May 13, 2014, Oral Argument in No 147-1167, *Bostic v Schaefer*

Argument Panel:
Honorable Paul V. Niemeyer
Honorable Roger L. Gregory
Honorable Henry F. Floyd

Arguing for Reversal:
David B. Oakley, Poole Mahoney PC, for Appellant George E. Schaefer, III.
David Austin Robert Nimocks, Alliance Defending Freedom, for Appellant Michele McQuigg, and on rebuttal.

Arguing for Affirmance:
Theodore Olson, Gibson, Dunn & Crutcher, LLP, for Appellees Timothy B. Bostic, Tony C. London, Carol Schall and Mary Townley.
Stuart A. Raphael, Solicitor General of Virginia, for Appellant Janet M. Rainey.
James D. Esseks, American Civil Liberties Union, for Intervenors Joanne Harris, Jessica Duff, Christy Berghoff, and Victoria Kidd.

Transcription:

Niemeyer: We're going to hear the first case, *Bostic v. Schaefer*, and Mr. Oakley, I think you lead off.

Oakley: Thank you Judge Niemeyer. Good morning, may it please the Court, I am David Oakley and I represent George Schaefer in his official capacity as the Norfolk Circuit Court Clerk. This is an appeal from the district court order, which is a broad and sweeping order and a dramatic departure from existing law. In fact, for the appellees to win here today, to win on appeal, they must show doctrinal change in Supreme Court jurisprudence. However, there's been consistent application of the law when it comes to laws dealing with persons based upon their sexuality and, specifically, laws dealing with same-sex marriages, has been consistent application of the law from the Supreme Court in several respects. First, dating back over four decades to *Baker v. Nelson*, a state refusing to recognize same-sex marriages does not violate the 14th Amendment of due process or equal protection clauses. Second, laws based upon a person's sexuality are only entitled to rational basis review. Third, the states have the near-exclusive right, power and ability to define what is marriage and to regulate marriage and finally, number four, is when it's an issue of important societal interest and is a part of public debate, then the court should defer to the democratic process and the fundamental rights of the voters. And that's where I would like to start my argument is with the case of *Schuette* versus…

Floyd: Let me ask you this, could the Supreme Court have decided *Windsor* and left *Baker* intact?

Oakley: Yes, I believe the Court in *Windsor* by specifically not addressing *Baker* had left it intact and the Second Circuit Court of Appeals, the Second Circuit specifically found *Baker* was no longer controlling law and on appeal to the Supreme Court, the parties asked the Supreme Court to again address *Baker* and decide whether it was controlling, and there was a small amount of argument, at oral argument over that discussion, but the Supreme Court, in its final opinion, did not address *Baker* and, in fact, *Windsor* is consistent with the holding in *Baker*, and so *Baker* still remains controlling. But the case of *Schuette v. Coalition* is when a matter is a part of the public debate, it's best left for the states to decide and allow the democratic process to continue because the states, the states can continue to develop the rights of their citizens and, obviously…

Niemeyer: Of course that has been well recognized and the Court is very much interested in leaving issues like this to the states, I believe, but and this is a big but, the states must conduct themselves in accordance with the overall structure they designed in the Constitution, so that even if you leave a decision to the states, the states still can't trample rights that are protected under the 14th Amendment, that really is the issue that we have here is what this becomes a constitutional issue of magnitude or whether this is a democratic issue that's resolvable by the states.

Oakley: You're absolutely correct. The states cannot create a law that's otherwise constitutional [*sic*] and the example that the Court gives in *Windsor* is *Loving v. Virginia*, which was decided on invidious racial discrimination grounds and at the time that *Loving* was decided, racial discrimination laws that were based upon that for a long period of time had already been subject to strict scrutiny and that's a different situation from the case we have here, where the laws that deal with persons based upon their sexuality or laws dealing with same-sex marriage, do not have that long history of receiving strict scrutiny and the Marshall-Newman Amendment in 2006 was passed by 57% of the voters, that was over 1.3 million voters in Virginia, chose to reaffirm that the traditional definition of marriage would stay and Justice Kennedy tells us that there are competing interests here. There's the individual liberty interest that's being asserted, but there's also the fundamental rights of the voters, and if society changes its views, the democratic process is still there and the Marshall-Newman Amendment certainly can be unwound by the voters again. The appellees here, they argue that not recognizing their relationships as qualifying, as same-sex marriage qualifying for the fundamental right of marriage, is demeaning. However, if we look at the reasoning of Justice Kennedy, what's equally if not more demeaning is to presume that the voters of the Commonwealth are incapable of deciding an issue of this importance and that their votes are to be ignored.

Niemeyer: Well, he gives you a little bit and he takes a little bit away in his opinion, as you know, he also spends a fair amount of time talking about the rights of the states to resolve this type of question and then he goes on to talk in some respects in language that would not be totally useful here.

Oakley: You're absolutely correct. However, the *Schuette* case certainly is consistent with prior opinions from the Court and it merely enhances the discussion in *Windsor*, which itself is based upon federalism in letting the states continue to decide the issue of marriage because *Windsor*, one of the most important lessons out of many that we learn from *Windsor*, is that the regulation of marriage is almost the exclusive province of the states.

Floyd: That's because Lemar's [*sic*] point…

Oakley: Yes.

Floyd: in *Windsor*, it kind of gave short shift to the argument of federalism and it went on and emphasized the due process and equal protection.

Oakley: They did go on to do a due process analysis, however, it was still couched in the idea and the, that this was federalism and that it was the state, the State of New York, had specifically gone forward and made that recognition of same-sex marriages and given that those marriages to the people of New York, but then it was taken away by the federal government. The federal government by passing section 3 of DOMA, the federal definition, took away that right from those citizens and the law was found to be one of an unusual character because it did take away those rights from the voters, and *Windsor* tells us that regulating marriage, not only is it part of, is it reserved to the states, but specifically the definition of marriage is the foundation of the state's broader authority to regulate the subject of domestic relations, and the notion that the states can define marriage how they choose, at that time *Windsor* was decided there was really only two ways that states had defined marriage, that's either the traditional, historical sense of a man/woman marriage or this newer version of recognizing same-sex marriages and so *Windsor* by specifically saying that the states have that foundation to be able to define what marriage is, they could have said that they have to define it to include same-sex persons, that that's a fundamental right, but they chose not to do so.

Floyd: But you do agree that marriage has been described as a fundamental right?

Oakley: Absolutely, as in *Loving v. Virginia* describes it as a fundamental right, however, with the exception of *Windsor*, every single Supreme Court case that has dealt with the fundamental right of marriage has only been between one man and one woman, so it's presumed that that fundamental right is only the traditional, the traditional notion of marriage unless the states choose as they did in *Windsor*, the State of New York did in *Windsor*, the states choose to expand that definition to include same-sex couples.

Gregory: Well, the fundamental right to marriage, is that an individual right?

Oakley: It is an individual right but it's also a right of the pairing of the couple.

Gregory: How could it be if the essence of the right to marry is the individual's choice to marry the person that they choose, isn't that the essence of the right?

Oakley: Correct, just like in *Redhail*.

Gregory: Do you agree with that?

Oakley: Yes, just like in *Redhail.*

Gregory: How do you then shift over and say now when you define it, it now became couple and so on, it's a choice, it's an individual choice. It's autonomy and you agree it's one of the most important decisions and rights that we have in America.

Oakley: It is an extremely important decision and it is an individual right. It affects the couple together.

Gregory: Then how can Virginia, how can Virginia define it to a point that its fundamental essence is unrecognizable?

Oakley: It's a – that's where I would disagree – it's not unrecognizable, it's the way the marriage has been defined throughout the centuries.

Gregory: Marriage has been defined throughout the centuries?

Oakley: As being between, being between one man and one woman.

Gregory: Marriage is for the people, the people aren't for marriage, I mean, even you admit that marriage existed before government did, isn't that correct?

Oakley: Yes.

Gregory: But the whole idea is a choice that the people make a decision and you said you could define in any way the state wants to?

Oakley: The state as long as it's otherwise constitutional that they are not placing an additional barrier on the right to marriage, such as the invidious racial discrimination in *Loving v. Virginia* or the prohibition on persons who owe child support like as in the *Zablocki* case.

Gregory: Child support?

Floyd: *Turner* case.

Oakley: Pardon?

Floyd: or the *Turner* case involving inmates.

Oakley: Correct. That was another situation which actually we decided on rational basis review because the Court applied a lower level of scrutiny because it was dealing with penalogical interests.

Gregory: Yet prisoners can marry.

Oakley: Correct. Prisoners are allowed to marry and that does not change because in the *Turner* case, it was…

Gregory: You can be in prison, a ward of the state, and you can make a commitment to love and cherish someone, and the state could not prevent that.

Oakley: Absolutely, and there's numerous…

Gregory: Yet a person, a person, because of a person's sexual orientation they don't have that right of union?

Oakley: There are numerous interests in marriage, love and commitment are certainly personal interests in marriage; however, the governmental interest in marriage is different.

Gregory: What is the governmental interest in marriage?

Oakley: The governmental interest in marriage, particularly here, is to steer the procreative potential of opposite-sex couples towards the notion of marriage in order to protect the children and counsel for Clerk McQuigg is going to address that further, but…

Gregory: Protect the children? Sounds like it's a totalitarian system where people are babymakers, and you get married for the interest of the state. Do you require married people to have children?

Oakley: Absolutely not and…

Gregory: Do you ban 90-year-old couples from getting married. Do you ban 90-year-old couples from…

Oakley: Judge Gregory, absolutely not.

Gregory: Well, why not?

Oakley: Because you can't. There would be no way to constitutionally put a procreation requirement on marriage; however, it is still a legitimate government interest.

Gregory: When you said there's no way you can constitutionally put procreation requirements of marriage, did you say that?

Oakley: Yes, judge.

Gregory: Okay.

Oakley: And if we are going to..

Gregory: So how is that a legitimate interest in Virginia proffers now, procreation and child-centered?

Oakley: I'm sorry, can you repeat the question?

Gregory: Isn't that the rational basis that you've proffered to the court?

Oakley: Absolutely, however, it's not our burden, it's not the government's burden to prove the rational basis, it's the plaintiff's burden, but that is one of the many rational bases that have been proffered by the parties and by the *amicus*.

Gregory: But the rational basis must have some reasonable connection to what you're trying, which you portend to achieve.

Oakley: Correct, and that rational basis, it's not irrational to know and to assume that only opposite sex couples have the biological potential to have a child. That's the only pairing that potentially could have an accidental pregnancy. And so it's the state interest to protect children in those sort of situations, and one of the other issues that we do need to address is defining the sort of liberty interest here, the appellees certainly want to argue that marriage, the broader definition, or the broader fundamental idea of marriage is the asserted liberty interest, however, the *Washington v. Glucksberg* case tells us that the asserted liberty interest must be carefully described and then you have to look to the history and tradition to see if that asserted liberty interest is deeply rooted for it to be a fundamental right, same-sex marriage, obviously, that is the careful description of the asserted liberty interest here and it certainly does not have deep roots in America's history and tradition. The Supreme Court in *Windsor* recognized that only, until a few short years ago, nobody would have considered same-sex marriage even to be a possibility and, indeed, just the last few years, the current count is 17 states now permit same-sex marriages; however, the majority of states, 33 still, still do not recognize same-sex marriages, and so there is not…

Gregory: Same thing was true in *Loving*, nobody would have considered interracial marriages in Virginia in the 1920s, 30s.

Oakley: You're absolutely correct, sir, however, there is a history of prior to the Jim Crow-era laws, the anti-miscegenation laws, the idea of interracial marriage was not prohibited. It still fit within the fundamental right of marriage that the idea of a man/woman marriage and before Virginia passed those affirmative anti-miscegenation laws, it might not have been the social norm, people certainly could have married and indeed did marry across racial lines. Pocahontas married John Rolfe in the early 1600s and their marriage wasn't declared unconstitutional. And it appears I am running short of time here and so in conclusion, the appellees do have a heavy burden here and they ask that this court set aside the public

debate and the democratic process in favor of a policy determination by this court and marriage is a fundamental right, but the voters of Virginia have spoken. They chose not to expand that right to include same-sex couples and binding precedence of *Baker v. Nelson* has not been altered in the last four decades. The consistent…

Floyd: Let's talk about that *Baker*. Wasn't that a summary dismissal?

Oakley: It was a summary dismissal and the…

Floyd: You want weight to be assigned to it?

Oakley: Absolutely, and I don't think that anybody here disagrees that a summary dismissal by the Supreme Court is a binding decision on the merits; however, the appellees argue that there has been a doctrinal change in the Supreme Court jurisprudence and they cite to three cases for that proposition. That's the *Windsor* case, the *Lawrence* case, and *Romer v. Evans*, and those cases are not a doctrinal sea change as the Solicitor General points out. Instead, they are a consistent message from the Supreme Court. Each one of those cases deals with persons based upon their sexuality to some extent and each one of those cases applies rational basis for review only, so it is a consistent message from the Supreme Court and it has not changed. I believe I'm out of time. Thank you very much.

Niemeyer: Thank you Mr. Oakley. Mr. Nimocks?

Nimocks: Good morning, and may it please the Court, Austin Nimocks on behalf of the Intervenor, Michele McQuigg. Before I address the three primary points I want to address this morning, I want to put this case in context. This case arises amidst a great debate in our nation right now over the true essence and meaning of marriage, and this Court to decide this case does not need to take sides in that debate. It only needs to determine whether the answer to that debate is dictated by the United States Constitution, or whether the people are free to decide it. The first point in this regard that I would address is that the right ascribed is the right to enter into the union of husband and wife. That is the fundamental right on the table. In all of the Supreme Court's historic cases – every single one of them – dating back to the *Murphy* case in the 1800s all the way up into the modern era support the fundamental right to enter into the union of husband and wife – a fundamental right that is inextricably linked to procreation, and this even includes, for example, cases like the *Turner* case that was mentioned a moment ago. A key point in the *Turner* case – the inmate case – was that the Supreme Court – Justice O'Connor specifically recognized that inmates are expected to be released and they are expected to consummate marriages that they will enter into. In the very next paragraph –I think this is a really important point about *Turner* – is the Supreme Court distinguished it from a case called *Butler* which was a summary affirmance from a case out of the Southern District of New York – where a prisoner was denied the right to marry because he was incarcerated for life with no possibility of parole. The distinction between the prisoners in those

two cases is that one was expected to get out and consummate his marriage, reaffirming the procreative link to the fundamental right and one was not, and thereby denied the fundamental right. And that important part of *Turner* cannot be overlooked. Even in the *Skinner* case – involved an inmate and the Supreme Court directly recognized that the procreative right of this inmate that would be implicated by the sterilization did implicate his fundamental right to marry. I think also implicitly recognizing the idea that this inmate in *Skinner* would get out. He was not incarcerated for life without parole, and I think his crime was robbery. So all of the cases about the fundamental right to marry support the right to enter into the union of husband and wife, and that has been affirmed by the Supreme Court in a multitude of cases, all of them, of course, involve a union between husband and wife. Judge Floyd, you asked about whether the Supreme Court can decide *Windsor* without addressing *Baker*. I agree with my co-counsel that they absolutely can. I want to make this point about *Baker*, and I think this is important. The reason this court should lend credence to *Baker* is not what I say but what the Supreme Court said. The Supreme Court has been explicit that some reaffirmances like *Baker* remain binding until the Supreme Court says otherwise. Until *they* say otherwise. They said that in the *Hicks* case and they said that in the *Tully* case. One of the common errors of all the courts that have addressed *Baker* since the *Windsor* decision is that they have refused to acknowledge that fact – that the Supreme Court said it belongs to them, not the lower courts, but only the Supreme Court to determine that when a summary affirmance like *Baker* is no longer binding.

Niemeyer: It's probably pretty evident that you're here in Richmond as a way station up 95 to Washington.

Nimocks: That very well could be said.

Niemeyer: We'll probably have our say and ultimately this issue will be decided again, I think, by the Supreme Court, either out of the 10th Circuit or our circuit or one of the other circuits that's considering this issue.

Nimocks: So, acknowledging that, Judge Niemeyer, that the Supreme Court may very well have a say, again as it pertains to *Baker*, but we do not believe that the plaintiffs' claims that they ascribe fit within the fundamental right to marriage, and the common error we believe . . .

Niemeyer: You know, this fundamental right to marriage is language of the Supreme Court, but it's built on a longer recognition of marriage as the core of the family unit which is a political unit that society does have an interest in recognizing for a lot of good reasons. I mean, every person in this room has, as a parent, one woman and one man, regardless of his orientation, and a grandparent that's one woman and one man as parents. And that family unit over history has been recognized as stable and it's been elevated by requiring a declaration publicly and a contractual relationship in order to promote it. I mean, the Supreme Court in the *Maynard* case talked about marriage being the foundation of family and society. So it

seems to me a state might be able to latch onto that and say we are interested in continuing that, but that said, why couldn't a legislature just as well say we can think it's in furtherance of the stability of society to recognize the union of same-sex couples and to provide them the same economic benefits and to give them recognition to raise the dignity of the relationship. That would be within the scope of the state's authority too, wouldn't it?

Nimocks: It would, Judge Niemeyer, and the *Windsor* court expressly recognized that what New York did with its marriage laws was perfectly constitutional. What the *Windsor* court did not say is that what New York did was constitutionally required of all the other states. And if that is true, that the United States Constitution answers this question for the court, then I believe that the *Windsor* opinion in its entirety becomes meaningless. The essence of the *Windsor* opinion is that the federal government must defer to the states. That is the essence of the opinion. That's what the Supreme Court concluded. But if the U.S. Constitution already tells us what the outcome is, what is the basis for deference? To what must the federal government defer coming from the states if, in fact, the source of the answer is already the Constitution? It obliterates the entire meaning of the opinion, the seven pages that the Court spent talking about the states' fundamental authority over the marital relationship. It makes it utterly meaningless if the U.S. Constitution, as the plaintiffs' claim, already answered this question. And remember that *Windsor* was a same-sex marriage case. If there was a time for the Supreme Court to say that the Constitution disposes of this issue, it was then. It was not a time to say that the states possess inherent authority over the marriage. That's the only, I think, rational way to read the *Windsor* opinion. And so that really answers the question, I believe, before this court – that the Constitution does not compel the outcome. This is a great debate. There are impassioned people on both sides. Our President has acknowledged that there are people of goodwill on both sides. But the Constitution does not require that Virginia do what New York does or that New York must do what Virginia has done in this particular case. And that really gets into: why does Virginia have its marriage laws? What are the rational bases for the marriage laws? Because if this right that the plaintiffs are claiming does not implicate a fundamental right, then we are under rational basis review. The marriage laws are dependent upon the distinguishing characteristics as the Supreme Court used in the *Cleburne* case of men and women and man/woman couples and their unique ability to procreate intentionally and oftentimes unintentionally as that may be. The State of Virginia is entitled to recognize as we stated in our brief that 99% of the kids born in this country are the products of man/woman relationships, and children are essential to the future of any society. The Supreme Court, or, excuse me, the State of Virginia is legislating at the core here, talking about 99% of the offspring and upholding, with the marriage laws, the idea that men and women bring diversity to parenting; bring the essence of both sexes to the idea of parenting, connecting as best as possible, as much as possible, children to the mother and the father that brought them into this world and providing stability to the families that are generally producing the next generation. Those are eminently rational concerns that the State of Virginia is entitled to have and they have had them from the very

beginning. Virginia became a colony in 1607. The marriage laws are nothing new in Virginia. The constitutional amendment did not change the law. The statutes that the plaintiffs have claimed are unconstitutional that were enacted in 1997 and 2004 are not new to the extent that they affirm Virginia's consistent and always definition of marriage as the union of one man and one woman.

Floyd: Well, I haven't heard either one of you talk about the California couple who were lawfully married under the California law and they come to Virginia and try to get their marriage recognized. What have you got to say about that?

Nimocks: Judge Floyd, the claim there rings as I understand it by the plaintiffs only in equal protection and that Virginia violates the Constitution by recognizing some marriages and not others, and I would say to this that Virginia and no state has ever been required constitutionally to recognize any marriage from another jurisdiction. The very idea of recognition implicates notions of full faith and credit. But more specifically, Virginia has always consistently maintained the right throughout its jurisprudence and case law to not recognize marriages that are inconsistent with its public policy and so as far as that is concerned, it is consistent and if Virginia has to recognize a same-sex marriage from California, then it – I see my time is on – may I finish my answer, Judge Niemeyer?

Niemeyer: Sure.

Nimocks: Thank you. It lays waste to the entire public policy, so what difference does it make if Virginia doesn't have to issue the license but it must recognize it from another state, it's really an end around Virginia's public policy, so it has an interest in upholding its public policy through recognition policies in the same way it would with concealed handgun licenses.

Gregory: I thought your policy was child-centered? What about the child? The children of those marriages that were consummated out of state legalized and then come to Virginia. What about the children?

Nimocks: Judge Gregory, there are, of course, all kinds of children in all kinds of families in the State of Virginia. The Commonwealth has an interest in all of them.

Gregory: Why do you want to deny them the – all of those warm and wholesome things about marriage?

Nimocks: Well, specifically because the animating purpose of the marriage laws, but I don't think Virginia denies anything to the children of same-sex couples any more than it denies to the children of a single mother. Or a grandfather who's raising a grandson. They don't have the rights or benefits of marriage. Is the Commonwealth. . .

Gregory: But they can marry the person they want to marry. That's the whole point. The single mother or single father you just talked about, they can marry the person they want to marry. Correct?

Nimocks: They could.

Gregory: But a same-sex. . .

Nimocks: ... not "a" person they want to marry, the opposite sex person they want to marry under Virginia law and under the fundamental right they have the right to do that…

Gregory: Do you think the child loves their parents less because they're same-sex parents?

Nimocks: Not at all. Not at all.

Gregory: Do you think that child wants less the embracement the dignity of marriage – what it offers any other child?

Nimocks: Not at all.

Gregory: Well, if you're concerned about the child, why does Virginia rip that from the child?

Nimocks: There are – as we've stated, there are three primary reasons why the State of Virginia is involved in the marriage business to begin with.

Gregory: But why does Virginia want to rip that embracement from the child? We're talking about the child. You said it's child-centered. Let's go to the core of your rational basis.

Nimocks: Same-sex couples do not provide . . .

Gregory: No, we're not talking about couples. We're talking about children. You said that it's child-based. Why do you want to rip that from a child? That's the question.

Nimocks: And let me try to answer it, Judge Gregory.

Gregory: Please.

Nimocks: Same-sex couples do not provide the child with both a mother and father. And if we want to look at it from the child's perspective, Virginia has stated over and over in its public policy that a child is entitled to have a connection to both its legal mother and father – the Virginia Supreme Court said that just last year. And Virginia accepts the proposition that the two sexes are not fungible. Something that is a mainstay in the Supreme Court jurisprudence. We recognize gender diversity in all kinds of arenas in our social society. The value of women in education, in the workplace, in juries where we administer justice. Is the State of Virginia really prohibited from saying that we value men *and* women as parents and role models in our families. We don't believe that that is an unconstitutional proposition.

Niemeyer: Alright. Thank you, Mr. Nimocks. Alright, Mr. Olson, we'll hear from you next.

Olson: Thank you, your honor, may it please the Court. I am Theodore Olson on behalf of the *Bostic* plaintiffs. Virginia's marriage laws single out for discrimination a class of Virginians according to their sexual orientation and the gender of the person that they love and exclude them from, not only marriage, which the Supreme Court has said again and again is the most fundamental and important relation in life, but prohibit – Virginia goes on and prohibits and invalidates any domestic partnership, relationship, or legal status that approximates "the design, quality, significance, or effects of marriage." That is what this case is about. Marriage – a fundamental right – and it is not. . .

Niemeyer: Let me ask you this. I pointed this out a little bit to your colleague. Indeed, the Supreme Court has elevated marriage to an important relationship. And I think one of the problems I had with the briefs in this case is that everybody was using the word 'marriage' to talk about different things. Different relationships. It seems to me what Virginia was trying to do was to recognize the fact that every person in this room is the product of a marriage. And that the stability of a family created by those unions was important to society. And, of course, as we all know, every society in history basically has found it so important they have required usually public contracts, public declarations, and many societies have elevated it to a sacred relationship. Now that relationship A, which is the core of a family and of the family unit as part of society was what *Maynard* recognized when it found that a marriage was the foundation of the family and society. That doesn't mean that society and a state can't recognize a different relationship – call it relationship B. And not until recently has there been a proposal to have that relationship recognized. Now to call both relationships marriage doesn't make sense if, traditionally and historically, it's always been thought of to be the core of a family. It's now thought to be … a State can redefine it, and call it marriage, but we have two relationships and we now have a new relationship that I think a State can well show respect to by recognizing a same-sex relationship, which gives a lot of the benefits. But it can't create the same family unit that has been recognized through history because it physically ends because the right to have you and you and everybody here cannot happen to the same-sex marriage. So the State is making a decision we're going to favor marriage by, for instance, inheritance. We're going to let the child inherit from the grandfather or grandmother. We're going to let the child inherit from the parent. Every state, I think, has default inheritance on that basis. So there are tax laws that promote benefits for people in a family relationship. That can be changed…. And a state could change it. But I don't think it's useful to start comparing the new relationship of a same-sex union and the old relationship of a heterosexual union. These are two different relationships that have totally two different purposes in society. I think it's very positive for you to present strong arguments that the State increases stability, increases the dignity of this new relationship. Increases the economic benefits. But to mix the two is to play with the language, I think.

Olson: Well let me answer that in a number of ways, your honor. In the first place, a number of those arguments – many of those same arguments – were made in the *Loving* case. That it's always been this way… [33:27]

Niemeyer: Except race is benign to the marriage. I mean that's racial discrimination. I don't think.

Olson; I respectfully dissent from that point of view, your honor, because the Supreme Court in the *Zablocki* case went on to say it involved race in that case but it involved marriage in that case and the right to marriage is *all* individuals. The *Loving* case is not just an equal protection case, it's a due process case.

Niemeyer: Yeah, but if you take marriage as a relationship that has been recognized for what it is, that is the unit of society that keeps society going. That's keeps human kind going. A black man and a white woman or a black woman and a white man can still do that. It's benign. It's irrelevant. The problem in *Loving* was racial discrimination.

Olson: But the Supreme Court of the United States has repeatedly said that the *Loving* case was not just a racial case. And that marriage is for all individuals. The Supreme Court has described marriage as a fundamental relationship in fourteen cases. Now those cases have involved divorce, sterilization, contraception (twice), divorce (twice), abortion, maternity leave, child care, and in the *Lawrence vs. Texas* case the Supreme Court of the United States said persons in a homosexual relationship are entitled to those same attributes of relationship. Now what the Supreme Court has said that marriage is all about, is liberty. Association. Spirituality. Privacy. And no state has ever…

Niemeyer: How far do you want to carry that? For instance, would we if we were to rule that this is a personal liberty that can't be infringed by a state, would we rule then that a man could marry six wives?

Olson: No your honor.

Niemeyer: Or could marry his daughter?

Olson: There are justifications, the State does have to come forth, and it has come forth in previous cases with respect to polygamy statutes, that there are overwhelming societal reasons with respect to polygamy and with respect to incestuous relationships…

Niemeyer: What is the heavy interest in interfering with the relationship between a man and three women.

Olson: Well the Supreme Court of the United States has said that it leads to tyranny between men and women, and hierarchical society. It creates problems with child care, child division, divorce and a whole number of things like that…

Niemeyer: Those are all things that are being regulated then by the Court and by society.

Olson: More fundamentally, more fundamentally, discrimination on the basis of sexual orientation and gender. Because as Judge Gregory was pointing out, this is an issue of choice. At the last line of the *Loving* decision, it said pretty much the same thing that Judge Gregory was saying that under our constitution the freedom to marry or not marry resides with the individual and cannot be infringed upon by the state. Now yes, that was a case about race, but subsequent decisions made it clear that the right of choosing your spouse in a marital relationship is an individual choice, it's not the right of the state.

Niemeyer: Can the state say to two persons – a man and a woman – that, to be married, you have to enter into a contractual relationship and publically declare that relationship? Can a state do that?

Olson: Well the state can regulate marriage in certain different ways and all of the states have done so. But what the states have never done is make procreation, the desire to procreate, or the willingness to procreate, or the ability to procreate a condition of marriage. Never once, in all of those cases that the Supreme Court …

Niemeyer: No procreation is not… that's backwards. You've got it exactly backwards. I don't think they've said that. What they have recognized is that marriage is the driving force for the family. The family doesn't have to exist ... a man and a woman don't have to have a child; they can go together. And marriages aren't always the product of love. Sometimes they've been arranged throughout the years. But a marriage is a unit that's important to society for a lot of reasons. And the state can elevate that importance without saying we're not going to recognize any other relationship. That's not even on the table. The idea is to support this unit and give it support through inheritance, and to say it creates stability in society, and that's what Virginia is doing.

Olson: With all due respect, what the Supreme Court decided in a number of pages just last June, in the *Windsor* case, it talked about families that involve people of the same-sex and families of different sexes. And it says if you are excluding from that relationship that you yourself pointed out is so important – it's important for tax benefits, it's important for child custody, it's important for inheritance, it's important for welfare, it's important for health insurance. All of those advantages are being withheld from individuals because they have a sexual orientation which different from heterosexual orientation. Strict scrutiny and heightened scrutiny is involved in this case because what the Supreme Court…

Niemeyer: Only if we are talking about the relationship that the Supreme Court has described as a fundamental right. That is, to enter into relationship of marriage that has been favored by societies for thousands of years. American law simply recognized what has been in existence literally as long as human memory continued. The question is a new relationship that just appeared – what 30 years, 40 years ago -- the proposal that we recognize a formal relationship between

same-sex people. When we do that we are entering into a new type of relationship and I think it would be well worth doing everything you're saying, that is to provide economic benefits, to provide… but you cannot make that union the same as union that is talked about in the Supreme Court cases.

Olson: It is the same. And the Supreme Court *Windsor* decision talked about all the reasons why when withholding that relationship – all of those benefits, and imposing that stigma, you're saying that these individuals, my clients, have a second class relationship. They're not entitled to those benefits, their children are demeaned by that relationship. The United States Supreme Court said those children are humiliated because they are not in the same status as the people are living next door. So you have a relationship that's exceedingly important. Because of all the benefits, because of what society recognizes, and all the damages that are done when you withhold that from a class of persons. Twelve times in the Supreme Court decision, the Supreme Court in *Windsor* recognized …

Niemeyer: Well I'm sure you're making good policy arguments that 17 states have now bought. And my guess is that number will grow. In other words, states will recognize it for the very same reasons that you're talking about. But that's a different story than saying relationship A is a relationship in which people in relationship B can participate in the original sense. They can have a new relationship that's parallel with less attributes because they can never be the core …

Olson: Withholding that relationship from same-sex individuals does not discourage heterosexual person from getting married, having children, remaining married, or procreating in any way whatsoever. So the damage is being done without serving what the state says is its purpose.

Niemeyer: Don't you think that would be a good argument for a legislature to recognize a same-sex union?

Olson: Of course it is a good argument for the legislature, but fundamentally we are in a court created by Article III to protect the fundamental rights and the equal protection of the citizens of the United States. And we are withholding that benefit that's very very very important. The most fundamental relationship in life; the *Windsor* court said it's an intensely important relationship. But withholding that from a class of our citizens on the basis of their sexual orientation and the gender of the person that they love – that does grave damage, that violates the Equal Protection Clause and it violates the Due Process Clause and you cannot read *Loving, Lawrence, Romer,* and the *Windsor* decision and come out any other way.

Niemeyer: Thank you Mr. Olson.

Olson: Thank you.

Niemeyer: Mr. Essex?

Esseks: Yes, your honor. May it please the court: James Esseks for the *Harris* intervenors. I'd like to take us to equal protection, your honors.

Niemeyer: Incidentally, I might have overlooked it. What are the facts of *Harris*? I do know the circumstances of the other two couples that are involved in this case. The *Harris* couple represent a class, do they?

Esseks: Yes, your honor. There are two class-representative couples. One of them is a couple that is unmarried in Virginia and wishes to marry. The other is a couple that is married in D.C. but lives in Virginia and wants their marriage respected. And they respectively, two subclasses of all same-sex couples in Virginia. About 14,000 couples who cover both the recognition class.

Niemeyer; I was just looking at the individuals who are representing the class. I understand there is a class. But so we have two couples: one living in Virginia and another living in D.C.

Esseks: Well actually both living in Virginia, your honor: one is unmarried and wishes to marry in Virginia; the other is married in the District of Columbia and wants that marriage recognized here. The marriage bans of Virginia violate equal protection on any level of review, but we urge this Court to hold that government discrimination based on sexual orientation is not entitled to a presumption of constitutionality because applying rational basis review to this law does just that. It says that there's a presumption of constitutionality. Instead the Court should require government to come forward with an explanation for why in any given instance it needs to rely on, and make distinctions based on sexual orientation. Applying a deferential level of review to sexual orientation discrimination by the government would be inappropriate because, in the words of Justice Kennedy it would demean the dignity and worth of a person to be judged by his or her own merit and essential qualities.

Floyd: But the Supreme Court did not put a label on the type of scrutiny it applied in *Windsor*. How does *Windsor* support your argument that heightened scrutiny applies in this case?

Esseks: Well you honor, two things: One is you're right that the Court in *Windsor* didn't give a traditional label to the level of review that it was applying. It talked about careful consideration. And the court could look at that as either some form of heightened rational basis review or, as the 9th Circuit did, the court could look at it as heightened scrutiny full force. But regardless of that, the Supreme Court has, in a series of cases, has laid out a series of factors – four factors that the courts have looked at – in determining whether a classification used by the government should be considered suspicious or suspect or quasi-suspect. And all of that doctrinal framework is out there. This court has never applied it to the question of sexual orientation classifications. This is an open issue in this circuit because the

prior precedent, where the Court did talk about this, happened prior to *Lawrence vs. Texas.* Those cases are no longer binding precedent, given the *Lawrence* decision.

Floyd: You say *Windsor* represents a culmination of the doctrinal move of the Supreme Court. Toward your position.

Esseks: Yes, it is moving towards that position, indeed your honor. This Court could also simply apply *Windsor*. This Court could apply *Windsor* and say, look there are enormous similarities between the Defense of Marriage Act and the marriage bans here. They use the same words. The Defense of Marriage act said "marriage is a man and a woman." The Virginia marriage bans say "marriage is a man and a woman". The purpose of both acts is similar. The purpose of DOMA was to ensure that the existing marriages of same-sex couples would not be respected by the Federal government.

Niemeyer: You sense in reading *Windsor* it's… I confess that it's a difficult opinion to read and to get exactly what is being held. But you sense that the main structural thrust is that DOMA was the Federal government getting involved in a very important relationship that was the domain of the States. And struck it down on that basis. But I acknowledge that that isn't all that clear. That's the sense I get as to why they addressed the Federal statute as opposed to the moving it right in and regulating under the 14th Amendment, the state.

Esseks: Well, your honor, I agree with your honor in the following sense: that the trigger for some form of heightened review, heightened rational basis or heightened scrutiny, in *Windsor* was that there was discrimination of a unusual kind. Which is what the Court said DOMA was. And that is a trigger for heightened review. But there are many other triggers that have triggered heightened equal protection analysis under rational basis in earlier Supreme Court cases. In *Romer*, in *Cleaver*, etc. Those are, for example, In *Romer,* the imposition of a broad, sweeping disability on the narrow class of people. Which is what happened in *Romer* and with Amendment 2 in Colorado. And is exactly what happened in DOMA and is what is happening here. Because the Virginia marriage bans say to same-sex couples, you folks can't get married and we all know that marriage covers a wide range of opportunities and protections and obligations in society. Everything from cradle to grave, and medical decisions in between. And the Virginia marriage bans say to same-sex couples you are excluded from all of that. That is a broad, sweeping disability imposed on a narrow group of people. That's exactly what, in the *Romer* case, prompted heightened scrutiny. I think the Court can apply the *Romer* level of review because of the broad, sweeping disability in the marriage laws because these marriage laws are unusual in the sense, as my colleague pointed out, they exclude same-sex couples not just for marriage but from domestic partnerships, civil unions or any other relationship. Also, they are unusual because this is the only part of the definition of marriage that appears in the Virginia Constitution. It's the only part of the domestic relations code that was repeatedly put into statue in 1975 and 1997 and 2004, and then into the

Constitution. So there are multiple triggers that this Court to look to prompt the kind of heightened rational basis review that the Court used in *Windsor*.

Niemeyer: What's your view of the First Circuit – Judge Boudin's approach. He just sort of described … I think he was following a little bit of the tenor of the Supreme Court which seems to be pulling back on this classifications, these levels of review and just looking at it. And I think he sort of suggests let's look at it carefully. And not pigeon hole it into rational or intermediate or strict scrutiny. What do think about that?

Esseks: Your honor that is certainly an approach. But I would point out there is what is interesting is, in Judge Boudin's opinion, the factors that he points to suggest that some form of heightened rational basis applies, are precisely the factors that the Court in a whole range of decisions has talked about as the four factors that trigger intermediate or suspect scrutiny.

Floyd: You think it was just a euphemism for what was already being done?

Esseks: I think his opinion said that he thought, and we believe that this is incorrect, that he was bound by *Baker vs. Nelson.* Therefore he couldn't just use those factors to get to the heightened scrutiny question. I think that's wrong. But I think his reliance on the heightened scrutiny factors is absolutely correct. And we would urge the Court to apply those…

Niemeyer: He didn't really call it heightened scrutiny, does he?

Esseks: No he calls it a heightened rational basis.

Niemeyer: Yes, he ducks the real…

Esseks: Indeed.

Niemeyer: Oh well, thank you very much.

Esseks: Thank you, your honor.

Niemeyer: Mr. Raphael.

Raphael: May it please the court: Stuart Raphael for the Virginia State Registrar in her official capacity. The equality of right principal that is at issue in this case is an ancient principle. What is new is our relatively recent recognition that gay people are entitled to the equal protection of the law. And that proposition is new because it was recognized in *Romer* and in *Lawrence*. And *Lawrence* was only in 2003. When you combine the teaching of *Loving* and the Supreme Court's fundamental rights cases regarding marriage, on the one hand, with the Supreme Court's holding in *Romer* and *Lawrence*, that gay people are entitled to equal protection of the law, the result here is ineluctable. Let me address the doctrinal issue that I think it concerns Judge Niemeyer. The issue of how do you define the

fundamental right? At what level of specificity do you define the fundamental right? Virginia agrees with the Plaintiffs in this case, that the proper definition is the right to marry, not the right to same-sex marriage. The clerks say, well what about *Glucksberg*? *Glucksberg* involved the alleged fundamental right to assisted suicide. And what the Supreme Court in that case said, well you've got to have a careful description of the right and the right there was described as assisted suicide. And the Court said in 700 years of Anglo-American jurisprudence, we can't find that right. So they like the historical focus in *Glucksberg*, but they overlook something that's really critical here. And I think when you write your opinion in this case, you really need to look at the *Michael H* decision by Justice Scalia, which was the plurality opinion by Justice Scalia in 1986, which only Chief Justice Rehnquist joined.

Niemeyer: Maybe we should just say we pass; let the case go on.

[Laughter in the Court]

Raphael: I think, you obviously are going to give it your best shot and the best shot…

[More laughter]

Niemeyer: That might be the best we can give it.

[More laughter]

Raphael: Justice Scalia, in the *Michael H* case, this is footnote six of *Michael H*, he thought that the way to do substantive due process analysis was to look at "the most specific level at which a relevant tradition can be identified." And that's really the approach you're seeing here. They want to define the right at issue here is the right to same-sex marriage. Now there's an obvious answer to that, which Mr. Olson gave: *Loving* obviously involved the right to marry in the context of interracial marriage, and if you looked at that right purely historically, it wouldn't have been upheld. Because it's clear that the drafters of the 14th Amendment didn't think that there was a right to interracial marriage and it had been banned since colonial times. So I think there's a better doctrinal answer than simply pointing out *Loving*. And the doctrinal answer that you really should look at is the discussion of *Michael H* in the *Casey* decision. *Casey* says we reject *Michael H*. And that's the quote; it's at page 22 of our brief. But that's the quote where the Court, the majority says, it's tempting to suppose that the due process clause protects only those practices defined at the most specific level and it's see *Michael H* footnote 6 and the Court says but such of you would be inconsistent with our law and they go onto cite *Loving* and *Turner*. Right, so that's really where the doctrinal, you know, rubber meets the road here and that's why *Glucksberg* is not controlling because what *Casey* says is once you identify the fundamental right as a fundamental right and in this case it's the right to marry. Once you do that you are not then limited to a historical application of that right. That's why *Loving* came out the way it did and that's why in *Glucksberg* there

was no fundamental right that the Court could identify and the Court – this is a really critical doctrinal point. It's a prominent part of our brief. You don't hear a single answer to that point from either the clerks or from any of their 21 *amici*. Now let me touch on the heightened scrutiny question. You've heard these four factors that the Court considers in determining whether to apply heightened scrutiny but they're all getting at the same point which is should we be suspicious of laws that discriminate on the basis of sexual orientation and that is a no brainer because it's only in 2003 that the Supreme Court actually constitutionalizes the right to engage in homosexual conduct. It's clear that laws that discriminate on the basis of sexual orientation ought to be looked at with a very jaundiced eye. They should be subjected to at least heightened scrutiny. Let me make one point about the gender discrimination argument. I agree with Mr. Olson that Virginia's approach here is a form of gender discrimination because whether you can marry the person you love is based on your gender and that person's gender.

Niemeyer: I'm not sure this argument gets you anywhere. I mean the whole reason Virginia articulates, you have to accept their reason in terms of this what they advance is the fact that you need a man and woman to have a family to have a child, to create the potential for a child to grow up.

Raphael: That's not true, your honor.

Niemeyer: That's not discriminating.

Raphael: You don't need to have a man and woman married…

Niemeyer: Well, as long as, I'm not aware of any person in the world that is a product of other than a man and a woman.

Raphael: That's not the point, your honor. The point is –

Niemeyer: Well, that's the point they're making.

Raphael: To the extent that procreation was, is the only basis of marriage that connects –

Niemeyer: Not the basis. It's a political unit that is a reality that has existed. The advancement of society, the increase in society can only occur by the combination of a man and a woman.

Raphael: That's correct but that's a different question.

Niemeyer: And at least as of now. Scientifically, you know, we just don't know where we're headed but as of now that's a reality and so the question is, with that reality society has addressed that as meaningful. So to say we're discriminating against a male or against a female because of their gender when we say the relationship can only be a male and a female doesn't make sense.

Raphael: Well you honor, I think the question is do you apply –

Niemeyer: On that basis. I'm just taking the state where it is –and that's why I'm saying the gender discrimination I don't think, uh –

Raphael: I think the question is whether you apply heightened scrutiny and I think you do because there is an explicit gender classification. Now, it's conceivable you can satisfy –

Niemeyer: Well, it's because it happens to be that it takes a male and female to have a child, to have a family.

Raphael: Virginia's law until 1975 applied to couples who wanted to marry. It was only in 1975 that Virginia came in and said you can't marry a person of the same-sex. The point is there is an explicit gender classification and you made this point, your honor, in the *Faulkner vs. Jones* case that you shouldn't confuse the question of whether there's intentional gender discrimination with the question of whether you apply heightened scrutiny once there is a gender classification on the face of the law. That's my point. You have to apply heightened scrutiny. On the issue of state's rights, I think the key aspect of *Windsor* that gets lost in the discussion is that the federalism argument at issue in that case was running in parallel and tandem with the due process argument. I disagree with Judge Niemeyer, with your point that federalism was the predominant theme when you look at Part 4 of decision, it's the due process argument that's the basis for the decision.

Niemeyer: You know, I don't – you shouldn't pin my question as to any position but my observation was simply, the Court didn't seem to want to have DOMA around. They didn't seem to want to have the federal government getting involved into this.

Raphael: That's right.

Niemeyer: Now the rationales they used weren't purely, I agree with you, they weren't purely state's rights or federalism.

Raphael: Right. When you get to the holding, the basis, the holding is the DOMA violates the equal protection provision of the 5th Amendment. My point at the outset was, the federalism argument was running parallel to the due process argument. In this case they conflict because federalism would say defer to the state and yet we have a due process problem if you do that and so then the question is, what do you do when there's a conflict? That's an easy one because the Bill of Rights trumps federalism and the Supreme Court tells us that repeatedly it told us that in *Loving*. My predecessor in *Loving* stood up and said, for the Supreme Court to strike down a bound interracial marriage would be the worst form of judicial lawmaking. It's the same argument you're hearing today. The Supreme Court in *Windsor* said, yes states get to define rights of marriage unless it violates the Constitution. That's at page 2691.

Niemeyer: Well, I can make a distinction. It seems to me in any kind of legal analysis between a regulation that says one partner in a marriage cannot be African

American and an argument that says two persons of the same-sex cannot be in a marriage because it doesn't work biologically and it seems to me the race is benign to the biological issue and sexual, uh two sexes is not benign to it and so the discussion really goes to what is the marriage relationship as understood by the Supreme Court even at the time of *Loving* and I respectfully suggest even the Court in *Loving* recognize that marriage between a man and a woman was a fundamental right and they had not anticipated sexual orientation and same-sex marriages. I think we have a brand new relationship that we have to look at and the question ultimately, in my view, is whether the Constitution really addresses that or whether we should leave it to the states.

Raphael: Respectfully, your honor, it sounds to me like you were trying to put the whole case into what the definition of marriage is and it's not a state based definition. It's some kind of extra legal definition and that's not how you should apply doctrine. You should apply doctrine and the question is, what's –

Niemeyer: What was the Supreme Court saying that marriage is the foundation of family and society. Family and society.

Raphael: It said that –

Niemeyer: It's not talking about orientation and so forth. It's talking about the marriage between a man and woman is the foundation of family and society.

Raphael: And before *Loving* there had not been a case involving interracial marriage. The point is you've got to apply doctrine. We think we win on heightened scrutiny or strict scrutiny. We also win on the rational basis tests because it's simply irrational to think that denying the right to marry to same-sex couples is going to make it more likely [*sic*] that opposite sex couples will marry and have children. This issue is compelled by combining *Loving* on the one hand with *Romer* and *Lawrence* on the other and it reminds of what John F. Kennedy said upon introducing the Civil Rights Act of 1963. Sometimes you look at what you've done and all you can ask is what you took you so long to do it.

Niemeyer: Thank you. Alright, I guess we have Mr. Nimocks.

Nimocks: Yes, sir, your honor. I'd like to start in my rebuttal first by addressing the arguments on doctrinal developments. I think one additional way to look at the *Windsor* case and to be more specific to your question earlier, Judge Floyd, is to look at the very last sentence of the opinion where the Supreme Court says expressly that the opinion and holding itself, both of them, are limited to the situation presented to it. Whether the federal government must recognize what the states give them. It specifically and expressly cabined the import of that case which was why we don't think it's applicable. The *Loving* case returned marriage to its original common law natural state as the union of husband and wife, what is was at the accession of Virginia as a colony before the import of the anti-miscegenation laws that came almost a century into Virginia's existence and so I

don't think that that can be used to support the argument for same-sex marriage and this is where *Baker* is applicable, I believe to this court, as if that there is any question as to whether *Loving* created the fundamental right to marry the person of your choice, the person that you love, *Baker* cabined that. *Baker* said five years later that this does not raise a substantial federal question. The *Lawrence* case does not –

Gregory: Do you think that's still true, Counsel, that this is not a substantial federal question still? Do you really believe that this issue is not of…. do you think so? It's not.

Nimocks: I don't believe so. I don't think the Constitution –

Gregory: Well, how do you, you ignore just the line of cases from the *Lochner* era down? That every barrier, if you will, with the states imposing itself in marriage have been struck down. The idea of procreation, *Griswold* said, no you can't prohibit married couples from deciding when or if they want to have children. The can use, you know, contraceptives, divorce, states can't keep people from going to other states and denying them a divorce. All down the line, the doctrines, it goes on and on and on and now, and in all of these cases, and clearly now *Romer* comes along, you can't discriminate. The question is, you just can't take a fundamental right and define it, if you want to Judge Niemeyer's focus on defining marriage to the point where the fundamental right of choice is unrecognizable. You just put a little batch, oh no, no, you have a right to marry but no same-sex marriages. It's not fundamental.

Nimocks: I think the way to look at all of those cases, Judge Gregory, when we talk about *Griswold*, when we want to talk about *Zablocki* or *Turner*, is that all of those were state imposed restrictions on the fundamental right to enter the union of husband and wife. It limited the liberty of the right to enter into the union of husband and wife and the Supreme Court rightly said, you cannot limit the husband and wife union. The argument here is not that the marriage definition limits it, they want to go beyond.

Gregory: Well, the ones I saw said marriage. It didn't say husband and wife, it said marriage. It talks about marriage.

Nimocks: Every case, Judge Gregory, has been a husband and wife.

Gregory: That's because of the facts but like you said, this counsel was, before you sat down, I mean there wasn't a case about interracial marriage until *Loving*. Right?

Nimocks: But, if we look – if the court applies *Glucksberg* which I do think is appropriate and we have a concrete description that is deeply rooted in the history and traditions, just as Kennedy said himself at the outset of the *Windsor* opinion, that it was not until recently that the idea of same-sex marriage was even up on society so we cannot make the argument that same-sex marriage or the right to genderless marriage is deeply rooted. It just doesn't stand. I don't think *Lawrence* advances

the argument here because *Lawrence* expressly set, it limited the holding there and said that this does not apply to any relationship that the government must confer recognition on so there's an express limitation there and *Romer* much like *Windsor* is unique and it's unique in this way, in that *Romer* and *Windsor* dealt with something brand new. It had never before been seen. *Romer* was in a unique law of an unusual character. The state had never done that before. In *Windsor* the federal government had never not deferred to the state. It was something that popped out of left field and the Supreme Court said this is unusual and it's unique and it carefully scrutinized that law. That argument cannot be made about Virginia's marriage laws. This is nothing new. Virginia's marriage laws have been the union of one man and one woman for over 400 years. The recent enactments did not change that substance and because of that fact –

Gregory: But tradition doesn't get you there, Counselor. Tradition doesn't –

Nimocks: I'm not contending –

Gregory: You are. You said because you, 400 years, you said that's the justification. The point is you're saying that it's procreation that drives this and child centered. You don't claim tradition in 400 years. That's a context but the text of your argument is that it's child centered and procreation and you would agree that same-sex couples can have children. You agree?

Nimocks: They – not the same way that opposite sex couples –

Gregory: What difference does it make? Children are children.

Nimocks: It makes a difference –

Gregory: Or are you making it difference in terms of children, like children of a lesser God. I mean, what are you talking about? The question is, can they have children? Yes or no?

Nimocks: Not the same way.

Gregory: Okay, so that means, so –

Nimocks: So okay, I would say no with a qualification, Judge Gregory.

Gregory: So then a couple who adopts, you would say, well you can have children but not the same way as someone who had it biologically. What does that mean? That would make no sense, would it?

Nimocks: It furthers that states –

Gregory: Would it make any sense under the law of Virginia that you would say, you're an adopted child as opposed to a – you're different. Does that difference make a difference in the law in Virginia?

Nimocks: It does, not just in Virginia but multiple states.

Gregory: Once you're adopted, does it? Once you're adopted, does it make any difference under the laws of Virginia? Answer that question.

Nimocks: I'm sorry with regard to adoption?

Gregory: After you adopted, does it make any difference whether you are the product of conception biologically of your parents or you're adopted? Does it?

Nimocks: But it does not –

Gregory: Does it?

Nimocks: …but the state's interest in it –

Gregory: Counselor, I guess you're not going to answer my question.

Nimocks: I am, I'm saying it does not.

Gregory: Well, answer my question. Is there any difference under Virginia law once that status is reached?

Nimocks: Once the status of adoption is reached.

Gregory: You're adopted, yeah. Does it make any –

Nimocks: Once you are a legal parent? Let me answer it this way, Judge Gregory, it generally does not…

Gregory: Oh, so you're not going to answer my question. Go ahead.

Nimocks: …but the state's interest in adoption and marriage are completely different. They're starting from two completely viewpoints.

Gregory: There are a lot of children in Virginia waiting to be, they're waiting for foster homes or waiting to be adopted. If you care about, if you care about children, you want to have more marriages so the potential there's, they'll have homes for security. It's really disingenuous, isn't it, really in terms of your interest in children, isn't it?

Nimocks: I don't agree with you, Judge Gregory, and I believe that those are good policy arguments.

Gregory: Well, why don't you answer my question then why is it different in terms of a same-sex couple having children by adoption or foster children. Aren't those, are they families that Judge Niemeyer talked about, in the terms that it was what's sacred about a marriage – Are they families?

Nimocks: Same-sex couples do not further the state's interest in the same way that opposite sex couples do and whether we're –

Gregory: But as long as they get to the objective of having wholesome homes and families and children. What difference does it make? That's the essence of your rational basis.

Nimocks: And let me answer that specifically…

Gregory: Yes.

Nimocks: …because the state of Virginia believes that the essence of the family does include both men and women. The state of Virginia believes in its policy and has affirmed this throughout, that gender diversity is essential to its understanding of the family. It doesn't prohibit other people from forming other kinds of families and other relationships. There is a diff –

Niemeyer: I'm trying to figure out whether to give you or Judge Gregory a ticket. You know the light's been red. [Laughter] But if you have further questions.

Nimocks: My apologies, Judge Niemeyer.

Niemeyer: No, I want to let Judge Gregory continue as long as he, to finish his line of questions.

Gregory: I appreciate that. Thank you, Judge Niemeyer, yes.

Niemeyer: Yeah, yeah. I'm trying to have you recognize that you're on borrowed time and as long as Judge Gregory has a further question, I'm requesting you answer it.

Nimocks: Okay, thank you, Judge.

Gregory: In *Loving* when they went into their home in 1958 in the middle of the night with flashlights and arrested them, convicted them and sentenced them, gave them probation on the condition they don't come back together for 25 years, how long does Virginia ask the same-sex couples to come back? How long to wait before they come back to Virginia?

Nimocks: Same-sex couples do not exist under the same threat of criminal prosecution that interracial couples did and there's a difference between saying that something is criminal and we will prosecute you and the state saying promoting a certain policy allowing the other things to exist and Virginia does that.

Gregory: After *Lawrence*, did Virginia remove those statutes off the book about sodomy?

Nimocks: I can't answer that, Judge Gregory…

Gregory: Oh you can't.

Nimocks: …but Virginia does not prosecute or exist with a threat of prosecution.

Gregory: So they left there for intimidation?

Nimocks: I don't think that the *Lawrence* case has application here because of the express reservation.

Gregory: Would that suggest some animus in terms of Virginia?

Nimocks: No, and this is my point about the age of the laws, Judge Gregory, is not that I'm arguing tradition, I'm arguing that there cannot be a credible argument made that Virginia's marriage laws came into existence because of animus. Four hundred years ago, the argument cannot be made that the laws were defined as one man and one woman because of an unconstitutional animus against gays and lesbians. As Justice Kennedy recognized this is a new thing upon us so the argument that the laws are unconstitutional because of animus simply just doesn't hold given the facts and the history of the marriage laws. I'm not asking you to say they're constitutional because they're old. Thank you very much.

Niemeyer: Alright, thank you, Mr. Nimocks. This is a, obviously an important issue and I want to thank counsel on all sides for your very elegant and eloquent arguments. I also thank the many people of the audience which is very full here today for the demeanor, the respect showing to the court. We will come down and greet counsel as is our tradition and then take a short recess.

Clerk: This Honorable Court will take a brief recess.

[End of audio recording – 1:10:24]

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