

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER *et al.*,

Plaintiffs,

ED Mi #12-10285

Hon. Bernard A. Friedman

-VS-

RICHARD SNYDER *et al.*,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW COME THE PLAINTIFFS, by and through their attorneys, Dana Nessel and Carole Stanyar, and, pursuant to F. R. Civ. P. 56, move this Court for an Order granting summary judgment and related relief with respect to Counts I and II of the Amended Complaint in this matter for the reasons stated in the attached supporting Brief.

Respectfully submitted,

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Dated: August 14, 2013

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**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

STATEMENT OF FACTS

Plaintiffs have been in a committed, long-term domestic partnership for over twelve years. They own a home together and are the parents of the minor plaintiffs in this case. They wish to marry each other and would if Michigan law allowed them to do so.

April DeBoer is the adoptive parent of a minor daughter, "R," and Jayne Rowse is the adoptive parent of minor sons, "J" and "N." April wishes to adopt, as second parent, "J" and "N", and Jayne wishes to adopt, as second parent, "R" [Exhibits 1 and 2, Affidavits of April DeBoer and Jayne Rowse]. They are precluded from doing so, however, under Michigan law. Michigan's adoption statute forbids DeBoer and Rowse from entering into second parent adoptions unless they are married to each

other, MCLA §710.24, yet the Michigan Constitution and statutory law forbid them from marrying each other. Mich. Const. 1963, art 1, §25; MCLA §§551.1-551.4 and §551.272.

ARGUMENT

Standard of Scrutiny.

A. Heightened scrutiny. While the United States Supreme Court and Sixth Circuit have not yet expressly held that heightened scrutiny is the appropriate standard for reviewing constitutional claims resulting from discrimination on the basis of sexual orientation, this standard should apply as to both Counts I and II. Gay and lesbian individuals clearly meet the four-factor test warranting such scrutiny: (1) As a group, gays and lesbians have historically endured intense and persistent persecution and discrimination; (2) sexual orientation has no relation whatever to aptitude or ability to contribute to society; (3) gay men and lesbians are a discernible group with “immutable”, distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and (4) the class remains a politically weakened minority. *City of Cleburne v Cleburne Living Center*, 473 US 432 (1985). See also analysis in *Windsor v United States*, 699 F3d 169, 181-185 (2d Cir 2012) (applying

heightened scrutiny), aff'd *United States v Windsor*, 133 SCt 2675 (2013).¹ See R 66, Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Plaintiffs. Plaintiffs join in the arguments raised in this brief.

A higher level of scrutiny is particularly warranted here because the constitutional deprivations at issue involve children. Intermediate scrutiny has historically been applied in assessing the constitutionality of laws that discriminate against children because of their parents' status. *Clark v Jeter*, 486 US 456, 461 (1988). This "heightened scrutiny" standard, which has been applied to legislation creating classifications on such bases as illegitimacy and gender, recognizes that, while there may be certain immutable distinctions, for example, between men and women or between legitimate and illegitimate children, that justify differing legislative treatments in limited circumstances, the legislature's authority to invoke those distinctions is not an "impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v Perez*, 409 US 535, 538 (1973). See also *Clark*,

¹The Supreme Court did not specify a standard of scrutiny in *Windsor*. However, as noted in *Massachusetts v Department of Health and Human Services*, 682 F3d 1, 10 (1st Cir 2012): "Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications ... In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible."

supra; *Mills v Habluetzel*, 456 US 91 (1982); *Mathews v Lucas*, 427 US 495 (1976).²

B. Rational basis. Whether this Court applies a heightened scrutiny analysis or the less exacting rational basis test in this case, the Michigan Marriage Amendment, MCLA §§551.1-551.4 and §551.272, and the adoption statute, MCLA 710.24, are unconstitutional. *Romer v Evans*, 517 US 620 (1996); *Lawrence v Texas*, 539 US 558 (2003); and *United States v Windsor*, 133 SCt 2675 (2013).

In *Romer*, the Court struck down, on equal protection grounds, a Colorado constitutional provision adopted by a 1992 statewide referendum that prohibited the inclusion of sexual orientation in state and local anti-discrimination laws. In *Lawrence*, the Court struck down, on due process grounds, a state law prohibiting consensual sex by same-sex couples.³ In so doing, the Court overruled *Bowers v*

²See also R 46, Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Count II, pp 5-7 [distinguishing *Equality Foundation v City of Cincinnati*, 128 F3d 289 (6th Cir 1997)], and see discussion in *Bassett v Snyder*, ___ FSupp2d ___, **14-16 (ED MI 2013) [2013 WL 3285111], Lawson, J.

³In *Lawrence*, Justice O'Connor took the position that the statutory discrimination against same-sex couples violated the equal protection clause. 539 US at 578-586, O'Connor, J., concurring. While basing its decision on due process grounds, the majority noted the link between due process and 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. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." 539 US at 575.

Hardwick, 478 US 186 (1986), and adopted critical language from Justice Stevens’ *Bowers* dissent: “The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” 539 US at 578.

Most recently, in *Windsor*, the Court held unconstitutional, as violative of equal protection under the Fifth Amendment’s due process clause, §3 of the federal Defense of Marriage Act (“DOMA”),⁴ which denied federal recognition of a same-sex marriage that was lawful under the law of the state where the same-sex couple resided. Concluding that the statute advanced no legitimate federal interest, the Court reiterated oft-quote language from *Department of Agriculture v Moreno*, 413 US 528, 534-535 (1973), that “[t]he 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.” 133 SCt at 2693. Significantly, the Court also concluded, based on DOMA’s legislative history, that the statute’s “essence” was to express “‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’” *Id.* (cite omitted). Neither rationale is constitutionally sufficient to justify

⁴ For all practical purposes, §3 of DOMA is identical to the Michigan marriage equality ban, as the former, like its Michigan constitutional and statutory counterparts, defines and recognizes only marriages between a man and a woman.

denying federal benefits to persons validly married under the law of their home state.
Id. at 2695-2696.

As these cases illustrate, the rational basis standard is not a “toothless one”, *Mathews v Lucas, supra*, 427 US at 510; a claim of rationality “must find some footing in the realities of the subject addressed by the legislation.” *Heller v Doe*, 509 US 312, 321 (1993). Consequently, animosity and prejudice on the basis of sexual orientation cannot constitute a legitimate state interest; a classification must be *objectively reasonable* and bear a *reasonable relationship* to the realities of the subject addressed by the legislation.

Under either standard of scrutiny, Plaintiffs are entitled to summary judgment because “... the pleadings ... and ... affidavits [on file in this case] show that there is no genuine issue as to any material fact and that [Plaintiffs are] entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).⁵

I. THE MICHIGAN MARRIAGE AMENDMENT AND MCLA §§551.1-551.4 and 551.272 DEPRIVE PLAINTIFFS OF DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF U.S. CONST., AM XIV.

⁵All parties appear to agree that, as to Count II, the Court is presented with a purely legal issue, no further discovery or evidentiary hearings are necessary, and summary disposition would be a proper method for resolving this case.

A. The right to marry and form a family are fundamental rights protected by the due process clause of the 14th Amendment. Marriage is the single most important legal and personal relationship between two persons. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving v Virginia*, 388 US 1 (1967). A core part of the “fundamental right of privacy” implicit in the Fourteenth Amendment’s due process clause, *Zablocki v Redhail*, 434 US 374, 384 (1978), “[m]arriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an institution 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).

Marriage is a relationship whose meaning flows from two persons’ commitment to and love for each other, a commitment as to which sexual orientation is utterly irrelevant. The right of two consenting adults to marry and to decide for themselves whether or not to have children -- whether through natural procreation, adoption or otherwise -- is a fundamental personal right that is insulated from governmental intrusion as a matter of due process. As the Supreme Court declared in *Lawrence, supra*, 539 US at 574:

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

(Citation omitted).

Opposition to marriage equality relies primarily on asserted notions of "traditional" marriage. However, the so-called "traditional" notion of marriage has changed dramatically over time as societal recognition of the rights of women has evolved and found expression in the law. At common law, for example, a married woman had no right to control property, even property she had acquired prior to marriage, *cf. Landmark Medical Center v Gauthier*, 635 A2d 1145, 1149 (RI SCt 1944); *Charlton v Charlton*, 397 Mich 85, 91, n2 (1976), and marital rape was a legal impossibility, as a woman was deemed to have consented to having sex with her husband by the fact of the marriage itself. *People v Pizzura*, 211 Mich 71, 73 (1920).

Indeed,

throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally L. Kanowitz, *Women and the Law: The Unfinished Revolution* 5-6 (1969); G. Myrdal, *An American Dilemma* 1073 (20th Anniversary ed. 1962).

Frontiero v Richardson, 411 US 677, 684-685 (1973) (plurality opinion). Like gays and lesbians under Michigan law today, a married woman was, in the eyes of the law, legally a non-person.

Not until the 1970s did the Supreme Court eliminate myriad legal distinctions between the relative rights of men and women in a “traditional” marriage as violations of the equal protection clause.⁶

In *Windsor*, Justice Kennedy eloquently noted the evolving nature of marriage: Defining marriage to include same-sex couples “enhance[s] the recognition, dignity, and protection of [that class of persons] in their own community.” 133 SCt at 2692. New York’s choice to authorize same-sex marriages “reflects both the community’s considered perspective on the historical roots of the institution of marriage and its

⁶*Frontiero, supra* (federal law providing men in military service with an automatic dependency allowance, but requiring women in military service to provide the actual dependency of their spouse in order to qualify for dependency allowance); *Weinberger v Wisenfeld*, 420 US 636 (1975) (provision of Social Security Act providing child support benefits to the surviving wife of a deceased male worker but not to the surviving husband of a deceased female worker); *Califano v Goldfarb*, 430 US 199 (1977) (provision of Social Security Act providing “survivors” benefits to all wives of deceased male workers without a showing of actual dependency on the deceased spouse, but providing such benefits to the husband of a deceased female worker only upon a showing of actual dependency); *Orr v Orr*, 440 US 199 (1977) (a state law requiring the divorced husbands but not divorced wives pay alimony to the formerly dependent spouse); *Kirchberg v Feenstra*, 450 US 455 (1981) (a state law in a community property state that made the husband the manager of community property).

evolving understanding of the meaning of equality.” *Id.* at 2692-2693. “The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.” *Id.* at 2689.

The State’s argument that the right to marry does not include the right to marry a person of the same sex parallels Virginia’s position in *Loving* that, while an African-American male had a fundamental right to marry, he did not have a fundamental right to marry a Caucasian woman. Considering this argument in the wake of California’s Proposition 8, the district court in *Perry v Schwarzenegger*, 704 FSupp2d 921, 992 (ND Ca 2010), explained the context in which *Loving* had been decided:

Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre. ... When the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change. 388 US at 12. Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry. *Id.*

....

Plaintiffs do not seek recognition of a new right. To characterize plaintiffs’ objective as “the right to same-sex marriage” would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy – namely, marriage. Rather, plaintiffs ask

California to recognize their relationships for what they are: marriages.⁷

While the “regulation of domestic relations” has long been entrusted to the states, “[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . .” *Windsor*, 133 SCt at 2691, citing *Loving*.⁸

Under current Michigan law, Plaintiffs are deprived of the rights associated with Michigan second parent adoption law as well as with civil marriage. See R 25, Brief in Support of Plaintiffs’ Motion for Summary as to Count I, pp 3-7. “Loss of survivor’s social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans.” *Massachusetts v Department of Health and Human Services*, 682 F3d 1, 11 (1st Cir 2012). See also 29 USC §2901.101(13) (spousal rights under Family Medical Leave

⁷In *Perry*, the district court found an equal protection violation based upon a deprivation of the right to marry. The Ninth Circuit affirmed on the narrower ground that California could not constitutionally extend the right to marry to its same-sex citizens and then take it away via Proposition 8. *Perry v Brown*, 671 F3d 1052, 1089 (9th Cir 2012). In *Hollingsworth v Perry*, 133 SCt 2652 (2013), the Supreme Court vacated the Ninth Circuit’s ruling on the ground of standing, leaving intact the district court decision.

⁸“The liberty protected by the Fifth Amendment’s due process clause contains within it the prohibition against denying to any person the equal protection of the laws. ... [T]he equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.” *Id.* at 2695.

Act). Plaintiffs DeBoer and Rowse also lose a host of additional rights and benefits as a matter of Michigan law.⁹

Under Michigan law today, same-sex couples can lawfully love one another, live together and be committed to one another. They may lawfully be intimate with one another and plan their lives together. As a result of the Michigan Marriage Amendment and parallel statutory law, however, they have *no* rights whatever as to the most fundamental decisions a couple make. They are deprived of all of the dignity, equality and many substantial legal rights enjoyed by married opposite-sex

⁹Rights and benefits lost to gay and lesbian couples under Michigan law include, but are not limited to, intestacy rights permitting surviving spouse to inherit automatically from the deceased spouse's estate if there are no parents or issue, MCLA §700.2201-700.2205; the right of a surviving spouse to an allowance or to occupy the homestead while the estate is being settled, MCLA §700.2205; the right of a surviving spouse to file a wrongful death lawsuit when a spouse is killed, MCLA §600.2922(2)(a); the right of an employee's spouse to file for or receive workers' compensation death benefits and retirement benefits, MCLA §420.3; the full benefit of dissolution laws that regulate separation and divorce process, such as child custody, visitation and support, MCLA §552.23, MCLA §772.2(c), and *Harmon v Davis*, 489 Mich 986 (2011); the right to make health decisions for a spouse when the spouse cannot, including the right to withhold or withdraw life-sustaining procedures and the right to donate a spouse's organs and tissues, *In re Martin*, 200 Mich App 703 (1993); the right to consent to a post-mortem examination, MCLA §333.2855; the right to make burial arrangements for a deceased spouse, MCLA §700.3206; the right to a spouse's veterans' benefits, MCLA §206.506; the right to receive crime victims' recovery benefits for a spouse who is a crime victim, MCLA §780.766(4)(h); and domestic partner benefits for partnered state government employees, *National Pride at Work v Governor of Michigan*, 481 Mich 56 (2008). See also *National Pride at Work*, 481 Mich at 98-99, notes 44-49 (Kelly, J., dissenting).

couples. This is the essence of a denial of due process.

Michigan's ban on marriage equality – enshrined not just in statutory law but also in the state's constitution to prevent the legislature from ever eliminating the ban – also stands in stark contrast with the laws of a host of other states which recognize the right to full equality for same-sex couples.¹⁰

B. There is no rational basis for the State's discrimination as to the right to marry and to form a family based on sexual orientation. The State Defendants have proffered two justifications for depriving Plaintiffs of the same legal right to marry and to form a family they would enjoy if they were heterosexual – (1) marriage has traditionally been limited to a man and a woman, and (2) limiting marriage to a

¹⁰As of the date of filing this Brief, 13 states and the District of Columbia allow same-sex marriage. Conn. Gen. Stat. Ann. §46b-20 (West 2009); D.C. Code §46-401 (2010); Del. Code. Ann. tit. 13, §101(e) (West 2013); *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003); Md. Code Ann., Fam. Law §2-201 (West 2012); Me. Rev. Stat. tit. 19-A §650-A; Minn. Stat. Ann. §517.01 (West 2013); N.H. Rev. Stat. Ann. §457:1-a (West Supp. 2012); N.Y. Dom. Rel. Law Ann. §10-a (West Supp. 2013); *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921 (ND Cal. 2010) (see also *Hollingsworth et al. v. Perry et al.*, *supra*); R.I. Gen. Laws Ann. §15-1 (West 2013); *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009); Vt. Stat. Ann. tit. 15, §8 (West 2009); Wash. Rev. Code §26.04.010 (2012).

An additional seven states ban same-sex marriage but recognize either same-sex civil unions, 750 Ill. Comp. Stat. Ann. 75/10 (West 2011); Colo. Rev. Stat. A. §14-15-101 *et. seq.* (West 2013); Haw. Rev. Stat. §572B *et. seq.* (2011); N.J. Stat. Ann. §37:1-28 *et. seq.* (West 2007), or domestic partnerships. Nev. Rev. Stat. Ann. §122A.100 (West 2010); Or. Rev. Stat. Ann. §106.300 (West 2008); Wis. Stat. Ann. §700.001 (West 2009).

man and a woman encourages “responsible procreation and child rearing.” Neither argument is rationally related to advancing a legitimate state interest.

The same-sex marriage debate has been the subject of extensive recent litigation. As a result of lengthy evidentiary hearings, the available sociological and psychological research has already been thoroughly examined and carefully evaluated. As such, there is not only a growing body of case law on the subject but also ample relevant “Brandeis brief”¹¹ material available to the Court.

1. Tradition. Tradition alone cannot form a rational basis for a law, *Williams v Illinois*, 399 US 235, 239 (1970); a classification’s “ancient lineage” does not make it rational. *Heller v Doe, supra*, 509 US at 327. “Rather, the state must have an interest apart from the fact of the tradition itself.” *Perry*, 704 FSupp2d at 998.

2. Encouraging “responsible procreation and child-rearing”. Within this broad rationale offered by the State are a variety of claims, none of which justifies

¹¹In *Massachusetts v Department of Health and Human Services, supra*, 682 F3d at 7, the Court utilized “Brandeis Brief”-type materials to resolve “‘legislative facts’ bearing upon the rationality or adequacy of distinctions drawn by statutes... Such information is normally noticed by courts with the assistance of briefs, records and common knowledge.” *Id.*, quoting from *FCC v Beach Communications, Inc.*, 508 US 307, 314-20 (1993), and *Daggett v Commission on Governmental ethics & Elections Practices*, 172 F3d 104, 112 (1st Cir 1999). “Historically, ‘the Brandeis Brief is a well known technique of asking the court to take judicial notice of social facts.’” *Knight v Dugger*, 863 F2d 705, 742 (11th Cir 1988).

disparate treatment of opposite-sex and same-sex couples: (1) extending the right to marry to same-sex couples will discourage opposite-sex couples from wanting to marry; (2) opposite-sex couples need the incentive benefits of marriage in order to avoid indiscriminate sexual activity while unmarried and to honor their commitments in the event a woman accidentally becomes pregnant; (3) same-sex households are not as stable as opposite-sex households; and (4) children need both a father and mother role model under the same roof in order to become well-adjusted adults. Each of these rationales has recently been extensively studied, litigated and assessed. Each has also properly been roundly rejected.

As the district court found in *Perry*, “[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.” Notably to the court, studies from Massachusetts (the state allowing same-sex marriage for the longest period in the United States) show that the rates of marriage and divorce held steady prior to and after that state allowed same-sex marriage. *Id.* at 972. Further, by the time of the litigation in *Perry*, California had issued 18,000 marriage licenses to same-sex couples, yet the state could point to no demonstrated harm as a result. *Id.* at 1003.

Moreover, while many same-sex couples, including Plaintiffs, choose to have

and/or to raise children, as do opposite-sex couples, opposite-sex couples can marry regardless of desire or capacity to have children, for the decision is personal to them as a matter of individual liberty and autonomy. People can and do also choose to have children without being married, and it is generally unconstitutional for the state to discriminate against children on the basis of their parents' marital status. *Cf. Levy v Louisiana*, 391 US 68 (1968), and its progeny.

Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse.... Proposition 8 has nothing to do with children ... [It] simply prevents same sex couples from marrying. Same-sex couples can have (or adopt) and raise children.”

Perry, 704 FSupp2d at 992, 999-1000. See also *Pedersen v Office of Personnel Management*, 881 FSupp2d 294, 337-339 (D Conn 2012) (ability to procreate is not a precondition to marriage). See also *Glonn v American Guarantee & Liability Insurance Company*, 391 US 73 (1968).

Further, same-sex couples, like opposite sex-couples, can and do have children by means of artificial insemination, surrogate parenting and adoption. Plaintiffs in this case are the parents of children, two and one respectively, by means of adoption. The State's position that “responsible procreation and childrearing” is advanced by children having two parents who are married to each other is, for this reason, actually

undermined by the ban on same-sex marriage.

Striking down the same-sex marriage ban would also have no effect whatever on the asserted justification of providing an incentive to opposite-sex parents to marry because they may suffer an “unintended pregnancy.” That incentive remains for opposite-sex parents entirely independent of this Court’s ruling in this case. As the district court observed in *Windsor*, the “responsible procreation and childrearing” justification for denying same-sex couples the right to marry relies on “factual assumptions that are beyond the ‘limits of rational speculation.’” *Windsor v United States*, 833 FSupp2d 394, 405 (SD NY 2012), quoting *Romer*, 517 US at 635, and *Heller*, 505 US at 320.

As the district court found in *Perry*, a ban on same-sex marriage does not promote stability or responsibility “in naturally procreative relationships”, nor does it increase “the probability that natural procreation will occur within stable, enduring and supporting family structures.” 704 FSupp2d at 972, 999. See also *Pedersen*, *supra*, 881 FSupp2d at 337-339 (analyzing and rejecting purported link between state-sanctioned same-sex marriage and incidence of extra-marital procreation).

Most courts considering this issue today have found that not only does a same-sex marriage ban not help children; it harms them. In *Pedersen*, for example, the district court found, as to DOMA, that

DOMA's denial of federal marital benefits to same-sex married couples in fact leads to a significant unintended and untoward consequence by limiting the resources, protections and benefits available to children of same-sex parents. ... DOMA ham-fistedly deprives these adopted children of governmental services and benefits desirable, if not necessary, to their physical and emotional wellbeing and development creating an increased potential that they will become a burden on society.

DOMA ... inflicts significant and undeniable harm upon such couples and their children by depriving them of a host of federal marital benefits and protections ... [including the right] to take leave to care for a spouse with a serious health condition. ... [The denial of this benefit, in turn, puts the household and its children] under greater stress in attempting to cope with the serious illness of a parent.

881 FSupp2d at 338. (citations omitted). Similarly, the Supreme Court found in *Windsor* that DOMA “humiliates tens of thousands of children now being raised by same-sex couples [and] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” 133 SCt at 2694.

The State argues alternatively, but equally unpersuasively, that same-sex marriage is also justified because a child benefits from being raised by a married father and a married mother living in the same household – thereby providing the child with both a same-sex role model and a model for an adult heterosexual relationship. The argument presumes the existence of standardized gender-based roles in opposite-sex marriages, an assumption that is as factually antiquated as it is

legally unsound. When this argument was raised by the DOMA defendants, the district court in *Windsor* observed that DOMA's ban "[a]t most ... has an indirect effect on popular perceptions of what a family 'is' and should be, and no effect at all on the types of family structures in which children in this country are raised." *Windsor*, 833 FSupp2d at 405.

As the district court found, after a full bench trial, in *Perry*, "[c]hildren do not need to be raised by a male parent and female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well adjusted." 704 FSupp2d at 981. Further, in Michigan, a "no fault" divorce state, a married opposite-sex couple can easily divorce, MCLA §552.6, so that while the children born during the marriage would still have two legal parents, Michigan law allows opposite-sex couples easily to undermine the State Defendants' vision of "a home environment with both a mother and a father". The State's argument also ignores the right of a single person to adopt a child under Michigan law.

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

struck down in that case:

... disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”...

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance... Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

517 US at 633 (citations omitted).

Because Michigan’s same-sex marriage ban is a part of its constitution – the only clause in that document enshrining discrimination in the fundamental law of the state – the State has foreclosed its legislature from ever enacting marriage equality as social attitudes change. Michigan’s Marriage Amendment literally forces supporters of gay and lesbian rights – the targets of more restrictive ballot initiatives than any other group in American history (see R66, Brief of *Amici Curiae* Constitutional Scholars, p 29, n 12) – to seek change only through the very costly referendum process. As in *Romer*, and for the very reasons the Court relied on in that

case, the Michigan constitutional ban on marriage equality further denies Plaintiffs and all other same-sex couples the equal protection of the law.

C. Proponents of the Michigan Marriage Amendment were motivated by a discriminatory animus. The Michigan *amici* law professors persuasively argue that the Michigan Marriage Amendment in essence is a “super DOMA” (R65), that it was motivated by the same discriminatory animus which led to the passage of DOMA, and that both the text and the history of the Amendment support this conclusion. Consequently, the same arguments that led the Supreme Court in *Windsor* to find a discriminatory animus based upon the history and text of DOMA lead to the same conclusion in this case as to the Michigan Marriage Amendment. Plaintiffs join in this argument, as it provides a related, and additional,¹² basis for this Court to conclude that Plaintiffs are deprived of the equal protection of the law.

D. Conclusion. While the Court in *Windsor* did not find it necessary to reach the ultimate question – the constitutionality of a legal ban on same-sex civil marriage

¹²The instant constitutional claim can be established *either* by showing that the enactment has no rational basis, *or* by showing that proponents of the initiative (or the electorate) harbored a discriminatory animus. Where the absence of a rational basis is evident, as here, the plaintiff need not affirmatively prove animus based upon public pronouncements regarding the enactments. See *Bassett*, *17, quoting from *Scarborough v Morgan County Board of Education*, 470 F3d 250, 261 (6th Cir 2006), *Warren v City of Athens*, 411 F3d 697, 711 (6th Cir 2005), and *Davis v Prison Health Services*, 679 F3d 433, 438 (6th Cir 2012).

– the Court’s reasoning in that case is equally applicable to consideration of the constitutionality of Michigan’s constitutional and statutory ban on same-sex marriage for all the reasons stated above.¹³ Of particular relevance in the present case is what the Court in *Windsor* stressed about the harm to children caused by DOMA’s ban on federal recognition of their parents’ same-sex marriage:

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

Windsor, 133 SCt at 2694 (emphasis supplied).¹⁴

Individually and taken together, *Romer*, *Lawrence* and *Windsor* teach that neither animosity and prejudice against gay and lesbian individuals nor traditional notions of “morality” are sufficient to excuse discrimination on the basis of sexual

¹³See also *Obergefell v Kasich*, 2013 WL 3814262 (SD Oh 2013) (plaintiffs demonstrated substantial likelihood of success as to claim that Ohio constitutional and statutory law prohibiting recognition of lawful same-sex marriages performed in another state while recognizing lawful opposite sex marriages performed in another state violates the 14th Amendment’s equal protection clause).

¹⁴“DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses, [a]nd it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.” *Windsor*, 133 SCt at 2695.

orientation. Such discrimination violates both due process and equal protection. Regardless of the standard of scrutiny applied, a State cannot deny gay and lesbian individuals the fundamental right to marry and to form a family. For all of these reasons, Plaintiffs are entitled to summary judgment on Count II.

II. THE MICHIGAN SECOND PARENT ADOPTION STATUTE DEPRIVES PLAINTIFFS OF DUE PROCESS AND EQUAL PROTECTION, IN VIOLATION OF U.S. CONST., AM XIV.

Even if this Court grants Plaintiffs the relief they request as to Count II, the Court should address Count I, itself a stand-alone count. The Court's decision as to Count II will likely be appealed; in the absence of a ruling as to Count I, the Court of Appeals would not have the benefit of this Court's analysis and conclusions as to that count.

A. Michigan's second parent adoption statute. Michigan law relating to adoption and second parent adoption is governed by MCLA §710.24, which provides in relevant part as follows:

(1) If a person desires to adopt a child or an adult and to bestow upon the adoptee his or her family name, or to adopt a child or an adult without a name change with the intent to make the adoptee his or her heir, that person, together with his wife or her husband, if married, shall file a petition with the court of the county in which the petitioner resides or where the adoptee is found[.]

Significantly, the requirement that a married person's spouse join in the petition may

be waived by consent or for good cause. MCLA §710.24(2)(a) & (b). The statute allows a married couple to adopt a child, it allows a single person to adopt a child, and it allows a married person to adopt a child even without spousal consent. However, Michigan forbids a joint adoption by two unmarried persons, or a second parent adoption by an unmarried person. On its face and as applied, the statute discriminates against Plaintiffs DeBoer and Rowse and their children.

B. Plaintiffs are suffering an injury cognizable under 42 USC §1983.

Plaintiffs are suffering clear injury in fact cognizable under 42 USC §1983. The child Plaintiffs are deprived on a daily basis of significant legal benefits afforded to children with two legal parents rather than one such as (a) the right to have a parent automatically in the event of the death of the other parent, (b) the right to dependency benefits under laws and other contractual arrangements providing for dependency benefits (*e.g.*, social security, workers compensation, pensions, insurance and tort law) and (c) the right to have at least one parent able to make decisions in the event the other parent is incapacitated or unavailable. See Exhibits 1, 2, 4, and 5, Affidavits of DeBoer, Rowse, Bostwick and Nelson.¹⁵ Moreover, the child Plaintiffs are

¹⁵See also *Adoption of Tammy*, 416 Mass. 205, 214 (1993) (an adopted child can inherit from the “second” legal parent under the law of intestate succession; the second parent is legally obligated to provide support for the child; the child is eligible for coverage under the second parent’s insurance policies, and for social security benefits in the event of the second parent’s disability or death). See also

suffering factual injury because this statute, when coupled with the Michigan Marriage Amendment, Mich. Const. Art 1, §25, and MCLA §§551.1- 551.4 and §551.272, assures that the child of a same-sex unmarried couple will *never* have two legal parents so long as his or her parents remain in a stable, committed same-sex relationship.¹⁶

The parent Plaintiffs also suffer injury in fact from the interstices of these Michigan laws because neither is permitted to file a joint or second-parent petition for adoption, each is deprived of the right to determine who may share custody of her child and each is deprived of the right to become a legal parent to her partner's child, whom she co-parents in every way [Complaint, ¶13]. Finally, the State Defendants cause the Plaintiffs' injuries because they execute, implement and defend Michigan's second-parent adoption statute [(Complaint, ¶18)].

C. The State Defendants' enforcement and defense of MCLA §710.24 results in discrimination against Plaintiff children based on their parents' unmarried status. Defendants Snyder and Schuette's actions in this case single out

Matter of Jacob, 86 NY2d 651 (1995) (same, as well as entitlement to health insurance and wrongful death benefits upon the death of the second parent); *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001) (same).

¹⁶The only way a same-sex partner may even attempt to adopt their partner's child under current Michigan law is for their partner to die and leave their child with no legal parent.

and deny legal benefits to a distinct subset of children – those who are parented by unmarried same-sex couples, who, unlike unmarried opposite-sex couples, cannot marry under Michigan law. As noted above, disparate treatment of the children of unmarried parents based on the conduct or status of their parents violates the equal protection clause. *See, e.g., Levy, supra* (invalidating provision denying children of unmarried parents the right to claim for wrongful death); *Weber v Aetna Cas. & Sur. Co.*, 406 US 164, 175 (1972) (invalidating provision denying “unacknowledged illegitimate” children the right to collect, under workman’s compensation, upon father’s work-related death); *Mathews v Lucas, supra*, 427 US at 505 (“visiting condemnation upon the child in order to express society’s disapproval of the parents’ liaisons ‘is illogical and unjust’”). In *Levy*, the Court noted what should be obvious, both then and now: “[I]llegitimate children are not ‘nonpersons’; they are clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.” 391 US at 70, quoting from Note, “The Rights of Illegitimates Under Federal Statutes”, 76 Harv.L.Rev. 337 (1962). As the Court explained in *Pickett v Brown*, 462 US 1, 7 (1983):

Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as unjust – way of deterring the parent ... [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where – as in this case – the classification is justified by no legitimate state interest,

compelling or otherwise.

See also Gomez v Perez, 409 US 535, 538 (1973) (“a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.”)

D. The Michigan adoption statute irrationally distinguishes between single persons and unmarried couples. MCLA §710.24 is irrational on its face. The State Defendants do not dispute that gay and lesbians can be just as good parents as heterosexuals. Moreover, single people, whether homosexual or heterosexual, are permitted to adopt under the statute. A strong consensus has also developed among the medical, psychological and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents. Exhibit 6, Howard Affidavit.¹⁷ See also R 66, *Amici Curiae*

¹⁷See also Position Statement of American Psychiatric Association, No. 200214, approved November 2002; E. Perrin, *Coparent or Second Parent Adoption by Same-Sex Parents*, Pediatrics 339 (2002); R.U. Paige, *Proceedings of the American Psychological Association, Incorporated, for the Legislative Year 2004: Policy Statement on Lesbian and Gay Parents* (2004); J. Stacey and T. Bilbarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 American Sociological Review 159 (2001); American Academy of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement*, Vol. 92 (2011); American Medical Association, *AMA Policy Regarding Partner Co-Adoption*, H-60.940 (2012); Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults* (2011), available <http://www.cwla.org/programs/culture/glbtpqposition.htm>.

Brief of Constitutional Law Scholars, pp 14-15.

Given these circumstances, it is both perverse and irrational to contend that *two* unmarried parents – whether straight or gay – cannot provide a stable and nurturing environment. The State Defendants’ argument loses all logical underpinning where, as here, the statute on its face permits a single person to adopt or a married person to adopt without spousal consent.

The Michigan statute is further irrational because Michigan allows unmarried couples – including gay and lesbian couples – to be foster parents and legal guardians. Indeed, both DeBoer and Rowse were certified *as a couple* by the State to be foster parents for “J”, a status which remained in effect until J was adopted by Rowse [Exhibit 1, DeBoer Affidavit, ¶12]. In striking down a law barring homosexuals from serving as adoptive parents as violative of equal protection, the Court in *Florida Department of Children and Families v Adoption of S.S.G. and N.R.G.*, 45 So.3d 79 at 85, observed, “[i]t is difficult to see any rational basis for using gay persons as foster parents or guardians, on a temporary or long term basis,

As to a similar consensus among legal authorities, see e.g., *Florida Department of Children and Families v Adoption of S.S.G. and N.R.G.*, 45 So.3d 79, 85 (Fla. App. 3 Dist. 2010)(striking down a law barring homosexuals from serving as adoptive parents as lacking a rational basis). See also *Gill*, 699 FSupp2d at 388-389, n 106 (citing the “consensus” that children of gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents).

while imposing a blanket prohibition on adoption by the second parent in a gay household.” *Id.* at 86. That is, this was “a distinction without a difference”. *Id.* at 86, n 9. The statute is irrational as applied here because *both* Deboer and Rowse were approved by the State as individuals to adopt their respective children after an extensive individualized assessment. The statute is yet further irrational because marriage, as noted above, is not a prerequisite to procreation, and an unmarried birth father in Michigan can become a legal parent simply by the inclusion of his name on the child’s birth certificate.

Nor can the State Defendants reasonably argue that the statute serves the State’s interests in replicating, through adoption, the “traditional family”, since the statute, by permitting single persons to adopt, necessarily also defines a family to include a single parent and his or her child. Moreover, the Supreme Court has made it clear, including in cases cited by the State Defendants themselves, that the “traditional family” cannot be defined so narrowly and still pass constitutional muster. *City of East Cleveland v Moore*, 431 US 494 (1977) (striking down, on due process grounds, city housing ordinance for defining a “family” to exclude a grandmother and her grandchildren living under the same roof; constitutional family protections may not be limited to the “arbitrary . . . boundary of the nuclear family”); *Smith v Org. of Foster Families for Equality and Reform*, 431 US 816, 844-845

(1977) (for constitutional purposes, a family is not limited to nuclear family of husband, wife and their children by birth; “biological relationships are not the exclusive determination of the existence of a family. . . [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association[.]”).

Any concern the State might entertain that DeBoer or Rowse or any other prospective adoptive same-sex partner parents may individually be unfit, or that as a couple, they may have an “uncertain level of commitment to each other” can be adequately addressed within Michigan’s legal and regulatory framework for adoption. The statutory scheme mandates an individualized assessment of a petitioner’s qualifications to become a parent before an adoption may be approved. Significantly, like any other prospective adoptive parent in Michigan (including married step-parents), DeBoer and Rowse had to petition the circuit court for permission to adopt each of these children. Before each of the children could be adopted by Rowse or DeBoer, both were interviewed extensively; both were screened by the State for criminal history and (through the Department of Human Services) for any history of abuse or neglect; an assessment was conducted through the county where the adoptions were to occur; their home was inspected; a temporary placement of each child was made in their home; they were monitored by the State in their home through

visits by social workers and nurses; and an individualized determination was made by the circuit court of applicable jurisdiction that each was a suitable parent and that the child being adopted was being properly cared for while in the temporary placement. See Exhibits 1, 2, 4, 5 Affidavits of Rowse, Deboer, Bostwick, and Nelson. Nor are the parent Plaintiffs in this case asking this Court to grant petitions for second-parent adoption; rather, they are requesting an order from this Court preventing the State Defendants from barring them from even attempting to adopt each other's child/children based solely on the fact that they are an unmarried same-sex couple.

For all of these reasons, the State Defendants' arguments ultimately fail the most fundamental of equal protection requirements – that a statute be “narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s].” *Romer, supra*, 517 US at 633.

The State Defendants also argue that if the statute is determined to be unconstitutional, “multiple people” could attempt to adopt a child, evoking the image of a lemmings rush of well-meaning adults lining the courthouse steps in an effort to adopt a lone infant. First, with throngs of unwanted children in Michigan's foster care system, the State should be so fortunate to have such an unlikely scenario arise.

See Exhibit 6, Howard Affidavit. Second, if and when the proverbial “village” ever seeks to adopt a child, the court can consider that situation at that time. At least as significantly, as adoption expert Jeanne Howard points out in her affidavit [Exhibit 6], gay and lesbian parents adopt special needs children from foster care systems in far greater numbers than do their heterosexual counterparts.

Until taken in and adopted by Plaintiffs DeBoer and Rowse respectively, the child Plaintiffs in this case were abandoned, surrendered, unwanted special needs children destined for state wardship, foster care or orphanages [Exhibit 1, DeBoer Affidavit, ¶¶8-10]. Consequently, Plaintiffs’ interpretation of the constitutionality of this statute has a far better chance than does the State Defendants’ interpretation of furthering the State’s professed “interest in encouraging a stable and nurturing environment of” both its adopted and foster children.

For these reasons, too, the categorical exclusion of same-sex couples from consideration as joint adoptive parents is unconstitutional regardless of the level of scrutiny applied.

E. The State Defendants’ enforcement and defense of MCLA §710.24 results in discrimination against the Plaintiff children’s unmarried parents. The State Defendants also discriminate against DeBoer and Rowse by targeting unmarried couples and their constitutionally protected intimate relationships. As in *Lawrence*,

the State Defendants subject parents to penalties for exercising their constitutionally protected fundamental liberty interest in having an unmarried, intimate adult relationship and in forming and protecting their family, while imposing no such penalty on married adoptive parents exercising their fundamental relationship rights. In doing so, the State Defendants impinge on Plaintiffs' fundamental liberty interests in family autonomy and in the care, custody and control of their children. *Stanley v Illinois*, 405 US 645, 651 (1972).

Even if no fundamental right were involved here, the State Defendants may not constitutionally discriminate against Plaintiff parents in the exercise of their parental, family and relationship rights because of their unmarried status, their sexual orientation or their decision to be in a same-sex relationship. See *Lawrence*, 539 US at 579 (O'Connor, J., concurring), and n 3, *supra*.

Additionally, this statute discriminates against the adult Plaintiffs on its face because both persons in a married couple can consent to an adoption by joining in the petition, while the unmarried Plaintiff parents – and all unmarried same-sex couples – are precluded by Michigan law from doing so, a classification with no logical relationship to the object to be attained. As such, this statute is neither “narrow enough in scope [nor] grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s].”

Romer, supra, 517 US at 633.

RELIEF REQUESTED

For all the reasons stated above, Plaintiffs respectfully request that this Court grant their motion for summary judgment, grant the other relief requested in the Amended Complaint and grant such other relief as equity and justice require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

CAROLE M. STANYAR hereby certifies that a copy of Plaintiffs' Motion for Summary Judgment, Brief and Exhibits in Support, and this Certificate of Service were served upon Assistant Attorneys General Kristin Heyse and Tonya Jeter, and upon counsel for Ms. Brown, Andrea Johnson and Michael Pitt, ECF filers, on August 14, 2013.

s/Carole M. Stanyar

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