UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, et al.,

Plaintiff,

v

Case No. 2:12-cv-10285-BAF-MJH
Hon. Bernard A. Friedman

RICHARD SNYDER, et al.,

Defendants.
_____/

DEFENDANT BROWN'S BRIEF IN SUPPORT OF SUMMARY JUDGMENT FOR PLAINTIFFS

QUESTIONS PRESENTED:

Does the Michigan Marriage Amendment violate the Fourteenth Amendment to the United States Constitution where it infringes upon the fundamental right of same-sex couples to marry?

Does the Michigan Marriage Amendment violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution where it irrationally disadvantages homosexuals for invidious reasons?

Plaintiffs Answer: Yes

Defendant Brown Answers: Yes

State Defendants Answer: No

MOST APPROPRIATE AUTHORITIES

United States v. Windsor, 133 S.Ct. 2675 (2013).

Lawrence v. Texas, 539 US 558 (2003).

Romer v. Evans, 517 US 620 (1996).

Loving v. Virginia, 388 US 1 (1967)

Davis v. Prison Health Servs., 679 F.3d 433 (6th Cir. 2012).

Scarbrough v. Morgan Cnty Bd. of Educ., 470 F.3d 250 (6th Cir. 2006).

Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

I. Statement of Defendant Brown's Position

In November 2012, Lisa Brown was elected to the position of Oakland County Clerk. As Oakland County Clerk, Brown is charged with issuing marriage licenses, recording death certificates, and recording deeds, among other duties. When she took office on January 1, 2013, Brown swore to "support the Constitution of the United States and the Constitution of this State." (Exh. 1, Oath of Office).

Brown is aware that the Michigan Constitution bans same-sex marriages under the Michigan Marriage Amendment (hereinafter "MMA" or "amendment"). For this reason, she is duty bound to deny approval of marriage licenses to same-sex couples, until a court rules on the constitutionality of the amendment.

Brown is also duty bound to uphold the United States Constitution. According to her understanding of the Fourteenth Amendment, access to marriage is a fundamental right which cannot constitutionally be infringed by the State without compelling justification. Additionally, her understanding of the Equal Protection Clause leads her to the conclusion that the MMA is unconstitutional on Equal Protection grounds.

Brown is aware that the right of same-sex couples to marry is a legal issue which courts are grappling with across this country. Despite this, she

believes that existing constitutional jurisprudence in this Circuit dictates that this issue be resolved in favor of same-sex couples. Her understanding of the protections afforded to same-sex couples pursuant to the United States Constitution has only been strengthened by the Supreme Court's recent decision in *Windsor*. Based on her duty to uphold the United States Constitution, she answered Plaintiffs' amended complaint by admitting that the MMA is invalid under the Fourteenth Amendment.[1]

For these reasons, Brown cannot defend unconstitutional, State sponsored discrimination. She writes this brief in support of the Plaintiffs' position that the MMA violates the Fourteenth Amendment, and requests that the Court resolve this important issue expeditiously so that she must no longer carry out her duties with this conflict between State and Federal law.

II. The Michigan Marriage Amendment

In 2003, Massachusetts became the first state to recognize same-sex marriage when the state's supreme court issued a landmark decision declaring that state legislation prohibiting same-sex marriage was unconstitutional under the equal protection clause of the state's constitution. *Goodridge v. Dep't of Pub. Health,* 440 Mass 309 (2003). This decision set the

[1] Despite Brown's decision not to defend this suit, the remaining party defendants will ensure that the amendment will have an adequate defense.

stage for an unprecedented debate on the right of same-sex couples to marry in the United States.

Michigan was not immune to this public debate. Following this decision, both the legislature and the public began discussing same-sex marriage with new urgency. In 2004, despite the fact that Michigan law already precluded same-sex marriage, *see* MCL 551.2; 551.3; 551.4, the Michigan House of Representatives began discussing House Joint Resolution U, which proposed an amendment to the constitution to define marriage as between one man and one woman. (Exh. 2 at 18-26, MI H.R. Jour., 2004 Reg. Sess. No. 19).

Ultimately, this Resolution failed.

According to comments made by Representatives explaining their nay votes, Resolution U failed, in part, because many Representatives believed the amendment invidiously discriminated against a minority group and because many thought it was unnecessary, as Michigan law already recognized only opposite-sex marriage. *Id.*

When the Resolution failed in the House, opponents of same-sex marriage began mobilizing to ensure that same-sex couples would not enjoy the same dignity and benefits as opposite-sex couples in Michigan. Thus, the Michigan Christian Citizen's Alliance began an initiative to place a constitutional amendment prohibiting same-sex marriage on the ballot.

According to a legislative analysis prepared by nonpartisan House staff for the House Fiscal Agency,[2] supporters of the ballot proposal made some of the following arguments for the passage of the proposal:

- "To allow marriage in any other form is not to 'expand' the definition of marriage or to 'extend' marriage to other kinds of couples, it is to fundamentally alter marriage as it has been traditionally understood. Efforts to alter traditional marriage are driven by the selfish needs of individuals, not the needs of children."
- "Persons in same-sex unions cannot enter into a true conjugal union. Therefore, it is wrong to equate their relationship to a marriage."
- "While the campaign to allow same-sex couples to marry is promoted as a means of extending civil rights, based on concepts of equality and tolerance, it is really designed to overturn traditional sexual morality."
- "Legitimizing same-sex marriages based on individual rights could lead to the collapse of other prohibitions, such as polygamy and polyamory (group marriage). Marriage as a cultural institution will be weakened and devalued."

(Exh. 3 at 4-5, Legislative Analysis, Ballot Proposal 04-02).

In the end, the proposal was successful, and the Michigan Marriage Amendment was passed by voters. The amendment, effective December 18, 2004, states:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

[2] Although this document does not constitute an official statement of legislative intent, it casts light on the intentions of groups that supported the amendment.

Mich. Const. Art I, §25

III. The Michigan Marriage Amendment Violates the Due Process Clause of the Fourteenth Amendment Because the Amendment Infringes Upon Plaintiffs' Fundamental Right to Intimate Association

Marriage is held by much of society as an intimate and revered union. As the Supreme Court so eloquently stated:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.
>
> *Griswold v. Connecticut,* 381 US 479, 486 (1965).

While marriage is generally "treated as being within the authority and realm of the separate States," *United States v. Windsor,* 133 S.Ct. 2675, 2690 (2013), "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id.* at 2691 (citing *Loving v. Virginia,* 388 US 1 (1967).[3] This is because marriage is "one of the basic civil rights of man, fundamental to our very existence and survival." *Loving,* 388 US at 12.

[3] Despite its discussion of traditional state authority, *Windsor* is not an opinion rooted in federalism. *Windsor*, 133 S.Ct. at 2693. The majority clearly states that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution." *Id.* at 2692.

The Due Process Clause of the Fourteenth Amendment guarantees that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const. Amend. XIV, §1. The Due Process Clause has been interpreted by the Supreme Court to include both procedural and substantive components. *Washington v. Glucksberg,* 521 US 702 (1997). Substantive due process under the Fourteenth Amendment protects an individual's privacy interests, including an individual's right to intimate association. *Anderson v. City of Lavergne,* 371 F.3d 879, 881 (6th Cir. 2004).

The right to intimate association is quite broad and encompasses our liberty to form intimate bonds with other individuals. It "is not limited to familial relationships but includes relationships characterized by 'relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.'" *Beecham v. Henderson Cnty,* 422 F.3d 372, 375 (6th Cir. 2005)(quoting *Roberts v. United States Jaycees,* 468 US 609, 620 (1984). The fundamental right of intimate association acts as an umbrella term, of sorts, covering many of the intimate bonds and relationships we take for granted every day. Of course, one of the intimate associations protected under the Fourteenth Amendment is the right to marry. *Loving, supra; Montgomery v. Carr,* 101 F.3d 1117, 1125

(6th Cir. 1996)(describing marriage as a component of intimate association rights).

It is clear, and all parties agree, that the right to marry is a fundamental right under substantive due process analysis. *See Zablocki v. Redhail,* 434 US 374 (1978); *Loving v. Virginia,* 388 US 1 (1967); *Montgomery v. Carr,* 101 F.3d 1117 (6th Cir. 1996).

Because intimate association rights, including marriage, are fundamental rights under current Supreme Court and Sixth Circuit jurisprudence, any "direct and substantial interference with intimate association is subject to strict scrutiny, while lesser interferences are subject to rational basis review." *Anderson,* 371 F.3d at 882 (quotes omitted). The Sixth Circuit utilizes a two step inquiry to determine the appropriate scrutiny level: "first, a court must ask whether the policy or action is a direct or substantial interference with the right of marriage; second, if the policy or action is a direct and substantial interference with the right of marriage, apply strict scrutiny, otherwise apply rational basis scrutiny." *Montgomery,* 101 F.3d at 1124.

It is clear that the MMA creates a direct or substantial interference with the right to marry because it completely prevents homosexual individuals from forming the intimate association of marriage, or a similar union, with the

otherwise eligible population of spouses—that is, persons of the same-sex.[4] Because this amendment burdens Plaintiffs' fundamental right to intimate association by entirely prohibiting marriage between same-sex couples, the Court must apply strict scrutiny to determine whether "the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg,* 521 US 702, 721 (1997); *Jenkins v. Rock Hill Local Sch. Dist.,* 513 F.3d 580, 590 (6th Cir. 2008). Here, it is impossible for the State to come forth with a compelling interest to survive strict scrutiny. Indeed, the State has made no attempt to do so in other briefs before this Court.

In this case, the State takes the position that only *some* rights comprising the fundamental right of intimate association apply to homosexuals. The State does not argue, for it is clearly settled, that homosexuals and same-sex couples may lawfully engage in sexual relations, live together, and raise children together. The State apparently advances the view that even though individuals identifying as homosexual have the fundamental right to form all other bonds under the umbrella of intimate

[4] As the State itself has argued just recently in another case before the Eastern District of Michigan, "it strains credibility to believe that a couple would marry simply to obtain health benefits, or would acquiesce to participation in a relationship they might not otherwise choose in order to qualify for the benefit." *Bassett v. Snyder,* 2013 US Dist. LEXIS 93345 at *57; 2013 WL 3285111 (E.D. Mich.)(quoting Def. Am. Mot. to Dismiss at 24). Likewise, it strains credibility to believe that homosexuals will enter into opposite-sex marriages just to gain access to the fundamental right to marry merely to obtain the dignity and benefits afforded to opposite-sex spouses.

association rights, they do not have the right to form the intimate association of marriage or similar unions. This position is intellectually dishonest and unsupported by Due Process jurisprudence.

The Supreme Court has not drawn any distinction between the fundamental rights of heterosexual individuals and homosexual individuals. Indeed, the Supreme Court has indicated just the opposite: that laws substantially burdening the intimate association rights of homosexuals receive strict scrutiny under a substantive due process analysis. *Lawrence v. Texas,* 539 US 558, 574 (2003). In *Lawrence*, the Supreme Court invalidated a state law which imposed a criminal penalty upon individuals who engaged in consensual sexual relations with individuals of the same-sex as violative of substantive due process because it infringed the fundamental rights of these individuals. This analysis applies equally to the fundamental right to marriage.

More recently, in *Bassett v. Snyder,* 2013 US Dist. LEXIS 93345 at * 35; 2013 WL 3285111 (E.D. Mich.), Judge Lawson had no difficulty in determining that long term, committed same-sex partnerships are protected by substantive due process under the umbrella of fundamental intimate association rights. In fact, it appears that in *Bassett,* the State actually conceded that homosexuals have a "'fundamental right to form and sustain

intimate family relationships.'" *Id.* at *35 (quoting Def. Mot to Dismiss at 17). The State was correct in conceding this point; however, it begs the question of how, then, is the marriage amendment constitutionally valid where it bans marriage and similar unions between persons of the same-sex. It is illogical to believe that the State may constitutionally pick and choose which intimate association rights couples of the same-sex are entitled to.

The Supreme Court holds that "[o]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence,* 539 US at 574. This constitutional protection does not extend only to those members of our society who we wish to encourage or reward; it equally protects the decisions of those citizens who may be politically unpopular. The intimate association rights of homosexual individuals are not distinct from the intimate association rights of heterosexual individuals. "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence,* 539 US at 574.

It is not determinative that, traditionally, same-sex marriage was not part of our lexicon. "'[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" *Lawrence,* 539 US at 572 (quoting *Cnty of Sacramento v. Lewis,* 523 U.S. 833, 857

(1998)(Kennedy, J., concurring)). As *Lawrence* clearly demonstrates, when the rights of homosexuals are at issue, history and tradition do not dictate the outcome of a substantive due process analysis.

Moreover, the State has advanced no persuasive reason why the marriage amendment at issue should not be reviewed using the strict scrutiny normally applicable to fundamental rights infringement cases under the Fourteenth Amendment. The State argues that the amendment is justified because the fundamental right to choose who you marry is available to all Michiganders, except for homosexuals, because, historically, "traditional marriage" does not include marriage between persons of the same-sex.

However, the State does not even attempt to tell this Court what traditional marriage is. The State fails to acknowledge that, from a historical perspective, there are many components of traditional marriage that no longer exist. This is intentional, as courts and a changing society have repeatedly rejected many historical attributes of traditional marriage, and have found protections for non-traditional/ non-historical attributes of marriage. Indeed, the State would be hard pressed today to argue that many other historical tenets of traditional marriage should be protected.

For example, from a historical perspective, traditional marriage was inexorably linked with procreation. To protect this tenet of traditional

marriage, states denied married couples access to contraceptives. Yet, the Supreme Court has held that such laws violate the Due Process Clause of Fourteenth Amendment to the Constitution. *Griswold v. Connecticut,* 381 US 479 (1965). From a historical perspective, traditional marriage is permanent—that is, ended only by death. Yet, all states currently embrace some form of no-fault divorce. From a historical perspective, traditional marriage includes gender roles.[5] Yet, neither courts nor society continue to advance this tenet of traditional marriage. Reviewing even the history of marriage in the 20th century shows clearly that the way Americans look at marriage is, simply put, no longer "traditional" from a historical perspective.

"It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same-sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. *Windsor,* 133 S.Ct at 2689. This, however, does not mean that persons who now choose to seek such status may constitutionally be denied

[5] "[M]arriage destroyed a woman's separate legal identity; her legal existence was merged in that of her husband, and because of this concept she incurred as she could have done before marriage; she had no separate estate as such; in general, her contracts were void and she could not incur debts creating a personal liability against her; neither husband nor wife was competent to sue the other for negligent or wrongful injury to person or property; in short, a married woman had no standing before the law as an independent personality." *United States v. Graham,* 87 F. Supp. 237, 1949 (D. Mich. 1949).

access to such status due to the exclusionary preferences of the State. History has shown us that as society changes, so too should our laws.

Supreme Court precedent does not support the argument that fundamental rights are protected by due process only if they are presented in their traditionally recognized or majority accepted forms. For example, in *Loving v. Virginia,* 388 US 1 (1967), the Supreme Court applied strict scrutiny to invalidate Virginia's anti-miscegenation law. "Traditional marriage" does not historically include marriages between different race couples.[6]

The Constitution protects the right to marriage, not just the right to marriage in its traditional or historically accepted form. It is enough that the right to marry itself is rooted in this nation's history and tradition; Plaintiffs need not convince this Court that same-sex marriage is a historically accepted tradition in this country. This is why interracial marriage, *Loving, supra,* and marriage for reasons other than procreation, *Griswold, supra,* are protected by our Constitution. This is true whether these now protected liberties were originally intended to be recognized as fundamental or, indeed, not at all. As the majority recognized in *Lawrence:*

[6] Brown does not intend to imply that it is her position that different race couples should not be protected by the Constitution or have the equal right to marry. She is merely referencing the historical reality that, at the founding of this country and for many years thereafter, the majority prevented marriage between different race couples.

> Had those who drew and ratified the Due Process Clauses of the Fifth or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 US at 578-79.

Defendant Brown does not view Plaintiffs as asking this Court to recognize any *new* fundamental right. This Court is not required to hold that a new fundamental right to same-sex marriage exists in order to find the marriage amendment unconstitutional under the Due Process Clause. The fundamental right of intimate association is nothing if it is not the right to choose who to intimately associate with. Yet this amendment definitively declares that in the State of Michigan, if one chooses to intimately associate with an individual of the same-sex, one cannot engage in the most sacred fundamental right under the umbrella of intimate association rights--marriage. Indeed, the amendment even goes so far as to prohibit same-sex couples from engaging in unions *similar* to marriage.

This Court should decline to endorse such a narrow view of the right of individuals to form the most intimate of bonds. The right to intimate association protects homosexuals just as it protects heterosexuals, and it

includes the fundamental right to marry the person of one's choosing. This amendment violates the Due Process Clause of the Fourteenth Amendment.

IV. The Michigan Marriage Amendment Violates the Equal Protection Clause of the Fourteenth Amendment

While Defendant Brown is of the opinion that sexual orientation discrimination should be subject to heightened scrutiny under the factors set forth in *City of Cleburne v. Cleburne Living Center,* 473 US 432 (1985) and *Bowen v. Gilliard,* 483 US 587 (1987), she concedes that, at this juncture, neither the United States Supreme Court nor the Sixth Circuit has explicitly embraced heightened scrutiny for sexual orientation discrimination. *See United States v. Windsor,* 133 S.Ct. 2675 (2013) (apparently applying rational basis scrutiny with bite); *Davis v. Prison Health Servs.,* 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty Bd. of Educ.,* 470 F.3d 250, 261 (6th Cir. 2006). Indeed, it appears that the Sixth's Circuit case law forecloses this Court from making such a ruling. *See Bassett v. Snyder,* 2013 US Dist. LEXIS 93345; 2013 WL 3285111 (E.D. Mich.)(encouraging the Sixth Circuit to revisit the issue of whether sexual orientation is a suspect classification).

However, rational basis review, when applied to a minority such as homosexuals, is not the lenient, highly deferential scrutiny the State suggests. It is sometimes referred to as "rational basis with bite." Gayle Lynn Pettinga,

Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 Ind. L.J. 779 (1987). Although the Supreme Court has never formally acknowledged its application of rational basis with bite, commentators have observed that the Supreme Court's rational basis scrutiny includes an unusually close examination of a law's purpose and effects when a law targets a politically unpopular minority group. *See, eg,* Jeremy H. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation,* 73 Fordham L. Rev. 2769 (2005); *see also Windsor,* 133 S.Ct. at 2689 ("the design, purpose and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution"). [7] Even Justice O'Connor observed, "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence,* 539 US at 580(O'Connor, J., concurring).

Thus, even under rational basis review, the MMA must be struck down as invalid because it lacks a rational basis which is congruent with the effects

[7] Cases where a more searching rational basis was applied include: *United States v. Windsor,* 133 S.Ct. 2675 (2013)(federal law targeting homosexuals irrational); *Romer v. Evans,* 517 US 620 (1996)(state constitutional amendment targeting homosexuals irrational); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 US 432 1985)(ordinance targeting mentally retarded irrational).

of the law, and it is motivated by animus against same-sex couples and homosexuality generally.

As this Court is well aware, recent Supreme Court decisions examining laws which have the effect and purpose of harming homosexuals demonstrate that the rational scrutiny, while not as rigorous as the scrutiny applied to currently recognized suspect classifications, is not without bite.

In *Romer v. Evans,* 517 US 620 (1996), the Supreme Court applied rational basis scrutiny to invalidate a Colorado constitutional amendment which disadvantaged homosexuals by prohibiting laws designed to protect homosexual individuals from discrimination. The Court reasoned that, despite the State's arguments, the harm imposed upon homosexuals by the law "is born of animosity toward the class of persons affected." *Id.* at 634. The Court ruled that "the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational basis to legitimate state interests." *Id.* at 632.

In *Lawrence v. Texas,* 539 US 558 (2003), the Court invalidated a law prohibiting sexual activity by gay couples. However, *Lawrence* was not just about consensual homosexual conduct. The Supreme Court made clear that criminalizing homosexual conduct was "an invitation to subject homosexual

persons to discrimination both in the public and in the private spheres." *Id.* at 575.

While the *Lawrence* Court rested its holding on substantive due process grounds and declined to decide whether the law also violated equal protection, the Court was clear that substantive due process rights are inexorably linked to equal protection. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575. Thus, *Lawrence* indicates that the law was more likely to violate equal protection simply because it violated the substantive due process rights of homosexuals.

Finally, in *Windsor,* the Court held that a federal law denying federal recognition of same-sex marriages permitted by state law violated equal protection. Similar to *Lawrence,* the Court found that "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695. Because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" *id.* at 2696, the law was deemed invalid.

These decisions stand for the proposition that, courts should closely examine whether laws targeting homosexuals have an effect congruent with

their purported rational basis justification, and examine whether they have the purpose or effect of harming homosexuals as a class. If the effect is not congruent with the justification or the purpose or effect is to harm homosexuals, the law cannot withstand any level of scrutiny under equal protection analysis.

A. The justifications offered by the State do not withstand rational basis review.

According to prior briefing in this Court, the State offers the following justification for the MMA: "Michigan supports natural procreation and recognizes that children benefit from being raised by parents of each sex who can then serve as role models of the sexes both individually and together in matrimony." State Def. Br. Sup. Mtn to Dismiss Amended Compl. at 2. Brown anticipates that Plaintiffs' brief will demonstrate that these justifications are irrational. Brown supports and joins in Plaintiffs' arguments on this issue.

In addition, it is important for this Court to note that the justifications advanced by the State are almost identical to the justifications soundly rejected by the Supreme Court in *Windsor.* Specifically, the Bipartisan Legal Advisory Group of the United States House of Representatives argued, in part, that the federal government could rationally defend the traditional definition of marriage to promote responsible procreation and child rearing. (Exh. 4 at

27-30, BLAG's Br. on Merits). The Supreme Court did not deferentially accept these justifications. It examined whether DOMA actually had an effect congruent with this purported rational basis justification, and found that it did not. The Court declared that instead of helping children, DOMA actually humiliated children and inflicted harm on same-sex family units. *Windsor,* 133 S.Ct. at 2694. These bases were insufficient to justify DOMA, and they are likewise insufficient to justify the MMA.

B. The MMA is a result of discriminatory animus.

"The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor,* 133 S.Ct. at 2693 (quoting *Department of Agriculture v. Moreno,* 413 U. S. 528, 534-535 (1973); *see also Romer v. Evans,* 517 U.S. 620, 634 (1996) ("If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). State action "must bear a rational relationship to a legitimate governmental purpose," *Romer,* 517 US at 635, "and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone

violates the Equal Protection Clause" *Stemler v. City of Florence,* 126 F.3d 856, 871 (6th Cir. 1997).

"In determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration." *Windsor,* 133 S.Ct. at 2693 (quotations omitted).

Here, the discrimination against same-sex couples and homosexuals is of an "unusual character" because at the time of the amendment's passage, same-sex couples were already prohibited from marrying in Michigan. MCL 551.2; MCL 551.3; MCL 551.4. "This is strong evidence of a law having the purpose and effect of disapproval of that class." *Windsor,* 133 S.Ct. at 2693. Moreover, there was no threat of a State recognized same-sex union of any type. Thus, there was no danger or threat to opposite-sex marriages. The sole reason for this amendment was to further discriminate against, disempower, and disadvantage homosexuals in the State of Michigan.

Statements made by proponents of the Amendment support this conclusion. These arguments suggest proponents morally disapproved of homosexuality, and their opposition grew out of fear. *See, supra* § II; Exh. 2 at 4-5. Proponents referring to same-sex marriage as selfish, wrong, and "designed to overturn traditional sexual morality" evinces a clear disapproval of same-sex marriage because it is politically unpopular and regarded as

immoral. *See, supra* § II; Exh. 2 at 4-5. Just as DOMA expressed "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality," *Windsor at* 2693, so too does the MMA. Moreover, the MMA, like DOMA, "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor at* 2694. "And it humiliates . . . children now being raised by same-sex couples." *Windsor at* 2694.

In many ways, the arguments used by supporters of the proposal were the very reasons Representatives in the Michigan House, declined to support an amendment against same-sex marriage. Representative Drolet stated: "It is not the proper role of government to interfere with peoples' relationships, nor discourage or encourage love or commitments between consenting adults who harm no one. This amendment is designed to demonstrate governmental disapproval of some peoples' relationships and will do nothing to protect or strengthen the marriages of heterosexual people." MI H.R. Jour., 2004 Reg. Sess. No. 19. Representative Drolet urged his colleagues to "stand up for equal protection under the law and for human equality by voting "No" on the proposed amendment." *Id.*

Representative Wenke stated that he did not "support the marriage protection amendment because the clear intent of this amendment is to

discriminate against a specific segment of our population, that being gay men and women." He also noted that "[p]rominent conservatives, including George Will, oppose gay marriage but still do not support amending the Constitution to deal with this issue." *Id.*

Such comments are exemplary of the comments of many other Representatives, including those who believed marriage should be reserved for one man and one woman. These Representatives refused to support an amendment that allowed the majority to discriminate against a politically unpopular minority for impermissible reasons.

It is clear that there was no need to "protect" opposite-sex marriage in Michigan, and the sole purpose of this amendment was to invidiously discriminate against homosexuals. The Sixth Circuit holds that State action for the purpose of harming homosexuals is a violation of equal protection. *See Davis,* 679 F.3d at 438; *Scarbrough,* 470 F.3d at 261.

This amendment is unconstitutional.[8]

V. Effect of Invalidation of the MMA on the Oakland County Clerk's Office

Due to Brown's reasonable opinion that the MMA is invalid under the United States Constitution, Brown has taken steps to ensure that, should this

[8] Likewise, MCL 551.2; 551.3; 551.4 fail as violative of substantive due process and equal protection.

Court rule the MMA invalid, the Clerk's office will smoothly transition to issue same-sex marriage applications and licenses. Immediately after reading the *Windsor* decision, Brown contacted the State Registrar to collaborate and draft marriage applications and licenses with gender neutral language. Although a form has not yet been approved, Brown anticipates that it will aid in any necessary transition. Additionally, Brown has taken steps to ensure that death certificates, deeds, and other aspects of her office will not be adversely affected by a change in law.

VI. Conclusion

The MMA is unconstitutional and judgment should be granted in favor of the Plaintiffs.

PITT, McGEHEE, PALMER, RIVERS & GOLDEN, PC

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Dated: August 14, 2013

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above cause was served via the ECF filing system on August 14, 2013.

Signature: /s/ Andrea J. Johnson
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