned, carefully considered by the lawmakers, whether they be the people themselves or elected representatives, and have been able to do so in multiple instances.

And so the other prongs, the contribution to

society, again the plaintiffs are same-sex couples are not naturally procreating. As counsel previously mentioned, they cannot accidentally create children.

I know that there was in the briefing some statistics showing that I think it was half of the pregnancies were unintended pregnancies or 70 percent between unwed couples, that is a real life general dynamic that happens, accidental procreation, and that is a legitimate governmental concern. It does not apply with regard to same-sex couples. Every procreative dynamics that would happen with the same-sex couple is very intentional and very planned.

As it pertains to marriage the plaintiffs have brought forth no evidence whatsoever that there is a history of discrimination against gays and lesbians as pertains to the history of Virginia's marriage laws. They can bring forth no evidence that when these marriage laws were first brought into existence that they were done with any intent or desire to harm gays and lesbians.

That in all the changes that have occurred over the hundreds of years of Virginia, that they were done so, and then they hand pick a couple of quotes from a couple of public officials in recent years and intend to impute that to the $1.3 million Virginians that voted in 2006 to constitutionalize marriage, which I think is important to

note, did not substantively change, Your Honor, the law in the state of Virginia. It had remained one man one man.

The citizens of Virginia are entitled as they do with all kinds of constitutional amendments to ingrain bedrock principles and remove them from the hands of the judiciary into their constitution, which is exactly what they did in 2006. And so as it pertains to marriage, and I'm talking about the full history of marriage in the State of Virginia, and the fact that it has been unchanged throughout that history, the plaintiffs can prove and bring forth no history of discrimination.

And as far as the ability is concerned, Judge, it is a consensus within the scientific community that there is no clear answer as to the nature of -- the pure nature etiology of sexual orientation. It is not in the record here but it was in the record in the Prop 8 case of which we were a part. That even the experts brought by the plaintiffs were unable to indicate exactly the origins of sexual orientation and the standard, Your Honor, is an accidental birth. There is no doubt in the record whatsoever but again I don't think this court has to go through that analysis. Not only is there not enough evidence for the court to look at but I think the Fourth Circuit precedent in Rainey is very clear and is dispositive of that question before this court.

And finally, Judge, I will address the -- very

briefly the question with regard to the preliminary injunction.

Obviously Clerk McQuigg believes that because the plaintiffs do not have a likelihood of success on the merits, given the arguments that we've made that there should be no injunctive relief, but we do concur with the solicitor general and the clerk from Norfolk that if this court were to issue injunctive relief, that it should stay the injunctive relief in light of what the Supreme Court did with the Tenth Circuit and the Northern District of Oklahoma case.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Anything else from plaintiffs?

MR. OLSON: If it please the court, the Solicitor General would go first and I'll finish.

THE COURT: That's fine.

MR. OLSON: Thank you.

MR. RAFAEL: Thank you, Your Honor.

THE COURT: You're welcome.

MR. RAFAEL: I will start with the Glucksberg case that Mr. Nimocks cited. That's the case that tells us there was no fundamental right to assisted suicide. We are talking here about the fundamental right to marriage, which is clearly a fundamental right, as Mr. Olson said recognized by the Supreme Court 14 times.

The other point I think is worth noting on this is you recall our citation to the Casey case, Planned Parenthood versus Casey. It's at page nine of our memorandum. And the court did something in that case that is really quite notable. It said -- it was dealing with this notion of defining the right at such a specific level that you define it away. Like the Bowers versus Hardwick case said there is no fundamental right to sodomy. When you define it at that level, it's the wrong way to approach it.

The court in Casey said it's tempting to suppose that the due process clause protects only those practices defined at the most specific level they were protected against governmental appearance when the Fourteenth Amendment was ratified. See Michael H., citing the plurality decision by the court in 1989, Michael H versus Gerald D, an opinion of Scalia, J, footnote 6. I'm going to come back to that.

The court goes on to say, "But such a view will be inconsistent with our law. 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 --

COURT REPORTER: I'm sorry, sir. Would you slow down please.

MR. RAFAEL: Yes.

COURT REPORTER: Thank you.

THE COURT: Thank you, Tami.

MR. RAFAEL: -- protected against state interference by the substantive component of the due process clause in Loving.

Now the reference to Michael H -- when you go back and look at that footnote 6, it was joined -- Scalia wrote that opinion. It was joined -- that footnote six was joined only by Chief Justice Rehnquist, and that's where he lead out this theory that you have to look at the right at the most narrow level that you can define it.

The majority -- majority of the Supreme Court rejected that approach in Casey and that is still the law of the land. That's why we don't talk about the right to interracial marriage or the rights of prison inmates to marry. We talk about the right to marriage and that is clearly a fundamental right.

Counsel for Clerk Schaefer argues that you should be persuaded by the Ninth Circuit's approach that looked at -- tried to narrow the ruling in California involving Prop 8 to a situation where the state was taking away a right that had previously been granted. That is not a distinction that makes a difference. As the courts in Oklahoma and Utah said, the denying the right to marry to same-sex couples even when they didn't have it before violates the constitution.

In this regard I would point the court to a

statute -- I don't know that the plaintiffs cited it. My predecessor cited this to the court in their summary judgment papers. House Joint Resolution 187 from 2004. This was the same year that the General Assembly enacted the law banning civil unions. House Joint Resolution 187 was the one that asked the US Congress to enact a constitutional amendment barring same-sex marriage.

I want to read to the court three of the recitals from that. The first one was -- of one of them was this. Whereas the unique legal status of marriage in the Commonwealth is in danger from constitutional challenges to these state marriage laws and the Federal Defense of Marriage Act which may succeed in light of the recent decisions on equal protection from the United States Supreme Court.

And it goes on then to talk about the successful legal challenges that were brought in Hawaii, Alaska, Vermont and most recently in Massachusetts. Then it says a federal constitutional amendment is the only way to protect the institution of marriage and resolve the controversy created by these recent decisions by returning the issue to its proper form in state legislatures. That's 2004. One year after the court decides Lawrence and Justice Scalia predicts there is no way to stop same-sex marriage now.

So the General Assembly knew exactly what it was doing when it enacted the ban on same-sex marriage in

Virginia's law in 2004 and again in 2005 and 2006. That -- I think that that is probably some of the best evidence that the ban here was designed to prevent a court from recognizing that there is a right to marriage that applies to same-sex couples.

Let me turn to the heightened scrutiny issue based on sexual orientation. We agree with Mr. Olson's position on this. It's not just his position, it's the position that the United States has expressed in its briefing in the Windsor case, which we cited in our papers.

I don't think it's fair or more accurate to say that as my colleagues do that Romer and the decision in Lawrence applied only rational basis review. I don't think you can really extract that from this. I think what the court was saying was that even if rational basis review applied, the laws at issue there couldn't pass muster.

But the oral argument in the Hollingsworth case was very telling. And I don't know if you had a chance to ever listen to that or read it, but at page 14 of the transcript, Justice Sotomayor asks Charles Cooper, the lawyer defending Prop 8, if he could identify any context outside of marriage where the government would have a rational basis for denying homosexuals any benefits or imposing any burden on them. He couldn't think of a single instance where the state could do that. And she followed up and said well if that's the case

isn't it reasonable to be suspicions of laws that burden homosexuals. And I don't think he really gave an answer to that.

We submit that the United States was correct in Windsor. That it is very suspicious when the state discriminates against people based on their sexual orientation. There is an undisputed history of discrimination against homosexuals in this country and therefore we should be inherently distrustful of laws that discriminate.

Let me turn to a subject that you haven't heard a lot about. The issue of whether this is gender discrimination. And we think it is as well. Because it's undisputed -- and I should start by saying it's undisputed that gender discrimination is subject to hyper scrutiny. And I think that there is a very compelling argument that same-sex marriage bans constitute gender discrimination because the test for who you can marry is based on the gender of the opposite person.

It's the same argument -- and to me this is the clincher. This is the same argument Virginia made to defend the ban on interracial marriage in Loving. The Supreme Court characterized Virginia's position as this: That the interracial marriage ban did not discriminate on the basis of race "because its miscegenation statutes punish equally both

the white and the negro participants in interracial marriage." That's the argument that was made in Loving. It's the same argument made here for why this is not gender discrimination. The Supreme Court thought they rejected it there. The same principle apply here. Virginia's ban on same sex marriage prohibits people from marrying based on the gender of the other person.

I don't believe my colleagues have done a very good job explaining the rational basis for Virginia's law. The fundamental flaw is that allowing same-sex couples to marry is not going to make heterosexual couples less likely to marry and have children. That's the Achilles' heel in the argument and you have not heard any good answer to that. No answer.

I also think, Your Honor, that Clerk McQuigg in her papers have conceded this point. If you take a look at Document 94 at page 5, Clerk McQuigg says that same-sex couples "neither advance nor threaten society's interest in responsible natural procreation." That's the point. Allowing same-sex couples to marry is not going to threaten heterosexual couples and prevent them from getting married and raising children.

Mr. Nimocks also cited the Virginia Supreme Court decision in L.F. versus Breit. He said it's laudable for children to be born into families with the mother and a

father, but that ignores the fact not only that allowing same sex marriages and is going to prevent or discourage that from happening but that there are thousands of children in the Commonwealth and tens of thousands nationwide who are being raised by same-sex couples, and telling them that their parents can't be married is not only insulting but it treats them as second-class citizens just like Justice Kennedy described in the Windsor case.

A couple of points on Baker versus Nelson. Mr. Nimocks quoted one of the sentences from Hicks versus Miranda talking about the jurisprudential -- the precedential value of summary affirmances. And he -- we quoted a sentence before the one he read. He didn't read the one which we quote, which is unless and until the Supreme Court should instruct otherwise, inferior courts had best adhere to the view that, if the court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.

That's the hook for looking at whether there have been subsequent doctrinal developments that have been changed the law. And there clearly have been. And at the end of the day the question the court has to ask about Baker versus Nelson is is it an unsubstantial question whether bans on same-sex marriage are unconstitutional. You cannot stand up in a courtroom now and say that that is true. You cannot say

it with a straight face. Of course it's a substantial question. There is no way you can say Baker versus Nelson controls on that.

Counsel for Clerk Schaefer argues that because we are making progress society seems to be moving towards supporting same-sex marriage, just wait for the General Assembly to act. We cited, Your Honor, the opinion by the US Supreme Court in the Barnett case where the court talks about why courts can't wait for legislatures to act. The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. To place them beyond the reach of majority as officials and to establish them as legal principles to be applied by the courts. Ones right to life, liberty and property, to free speech, 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. And that's true today as much as it was true in 1943 when the Supreme Court wrote those words.

You also heard an argument that gays and lesbians are not politically powerless. Look, they have the Attorney General on their side now. But that's focusing on the wrong thing. The issue that that goes to is whether we should be suspicious of laws that discriminate. We have an African-American president. Does that mean we no longer

apply strict scrutiny the laws that discriminate on the basis of race? Of course not. We apply strict scrutiny the laws that discriminated on the basis of race, and heightened scrutiny the laws that discriminate on the basis of gender because we don't trust it when the legislature uses those types of classifications. It doesn't matter how powerful women or African-Americans have become. We apply heightened scrutiny and strict scrutiny because we don't trust legislative judgment based on those classifications and that rational applies just as equally to laws that discriminate on the basis of sexual orientation.

Mr. Nimocks said that it's been accepted -- it's been an accepted truth until only a few years ago that marriage was between men and women. Well the same argument was made in justice segregation in 1954 and to justify the ban on interracial marriage and justify not allowing women in the VMI. It had been an accepted truth in all of the situations that not to permit those practices, and yet the court in each case applied the overarching equality of right principle to recognize that those practices were wrong.

Let me wind up by saying that we think that Justice Kennedy got it right writing for the majority in the Lawrence case. That the constitutional framers knew the times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to

oppress. That's exactly what's going on here.

And he said something simpler in a case that the plaintiffs cite -- the Clerk McQuigg cites, the Board of Trustees versus Garrett from 2001. He said there when he was talking about disability discrimination in that case, he said knowledge of our own human instincts, he said, should teach us that some things might at first seem unsettling to us unless we are guided by the better angels of our nature.

The equality of right principle here is an ancient one. It hasn't changed, and it applies here just as it did in cases involving segregation, miscegenation and gender discrimination.

Thank you.

THE COURT: All right. Thank you very much.

MR. OLSON: Thank you, Your Honor.

THE COURT: You're welcome.

MR. OLSON: Very patient with us.

Let me start by saying something that the Supreme Court Justice Ginsburg said in the VMI case, US versus Virginia. The history of our country is the story of the extension of constitutional rights to people once ignored or excluded. That is what we are talking about here today.

Marriage is a fundamental right. Fourteen times the Supreme Court has said that and not once did the Supreme Court say that we are talking about marriage between a man

and a woman. Yes, those cases involved persons of different gender, but when the court talked about what was fundamental about that right, the court talked about the right to privacy, to liberty association.

The Supreme Court's decision in MLB versus SLJ, 1996, said it this way, choices about marriage, family life, and the upbringing of children are among associational rights this court has ranked as of basic importance in our society, sheltered by the Fourteenth Amendment against the state's unwarranted usurpation, disregard, or disrespect.

The court goes on to say, the Supreme Court has said that in connection with marriage, procreation, raising children. The court has also said the same thing in the Lawrence case about homosexuals. It said the same thing about abortion in Roe versus Wade and Casey. It said the same thing about contraception in other cases of the Supreme Court. It said the same thing about divorce. Marriage is not all about children. It is about freedom. It is about liberty.

And the testimony in the Perry case in California, the witness who's an expert, renowned expert on marriage, talked about the fact that slaves were not allowed to be married until the time of the emancipation proclamation and at the time of that doctrine, the time of that pronouncement by President Lincoln, slaves flocked to get married because

it was a sign that they were free, that they had liberty. That is what we are talking about here today. People may choose to procreate -- and by the way same-sex couples procreate as well. We know that.

So we are talking about the right of people to come together, to bond with one another, to become a part of our society, to associate with one another freely, to form a family, to be accepted.

And what the Supreme Court said just last June is that laws that prohibited people from getting married or prohibited the recognition of their marriage, that's what this does, that's what this constitutional provision does, said the marriage relationship won't be recognized. It will be void. Served to demean, put people in a second-class status, put them in second-tier, tell them that their relationships, that same relationships that slaves flocked to become a part of, is unequal. That relationship that the plaintiffs who are sitting in the back of this courtroom wish to have for themselves and their children is no good. It's invalid. It's disrespected. That is what the United States Supreme Court said a few months ago.

What the Romer case said is, Justice Kennedy, one century ago, the first Justice Harlan in his dissent in Plessy versus Ferguson, admonished this court that the constitution neither knows nor tolerates classes among

citizens. That's what we are talking about today.

And Justice Scalia in the Lawrence versus Texas case, said at the end of its opinion -- he is dissenting. At the end of his opinion the court says that the present case does not involve whether the government must give formal recognition to any relationship that homosexuals seek to enter such as marriage. He said do not believe it. He said personal decisions -- this is what the court held in that case. This is Justice Scalia. He was as close as you can get. He was unhappy with it when he said personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education and persons in a homosexual relationship may seek autonomy for these purposes just as heterosexual persons do.

And he said the same thing again last June. He said in my opinion the view that this court will take of state prohibition of same sex marriage is indicated beyond mistaken by today's opinion. And he looked at the purpose and affect of the Defense of Marriage Act. And he said the purpose and the affect is to disregard, demean and disparage people in a homosexual relationship.

Should this case be examined under strict scrutiny because this is a suspect class? Mr. Nimocks said gays and lesbians don't fit any one of the various categories that the court has talked about with respect to suspect class. Well

it does fit fundamental right to marriage. That's what the Zablocki said. So you have to look at this with strict scrutiny because of the due process law requires it because it's a fundamental right to marriage. It's not fundamental right to same sex marriage. It's not a fundamental right to interracial marriage. It's not a fundamental right to any of other things. It's a fundamental right to marriage. So therefore you have to look at it very carefully.

And with respect to whether this is a suspect class involved, Supreme Court has already decided that and this is a class of our citizens. That's the Christian Legal Society. That's the Windsor case. And with respect to the four characterization tests that the Supreme Court has set out, the history of discrimination. This country has got a history of discrimination against gay and lesbian citizens. In the Eisenhower administration, the President of the United States issued an executive order that said if you were gay or lesbian you could be fired from federal service. You could not be an employee of the United States government if you were gay. That's a history of discrimination.

And Judge Walker in the case in California, examined the expert testimony with respect to that and issued comprehensive findings with respect to history of discrimination. In fact our opponents didn't even contest that point in that case, and didn't contest it in the United

States Supreme Court.

Immutable characteristics, Mr. Nimocks says there is no conclusive evidence about that. Well he has missed of what every psychiatrist and psychologist said in the Perry case in California, the findings of the District Court and the findings of court after court after that. This is a characteristic that you don't choose. It affects who you are. And the Supreme Court said that again in the Windsor case last June.

With respect to political power, powerlessness, Mr. Rafael already answered that. We don't change the care that we scrutinize these laws with because someone gets elected president of the United States, or someone gets an Attorney General to come in and support them because of their fundamental rights and because of the discrimination.

What the court is looking at there is people who have been discriminated against because of their characteristic often are the victims of discrimination by our society, by the majority.

Our opponents say well let the voters decide, let the legislature decide. The reason that we have Article III to the Constitution, the reason we have an independent judiciary, the reason we have a Bill of Rights, and the reason we have a Fourteenth Amendment is because sometimes the voters and the legislatures get it wrong. And when they

do they often select for discrimination people who are in the minority, who don't have the power to defend themselves. So we have you. We have the judges of this federal government to protect the minorities from that discrimination. So we don't let the voters decide all the time because we have discrimination and we continue to have it in this country.

As far as contributions to society, that's an important part of the test. Gays and lesbians participate in every way equally in society except where the law prevents them from doing it. They can procreate the same way that males and females can but they can procreate. They are procreating all over the country.

Justice Kennedy noted during the oral argument in the Perry case in the Supreme Court last March, what about the 40,000 children in California that were a part of same-sex households? Don't they need protection too? Mr. Nimocks says it's all about children. Marriage isn't all about children, but the constitution is all about children. And to protect the rights of our citizens, including their children, to equality and the respect when they are growing up in families of gay and lesbian citizens, they are entitled to be able to talk about their two moms or two dads or their family in the same way that everybody else does.

Now I've been a Virginian for 30 some years and I'm very, very proud of this state, and I'm proud of the fact

that it's -- I can tell my grandchildren it's George Washington and it's Thomas Jefferson and it's James Madison, it's Patrick Henry, it's all those things that we learn about Virginia.

As Mr. Rafael says Virginia has had it wrong from time to time, egregiously wrong. And I submit it's wrong now.

Mr. Nimocks said there is no history of discrimination in Virginia with respect to gays and lesbians. Look at page three and four and five of our brief, and you have resolution after resolution after resolution in the Virginia legislature talking about gays are -- the only reason that they exist is so they can exploit children. It's outrageous some of that history. Unfortunately, it is there. And it's sadly a part of Virginia's history. And it's now written into the constitution and laws of Virginia that gays and lesbians cannot have relationships that the rest of us can have. Their relationship even if it looks like marriage is void in this state. It's tragic, and it's very, very sad and we need to fix that. And I hope that you will.

Thank you.

THE COURT: All right. Thank you.

Anything else from any of the parties on this side?

MR. BOIES: No, Your Honor, I think you have our points from the brief.

The only thing I would add is the preliminary injunction point, one of the advantages is it can celebrate the resolution of this and I think that is something that is in everybody's interest.

THE COURT: All right. Thank you very much.

And how about Defendant Rainey? Counsel, anything additional, gentlemen.

MR. RAFAEL: No, Your Honor.

THE COURT: All right. And our last two defendants, anything additional?

MR. NIMOCKS: No, Judge.

THE COURT: All right. I would like to thank all the parties for their briefing, your time and attention. I'd like to thank the parties that you represent as well. And I'd also like to thank all of those that are in attendance. And I'm going to take this matter under advisement and you will be hearing from me soon.

Thank you.

(Hearing adjourned at 11:56 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript

from the record of proceedings in the above-entitled matter.

X_____/s/ Tamora Tichenor_____x

Tamora Tichenor

X___2/6/2014___x

Date