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

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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.

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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

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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.

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

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

10 Are counsel for the plaintiffs ready to proceed?

11 **MR. OLSON:** We are.

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

13 **THE CLERK:** Are counsel for defendants ready to  
14 proceed?

15 **MR. RAFAEL:** We're ready.

16 **THE COURT:** Mr. Shuttleworth.

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

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

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

24 **MR. BOIES:** Good morning. Thank you.

25 **MR. RAFAEL:** Good morning, Your Honor. Stuart

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

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

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

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

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

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

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

17 **THE COURT:** All right, Mr. Olson.

18 **MR. OLSON:** If it pleases the court, I will take  
19 10 minutes of our allotted time, and Mr. Boies will address  
20 the preliminary injunction issue for the remaining 10 minutes  
21 of the opening part of our presentation.

22 **THE COURT:** That will be fine.

23 **MR. OLSON:** Thank you, Your Honor.

24 **THE COURT:** You're welcome.

25 **MR. OLSON:** Virginia erects a wall around its gay

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

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

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

25 You will hear possibly on behalf of the defense of

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

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

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

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

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

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

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

1 the restriction against nepotism was something that should be  
2 overturned.

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

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

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



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

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

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

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

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

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

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

25           I will reserve the balance of my time and then for

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

13 **THE COURT:** All right. Thank you very much.

14 **MR. OLSON:** Thank you, Your Honor.

15 **THE COURT:** Mr. Boies.

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

18 **THE COURT:** Good to see you again.

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

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

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

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

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

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

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

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

19 And as the Fourth Circuit again said in Centro  
20 Tepeyac against Montgomery County, where you have  
21 constitutional rights at issue there is no harm to the state  
22 in issuing an injunction. Indeed, as the court says in page  
23 191, what that does is it improves the system because the  
24 State's function is to provide rights and protect the rights  
25 of its citizens. And so where the court issues a preliminary

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

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

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

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

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

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

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

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



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

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

7 **MR. RAFAEL:** Good morning, Your Honor. Stuart  
8 Rafael.

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

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

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

25 In Brown versus Board, the Virginia, my predecessor,

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

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

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

25 I also noticed in preparing for the argument today

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

25 I do want to take issue with one thing that my

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

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

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

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

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

25 Let me end by just saying what I think that the

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

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

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

5 Thank you, Your Honor.

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

7 **MR. OAKLEY:** Good morning, Your Honor.

8 **THE COURT:** Good morning.

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

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



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

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

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

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

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

14 And it's important for a couple of reasons.

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

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

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

3           As I said, this case really it's about the process.  
4 The voters of Virginia they elect their legislators in the  
5 General Assembly. 2004 the General Assembly passed a bill  
6 saying that a marriage is -- confirming that a marriage is  
7 only between a husband and a wife, a man and a woman. And  
8 then in 2006, the process continued and there was a  
9 constitutional amendment under the Marshall-Newman Amendment  
10 which was voted on by both the legislature and approved by  
11 57 percent of the voters that again confirming the definition  
12 of marriage is only between a man and a woman. And that  
13 legislative process is to be respected. It allows for more  
14 open and public debate, and it really is the better avenue to  
15 create -- to effectuate a great social change like this when  
16 you're changing the basic understanding of concept what is  
17 marriage. It's always been between man and a woman.  
18 Throughout history -- and Miss Rainey in her original brief  
19 she filed in support of her motion for summary judgment  
20 brought by prior counsel, they went to great length to show  
21 the long history of marriage is only being between a man and  
22 a woman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 purposes they have been put forth as legitimate reasons.

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

1 for certain benefits that they wouldn't otherwise get.

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

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

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

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

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

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

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

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



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

6 **THE COURT:** Mr. Nimocks.

7 **MR. NIMOCKS:** Yes, ma'am.

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

10 **MR. NIMOCKS:** I will be happy to.

11 **THE COURT:** All right.

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

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

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

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

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

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

1 Virginia case law makes clear that it is in a child's best  
2 interest to have the support and involvement of both a mother  
3 and a father. That is the public policy that has animated  
4 the marriage laws in Virginia now for over 400 years and it  
5 has not changed. It has not changed because every child has  
6 a mother and a father. And we know from statistics produced  
7 by the federal government that -- I think it's around  
8 99 percent, from the most recent statistics produced that by  
9 the CDC, that 99 percent of the children born in this country  
10 are the products of sex between men and woman. Meaning that  
11 99 percent of the children who are born have a known mother  
12 and father that can be pointed to and identified in that  
13 regard.

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

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

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

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

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

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

5           What the plaintiffs are asking this court to do is  
6 to strike down the marriage laws that have existed now for  
7 400 years, rationally so, and make a policy in this state  
8 that mothers and fathers don't matter. That it is  
9 unreasonable as a matter of constitutional principle for the  
10 citizens of Virginia to enact a policy that says we believe  
11 that mothers and fathers are important and are important  
12 components of the family and necessary for children. The  
13 citizens of Virginia have consciously chosen for hundreds of  
14 years to celebrate the unique complementary and fundamental  
15 differences between men and women, and we have elected to  
16 celebrate in our most fundamental institution the diversity  
17 of the human race, moms -- excuse me, men and women.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

25 Marriage laws have never required people to intend

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

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

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

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

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

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

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

25           And so the other prongs, the contribution to

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

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

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

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

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

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

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

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

1 briefly the question with regard to the preliminary  
2 injunction.

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

11           Thank you, Your Honor.

12           **THE COURT:** All right. Thank you.

13           Anything else from plaintiffs?

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

16           **THE COURT:** That's fine.

17           **MR. OLSON:** Thank you.

18           **MR. RAFAEL:** Thank you, Your Honor.

19           **THE COURT:** You're welcome.

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

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

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

17           The court goes on to say, "But such a view will be  
18 inconsistent with our law. Marriage is mentioned nowhere in  
19 the Bill of Rights and interracial marriage was illegal in  
20 most states in the 19th Century, but the Court was no doubt  
21 correct in finding it to be an aspect of liberty protected --

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

24           **MR. RAFAEL:** Yes.

25           **COURT REPORTER:** Thank you.



1           **THE COURT:** Thank you, Tami.

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

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

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

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

25           In this regard I would point the court to a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Counsel for Clerk Schaefer argues that because we  
5 are making progress society seems to be moving towards  
6 supporting same-sex marriage, just wait for the General  
7 Assembly to act. We cited, Your Honor, the opinion by the US  
8 Supreme Court in the Barnett case where the court talks about  
9 why courts can't wait for legislatures to act. The very  
10 purpose of the Bill of Rights was to withdraw certain  
11 subjects from the vicissitudes of political controversy. To  
12 place them beyond the reach of majority as officials and to  
13 establish them as legal principles to be applied by the  
14 courts. One's right to life, liberty and property, to free  
15 speech, free press, freedom of worship and assembly and other  
16 fundamental rights may not be submitted to vote. They depend  
17 on the outcome of no elections. And that's true today as  
18 much as it was true in 1943 when the Supreme Court wrote  
19 those words.

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

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

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

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



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

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

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

13           Thank you.

14           **THE COURT:** All right. Thank you very much.

15           **MR. OLSON:** Thank you, Your Honor.

16           **THE COURT:** You're welcome.

17           **MR. OLSON:** Very patient with us.

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

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

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

5           The Supreme Court's decision in *MLB versus SLJ*,  
6 1996, said it this way, choices about marriage, family life,  
7 and the upbringing of children are among associational rights  
8 this court has ranked as of basic importance in our society,  
9 sheltered by the Fourteenth Amendment against the state's  
10 unwarranted usurpation, disregard, or disrespect.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 States Supreme Court.

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

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

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

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

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

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

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

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

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

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

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

21 Thank you.

22 **THE COURT:** All right. Thank you.

23 Anything else from any of the parties on this side?

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



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

5           **THE COURT:** All right. Thank you very much.

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

8           **MR. RAFAEL:** No, Your Honor.

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

11          **MR. NIMOCKS:** No, Judge.

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

18          Thank you.

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

20  
21                                   CERTIFICATION

22  
23  
24          I certify that the foregoing is a correct transcript  
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from the record of proceedings in the above-entitled matter.

X \_\_\_\_\_ /s/ Tamora Tichenor \_\_\_\_\_ x

Tamora Tichenor

X \_\_\_\_\_ 2/6/2014 \_\_\_\_\_ x

Date