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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

- - -

JAMES OBERGEFELL, et al., : CASE NO. 1:13cv501  
: :  
Plaintiffs, : Cincinnati, Ohio  
: :  
- v - : Wednesday, December 18, 2013  
: 10:00 a.m.  
CAMILLE JONES, et al., : **MOTION FOR DECLARATORY**  
: **JUDGMENT AND PERMANENT**  
Defendants. : **INJUNCTION**

- - -

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE TIMOTHY S. BLACK, JUDGE

- - -

APPEARANCES:

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Proceedings reported by stenotype.  
Transcript produced by computer-aided transcription.

1 MORNING SESSION, Wednesday, December 18, 2013

2 (Proceedings commenced at 10:00 a.m.)

3 THE COURT: Good morning ladies, and gentlemen. I'm  
4 here in the open courtroom on the record on the civil case of  
5 *James Obergefell, et al., versus Theodore Wymyslo, et al.*

6 We're set for final hearing on the plaintiffs' motion  
7 for declaratory judgment and permanent injunction. The Court  
8 is prepared and ready to proceed in that regard.

9 I'd ask that the attorneys enter their appearances for  
10 the record and help me as to who is here. And then I wish to  
11 hear from each attorney what you anticipate presenting and the  
12 length of time, and we will proceed.

13 So for purposes of the record, who appears on behalf  
14 of the plaintiffs?

15 MR. GERHARDSTEIN: Judge, I'm Al Gerhardstein, and  
16 with me is James Obergefell at the table. We have Robert Grunn  
17 at the end. David Michener is a plaintiff, sitting next to  
18 Robert Grunn.

19 And with me is counsel. Behind me is Lisa Meeks and  
20 Jennifer Branch, Jackie Gonzales Martin. And Adam Gerhardstein  
21 is here, who is admitted in Minnesota but not yet in Ohio.

22 THE COURT: Very well.

23 MR. GERHARDSTEIN: We've agreed on an hour apiece, but  
24 I think we're both so impressed with our briefing that we may  
25 not need all of that time.

1 THE COURT: Very well. Thank you.

2 And on behalf of the State's defendant?

3 MS. COONTZ: Good morning, Your Honor.

4 Bridget Coontz on behalf of Doctor Wymyslo. With me  
5 today is Assistant Attorney General Zach Keller, and Assistant  
6 Attorney General Ryan Richardson.

7 And plaintiffs' counsel is correct, I do not believe  
8 we're going to need a full hour.

9 THE COURT: The Court may.

10 Very well. Good morning, welcome.

11 And on behalf of the City defendant?

12 MR. HERZIG: Good morning, Your Honor. Eric Herzig  
13 for Doctor Jones for the City of Cincinnati. I don't need to  
14 speak in separate arguments from the City unless we're  
15 separately implicated during the arguments of the others.

16 THE COURT: Very well. Welcome.

17 Well, the Court's ready to proceed. On behalf of the  
18 plaintiffs, Mr. Gerhardstein.

19 MR. GERHARDSTEIN: May it please the Court, this case  
20 is about love surviving death. Whether the plaintiffs, who  
21 were married in other states, can require Ohio to recognize  
22 their valid legal same-sex marriages on their Ohio death  
23 certificates.

24 We need to remind ourselves where we've been. When  
25 James Obergefell and John Arthur started this case, they really

1 had a simple goal. John Arthur was going to die and they  
2 wanted his Ohio death certificate to accurately report that he  
3 was married and that James Obergefell was his surviving spouse.

4 You granted a TRO ordering that result, and John died  
5 on October 22nd, 2013. His death certificate, which is in the  
6 record at 52-3, records that he was married when he died and  
7 that James was his surviving spouse.

8 Another TRO was issued at the request of plaintiff,  
9 David Michener, and now his death certificate -- his spouse's  
10 death certificate -- William Ives, is also in the record  
11 recording that he was married and that David Michener was his  
12 surviving spouse.

13 Mr. Obergefell and Mr. Michener are here today seeking  
14 to make permanent the injunctions that have been issued so far,  
15 because Ohio retains the power to amend their husbands' death  
16 certificates unless this Court says no by issuing a permanent  
17 injunction.

18 Mr. Grunn is here as the funeral director who handled  
19 the cremation of John Arthur and filled out the death  
20 certificate for John Arthur that's in this record. And he will  
21 have more same-sex clients who are married in other states but  
22 who die in Ohio. And he seeks a declaratory judgment and  
23 injunction that permits him to fill out those clients' death  
24 certificates in a way that recognizes the marriage of those  
25 clients, like he's done for John Arthur.

1           Now Doctor Jones, the City defendant, the local  
2 registrar for the Ohio Department of Health, has not opposed  
3 this relief, but she's also indicated to the Court that she  
4 wants the Court to say it's okay so that when she's  
5 participating in the submission of these records, she's not  
6 prosecuted for submitting false records to Doctor Wymyslo.

7           It's only the State, Doctor Wymyslo, the Director of  
8 the Ohio Department of Health, who says that couples like James  
9 and John, or David and William, should not have their  
10 out-of-state same-sex marriages recognized by Ohio for any  
11 purpose, even to grant them the dignity at death by recognizing  
12 their marriages on their death certificates. And by refusing  
13 even this limited relief, Doctor Wymyslo is violating the Equal  
14 Protection Clause and the Due Process Clause of the United  
15 States Constitution.

16           So, let's review what the classification is that we're  
17 talking about, because that's central to understanding an equal  
18 protection argument.

19           Seventeen states in the District of Columbia and  
20 Canada and other countries now permit gay marriage. The  
21 marriage of John and Jim, and of Dave and William, are  
22 recognized in all of those jurisdictions and now, because of  
23 *Windsor*, in the federal government.

24           The problem is that every day more married same-sex  
25 couples will be moving to Ohio who have been married in those

1 states, and a growing number of those individuals are going to  
2 die in Ohio. Director Wymyslo says the registrars and funeral  
3 directors may not list those individuals as married on their  
4 death certificates.

5           So what if -- what if instead of marrying John, James  
6 had married his female first cousin, out of state, and then  
7 when they moved back to Ohio she had died. Under 3101(A), Ohio  
8 would not let that marriage take place between first cousins.  
9 But if she had come back and died after they were married, Ohio  
10 would have recognized the marriage and we wouldn't be here.  
11 There would be no problem. Her death certificate would record  
12 him as the surviving spouse, because Ohio follows the  
13 place-of-celebration rule.

14           Same for underage wives. Females cannot get married  
15 on their own in Ohio if they're under 16. But if a 15-year-old  
16 goes off to a state where that's legal and gets married, then  
17 comes back, Ohio will recognize the marriage.

18           So now we have these same-sex marriages. James and  
19 John were legally married in Maryland, David and William were  
20 legally married in Delaware, so their marriages are legal in  
21 the states where they were celebrated, but they're not treated  
22 the same by Director Wymyslo.

23           And we also have a category that we haven't talked  
24 about much in this case yet, which is common-law marriages.  
25 Common-law marriages were banned in Ohio in 1991 by statute.

1 But to this day, Ohio continues to recognize common-law  
2 marriages where they are legal in those states if they come  
3 here to Ohio and then need to rely on their married status.

4 And, in fact, that same statute that created the  
5 problem before this Court amended the common-law marriage  
6 statute, 3105.12, to say, well, we do recognize common-law  
7 marriages from other states unless they're same-sex marriages.

8 So that is yet another example of the difference in  
9 treatment by Ohio that violates the place-of-celebration rule.

10 So, we've made a little progress through the briefing,  
11 and that is that the State concedes that discrimination based  
12 on sexual orientation can violate the Equal Protection Clause.

13 The State cites *Scarborough and Davis versus Prison*  
14 *Health Services* for the point that rational basis applies, and  
15 we'll get to that in a minute. But remember that in both of  
16 those cases, dismissals of the claim of sexual orientation  
17 discrimination were reversed by the Sixth Circuit and said, no,  
18 go back to the trial court and try this case, because  
19 purposeful discrimination based on sexual orientation violates  
20 equal protection.

21 So we made that much progress. But the failure -- so  
22 I'm not going to talk about rational basis yet because I want  
23 to start with a discussion of whether heightened scrutiny  
24 applies. And that's why we built the record we did. The  
25 record supports heightened scrutiny.

1           And it's really based on two things: First, under  
2 equal protection, there's two traditional categories that a  
3 court looks at in order to see if there is a special reason  
4 that a classification should be reviewed under a higher level  
5 than rational basis. Those four categories are: History of  
6 discrimination; whether the category that's distinctive to the  
7 group is related to that person's ability to contribute to  
8 society; lack of political power; and immutability.

9           The most important of those categories are: History  
10 of discrimination and ability to contribute to society.

11           We've got the leading expert in the world on  
12 discrimination against gays, Professor Chauncey, his report is  
13 at 42-1 in the record, and we also have a very thorough review  
14 of the history of discrimination against gays in Ohio by  
15 Professor Becker, and her report is at 41-3.

16           And both of these reports together thoroughly document  
17 that gays have been targeted, persecuted and oppressed with  
18 respect to all areas of discrimination, public accommodations,  
19 crimes, violence, every area of discrimination, in addition to  
20 marriage.

21           So that category is satisfied.

22           With respect to the ability to contribute to society,  
23 the notion is you shouldn't be creating a government  
24 classification if the classification is based on something that  
25 doesn't relate to whether the person can be a productive



1 citizen. So that heightened scrutiny was granted when race was  
2 the classification, when gender was the classification, when  
3 national origin was the classification, because the notion is,  
4 if you're really creating government classifications based on  
5 that, that's prejudice. That's just punishing people for who  
6 they are.

7           And if you look at Professor Peplau's report in 46-1,  
8 she thoroughly documents how people who are gay, lesbian,  
9 bisexual, or transgender can contribute fully to society just  
10 as people of various races, people of various genders, and  
11 there's really no purpose at all to be served by creating a  
12 classification based on sexual orientation.

13           THE COURT: Is there any dispute in the record that  
14 sexual orientation has relevance to a person's ability to  
15 contribute to society?

16           MR. GERHARDSTEIN: I have seen none.

17           THE COURT: I agree.

18           MR. GERHARDSTEIN: Okay. And so the next category,  
19 which is not as important but still often discussed, is whether  
20 the group that is the target of any government classification  
21 lacks meaningful political power.

22           And Professor Segura and, again, Professor Becker --  
23 Segura is at 47-1 -- have addressed this. And one might say,  
24 well, look what's happened here recently. There's been a  
25 growing number of states through their legislatures adopting

1 the notion that they will recognize gay marriage. And that's  
2 true.

3 But this notion of political power is something that  
4 we look at over the long run, and there are 40 states that have  
5 either constitutional prohibitions or statutes that have been  
6 passed mainly since 2004 that prohibit gay marriage and that  
7 demonstrate that gays, unless they are in very, very strong  
8 coalition, do lack a significant amount of political power.

9 And of course in Ohio, we don't even have a civil  
10 rights act that protects gays from discrimination in public  
11 accommodations. We don't have a civil rights act that protects  
12 gays from discrimination in employment. Our office gets called  
13 routinely by people who have been discriminated against because  
14 they're gay, and we can't help them unless they're a public  
15 employee.

16 So there's plenty of work to do and plenty of muscle  
17 that doesn't exist in the gay community yet.

18 THE COURT: There's no federal relief yet, either.

19 MR. GERHARDSTEIN: That's correct. And that is up in  
20 the Congress this year, but it does not look, at this point,  
21 that the House is willing to even address it. So that's still  
22 an issue.

23 THE COURT: The Senate passed it.

24 MR. GERHARDSTEIN: Correct.

25 THE COURT: And the gridlocked Congress is unable to

1 act further.

2 MR. GERHARDSTEIN: That's correct.

3 And the last category is whether the anchor for the  
4 classification hits on something that's immutable. And sexual  
5 orientation is that. And, again, look at Peplau. And the  
6 notion is, if you're really classifying things based on a core  
7 trait, then you're not basing it on anything that's a  
8 legitimate governmental purpose. And that's certainly true  
9 when it comes to sexual orientation.

10 So the classification here, the denial of recognition  
11 of same-sex marriages, while recognizing similar opposite-sex  
12 marriages, is based on a category that targets a group that is  
13 fully able to contribute to society, that's been the target of  
14 discrimination, that lacks meaningful political power, and the  
15 core trait is immutable. And all of those suggest that  
16 heightened scrutiny should be addressed, along with the fact  
17 that we're talking about marriage and marriage is a fundamental  
18 right. And that is something that the Supreme Court has  
19 recognized for prisoners in *Turner*, for people who owe child  
20 support in *Zablocki*, and for people of various races in *Loving*.  
21 So it is a fundamental right to marriage that's burdened here.  
22 And that, again, supports the notion that there should be  
23 heightened scrutiny.

24 And that suggests that in order to defend this  
25 statute, the State has to show that this classification is

1 substantially related to an important governmental purpose, and  
2 they can't do it, because there is no purpose in discriminating  
3 against gays with respect to recognition of their marriages in  
4 other states that has been identified that meets this high  
5 burden.

6 THE COURT: And before you go there and get to that, I  
7 want to back up on this fundamental right to marriage. The  
8 only way we get to heightened scrutiny is if there's a  
9 fundamental right at issue; is that right?

10 MR. GERHARDSTEIN: That is one path. That's the due  
11 process path.

12 THE COURT: And on the due process path, every court  
13 that's ruled on the issue has held that, although there's a  
14 fundamental right to marriage, that's not speaking to a  
15 fundamental right to have same-sex marriages, because that's  
16 not deeply rooted in our nation and tradition.

17 MR. GERHARDSTEIN: You know, this is where *Lawrence* is  
18 so instructive because *Lawrence* didn't say this case is about  
19 the fundamental right to have same-sex sexual acts. *Lawrence*  
20 said this case is about the fundamental right to have physical  
21 intimacy in your loving relationship.

22 So that's how we have to look at this. *Lawrence*  
23 reversed *Bowers*, and in reversing *Bowers*, it said, you know, we  
24 aren't going to define gays by conduct that some people  
25 associate with gays. Instead, we're going to look at this,

1 this desire to engage in this physical intimacy, and say that  
2 that is a fundamental right. And they didn't even get to  
3 marriage yet and they're recognizing a fundamental right.

4 And in rejecting *Bowers*, they said *Bowers* was not  
5 correct when it was decided and it is not correct today. Its  
6 continuance as precedent demeans the lives of homosexual  
7 persons and represents an invitation to subject homosexual  
8 persons to discrimination, both in public and in private  
9 spheres.

10 So to take that sort of analysis and -- *Lawrence* also  
11 said, yes, we look to the traditions of society, but you have  
12 to frame that look at our traditions correctly. And the way  
13 they framed it was not a right to homosexual physical acts but,  
14 rather, to intimate acts.

15 The way we need to frame it is a right to marriage,  
16 not same-sex marriages, but a right to marriage. And it's that  
17 right to marriage that's burdened.

18 Because there was a long tradition in this country of  
19 banning interracial marriage, and it wasn't framed in *Loving* as  
20 a right to interracial marriage -- it was a right to marriage.  
21 And that's the correct way to look at it, because sometimes the  
22 tradition is the embodiment of a long-term prejudice. And in  
23 *Loving*, we found that, and it was right for the Court to knock  
24 it down.

25 Here, we have the same thing. It is the right to

1 marriage that's the issue, and not just same-sex marriages.

2 THE COURT: Because we have a liberty interest in, as  
3 consenting adults, to engage in private sexual intimacy and to  
4 marry who we choose?

5 MR. GERHARDSTEIN: Yes, all of those things. The  
6 private sexual intimacy was guaranteed through *Lawrence*, and  
7 the right to marry was the start of that, was actually  
8 recognized here in *Windsor*. So, yes in both instances.

9 THE COURT: So that's the liberty interest you're  
10 talking about --

11 MR. GERHARDSTEIN: Correct.

12 THE COURT: -- that gets it to heightened scrutiny?

13 MR. GERHARDSTEIN: And that gets us to heightened  
14 scrutiny as a parallel path to the heightened scrutiny that's  
15 supported by the history of discrimination and the other  
16 factors that traditionally are looked at and that were set out  
17 in *Cleburne* and *Frontiero* and the alien education cases in  
18 those regards.

19 But, you know, and I want to emphasize that this, at  
20 this stage, has to be a parallel review of what we should talk  
21 about next, which will be rational basis. Because there is the  
22 Sixth Circuit cases -- there are the Sixth Circuit cases --  
23 most recently *Davis* in 2012 -- that says you have to use  
24 rational basis.

25 But I would suggest, as the court said in *Bassett*,

1 that this court say to the Sixth Circuit, respectfully, maybe  
2 you should look at this again. Because when the Court parrots  
3 that conclusion, as they do in two-sentence statements, we have  
4 to use rational basis, there is no heightened scrutiny. If you  
5 really review the basis for the Sixth Circuit holding in that  
6 regard, it all goes back to an *Equality Foundation*. And I know  
7 that case because I lost it. And *Equality Foundation* was  
8 decided in 1997, and it squarely is grounded on *Bowers*.

9 THE COURT: Which was reversed.

10 MR. GERHARDSTEIN: Which was reversed, after *Equality*  
11 *Foundation* was decided.

12 So when you -- and if you look at *Equality*  
13 *Foundation* -- and I remember this from the argument -- the  
14 Sixth Circuit panel, both in argument and then in the decision,  
15 said: We reject heightened scrutiny -- and I quote -- because  
16 the conduct which defined them as homosexuals was  
17 constitutionally proscribable. Meaning, the Sixth Circuit  
18 panel at that time thought that gay people were defined by the  
19 sex acts they engaged in. And since *Bowers* said that can be  
20 criminal, there's no way that could ever been heightened  
21 scrutiny.

22 And that's all wrong. *Lawrence* says it's wrong and,  
23 hopefully, the Sixth Circuit will revisit it if this Court  
24 chooses to explore that as at least an alternate basis of  
25 reasoning in a case like this.

1 THE COURT: Okay. Before you get to rational basis,  
2 I'm still back on the fundamental right.

3 MR. GERHARDSTEIN: Okay.

4 THE COURT: We talk about the liberty interest in  
5 private behavior and marriage. Is there a liberty interest if  
6 you get married in one state and come to the next state and the  
7 next state refuses to recognize it? Isn't that violating your  
8 liberty interest in the right to remain married?

9 MR. GERHARDSTEIN: Yes. The fundamental right to  
10 marriage should be transportable across state lines. And  
11 that's what the celebration rule really gave us. It gave us  
12 the certainty of knowing that, if I'm going to have a good time  
13 and go to Vegas and get married and celebrate and then come  
14 back to Ohio and live my more mundane life after my big party,  
15 yes, I'm still married even though I was married in Vegas.

16 And more concretely for this case, if I am a  
17 common-law marriage in another state, if I'm a first-cousin  
18 marriage in another state, if I'm an underage marriage in  
19 another state, and if all of those are legal in those states  
20 and I come back to Ohio, even though I couldn't do those  
21 marriages here, Ohio is going to recognize them because it  
22 follows the place-of-celebration rule.

23 And Professor Grossman is our expert on marriage and  
24 the history of marriage, and she actually says that Ohio is at  
25 the far end of this celebration rule, recognizing everything.



1           So that's a very important liberty interest. It's  
2 been well established in Ohio as a liberty interest, and it is  
3 critical to the negotiations that we're trying to explore in  
4 this case.

5           And on top of all of that is Professor Becker's review  
6 of the 2004 campaign for the constitutional amendment and for  
7 the laws that are passed that are the subject of what we're  
8 doing in court today. And she very carefully documents how  
9 much animus was just spread all over the campaign itself.

10           No one of these things standing alone may be enough,  
11 but I think, as a package, it is fair for this Court to say  
12 that there really is no legitimate governmental purpose and  
13 that the classification in this case is based on a hostility  
14 towards gays and a desire to hurt that identifiable group.

15           So, what do we do about rational basis? The marriage  
16 recognition ban flunks even this lowest level of review. And  
17 I'm taking the State up on their invitation here. They say:  
18 We have to apply rational basis. So let's do that.

19           And that takes us to *Windsor versus United States*.  
20 And we see in *Windsor* that the Supreme Court was attempting,  
21 and did, apply rational basis. And they said when they were  
22 talking about equal protection at 133 Supreme Court 2692:  
23 Discriminations of an unusual character especially suggest  
24 careful consideration to determine whether they are obnoxious  
25 to the Constitutional provision. And they cite *Romer*.

1           So what was the discrimination of an unusual character  
2 in *Windsor*? Well, the discrimination of an unusual character  
3 in *Windsor* was the fact that the federal government, Congress,  
4 had never told us what was a good marriage and that they would  
5 recognize, and what was a marriage that they would no longer  
6 recognize. And here comes DOMA, Section 3, and they pass a law  
7 in 1996 that says, all right, from here on out, we are only  
8 going to recognize, for federal law purposes, marriages between  
9 a man and a woman.

10           And the Supreme Court said, well, that's a  
11 discrimination of an unusual character because you've just done  
12 something you had never done before solely to target this group  
13 of folks who get same-sex marriages, even if it's legal in the  
14 state where they get their same-sex marriages. So the Supreme  
15 Court gave it careful consideration and struck it down and  
16 said, no, you need to recognize those marriages from those  
17 states that say they're legal, because otherwise, under this  
18 rational basis test, if we give it a careful consideration,  
19 there's really no legitimate governmental purpose to be served  
20 by changing the rules just because some states are now  
21 recognizing same-sex marriages.

22           And what was the unusual discrimination in *Romer*? In  
23 *Romer*, we have the Colorado Amendment 2 passed on top of a  
24 state that had jurisdiction that had already granted  
25 protections from discrimination to people who were gay, lesbian

1 transgender and bisexual. And then they did this sweeping  
2 Amendment 2, and the Supreme Court said, that's an unusual  
3 discrimination because you're taking away something that had  
4 already been standing there and already existed; you're taking  
5 away rights that local municipalities had granted and now  
6 you're doing it solely because of sexual orientation. The  
7 purpose, when we give that careful consideration, can only be  
8 to harm the gay people.

9           So, the way the Supreme Court said it in *Windsor* was:  
10 DOMA's unusual deviation -- again, that's their framework,  
11 "unusual deviation" -- from the usual tradition of recognizing  
12 and accepting state definitions of marriage here operate to  
13 deprive same-sex couples of the benefits and responsibilities  
14 that come with the federal recognition of their marriages.

15           And I quote: This is strong evidence of a law having  
16 the purpose and effect of disapproval of that class. That's  
17 *Windsor* 133 at 2693. And of course, the Court goes on to say  
18 that there's no legitimate purpose in that situation.

19           So what is the discrimination of an unusual character  
20 here? Ohio has a long tradition of recognizing, through its  
21 place-of-celebration rule, marriages contracted in other states  
22 that would not have been authorized here -- common-law  
23 marriage, first cousins, underage.

24           So according, as I said, to Professor Grossman, Ohio  
25 fell on the extreme pro-recognition end of the spectrum. And

1 now in gay marriages authorized in other states, Ohio changes  
2 its rules and refuses recognition to same-sex marriages while  
3 leaving everything else the same.

4           That deserves the same recognition and careful  
5 consideration that we see the Supreme Court doing in *Windsor*  
6 and in *Romer*. And because it is unusual and it is a change in  
7 the law triggered solely by the prospect of some states  
8 providing same-sex protection -- same-sex marriages protection,  
9 then it is, in the words of *Windsor*, strong evidence of a law  
10 having the purpose and effect of disapproval of that class.

11           So it didn't work in *Windsor*, it didn't work in *Romer*,  
12 and it shouldn't work here. And the arguments raised by the  
13 State are the same as those raised and rejected in *Windsor* and  
14 also in *Hollingsworth versus Perry*. And in the face of that  
15 analysis, it's hard for the State to come up with any purpose  
16 that meets that test, even though we label it a rational basis  
17 test.

18           But what did the State say? In their brief they said,  
19 well, this court should stand down because we need to respect  
20 the democratic process. People voted for these prohibitions,  
21 for these discriminatory refusals to recognize gay marriage.  
22 Therefore, we ought to leave it alone.

23           And of course we know -- just look at *Romer* -- we know  
24 that judicial review applies to regulations as well as to  
25 statewide initiatives. *Romer* was a statewide initiative but

1 the Supreme Court didn't have any trouble declaring it  
2 unconstitutional.

3           And it is the duty of the judiciary to enforce the  
4 Constitution and to exercise restraint. But you can't not  
5 enforce the Constitution, and you can't just stand down in the  
6 face of a constitutional violation.

7           So this case is a perfect example of the proper  
8 balance, because what we're asking the Court to do is not  
9 create something that would become the *Roe v. Wade* of gay  
10 rights. I mean, we're talking about a limited injunction that  
11 solves a discrete and concrete problem, a very real problem.

12           I mean, we have clients here who have presented to the  
13 Court a problem that, until this Court acted, would not have  
14 been solved, and won't be solved going forward without the  
15 permanent injunction. So that's measured judicial action, and  
16 its exactly the type of judicial restraint that balances the  
17 role of the courts and the role of any public vote.

18           So what's --

19           THE COURT: Can we talk about that?

20           MR. GERHARDSTEIN: Sure.

21           THE COURT: I mean, the State makes a big deal about  
22 the people of Ohio voted to establish these bans. The law is  
23 clear that, you know, voters can't pass a statute to violate  
24 the Constitution. Is that where we are?

25           MR. GERHARDSTEIN: Right. Yes.

1 THE COURT: All right. Help me on fundamental  
2 history. Give me some examples of things voters have approved  
3 that have been struck down by the Supreme Court as violations  
4 of constitutional law.

5 MR. GERHARDSTEIN: Well, I mean, Prop 8 was an  
6 example. Now the Supreme Court didn't rule on the merits of  
7 that, but the Ninth Circuit did.

8 The -- *Romer* is the best example because there the  
9 state-wide initiative was passed by 66 percent of the voters of  
10 Colorado and the Supreme Court struck it down as a violation of  
11 equal protection because its purpose and effect was to harm gay  
12 people. And that was under the Equal Protection Clause. So  
13 that is the absolute best example of a popular initiative that  
14 was struck down, and the most relevant to this case.

15 *Lawrence* was a statute. *Cleburne* was a statute.  
16 *Frontiero* and *Zablocki* were statutes. Well, actually, I think  
17 *Zablocki* was a local initiative, if I'm not mistaken.

18 So there are other initiatives -- *Hunter versus*  
19 *Erickson* was a housing initiative passed by the public to  
20 prohibit certain types of public housing, and that was struck  
21 down as a violation of the Due Process Clause by the U.S.  
22 Supreme Court.

23 So there are examples, and we would be happy to  
24 supplement that if the Court wants some supplemental briefing.

25 THE COURT: Well, just big picture, I suppose there

1 were statutes passed by voters that refused to permit marriages  
2 between people of different races.

3 MR. GERHARDSTEIN: Yes. I actually don't know if that  
4 was an initiative or not, but *Loving* struck down the Virginia  
5 statute that prohibited what they call miscegenation, but I  
6 don't know whether that was passed by popular vote or by the  
7 legislature. I think it was by the legislature.

8 THE COURT: So your position is, with all due respect,  
9 the mere fact that the majority of the voters in 2004 voted for  
10 something, if it is unlawful discrimination, the Court is  
11 required to act?

12 MR. GERHARDSTEIN: That's right. And that's also why  
13 we cited the Federalist Papers in our brief, because this is  
14 basic. The founders knew that if you just do democracy, then  
15 the majority could be tyrannical. They can pass laws that  
16 would absolutely oppress the minority and there would be no  
17 remedy.

18 That's where courts come in. Courts are here to say,  
19 all right, we have these fundamental principles that we're  
20 going to honor, equal protection, due process, and if the  
21 majority passes a law that violates those fundamental  
22 principles, it's the job of the court to strike it down.  
23 Strike it down wide? No. Strike it down as narrowly as  
24 possible so that the democratic process could fix it, and  
25 that's all we are doing here.

1 THE COURT: Just fix the death certificate issue?

2 MR. GERHARDSTEIN: Well, the democratic process may  
3 choose to fix more than that, but the only issue before this  
4 Court is the failure to recognize marriages when citizens come  
5 before a registrar seeking a death certificate that has the  
6 marriage on it -- that should have the marriage on it.

7 I mean, yesterday was my anniversary, 41 years  
8 married. If I die tomorrow, I am sure that my wife would want  
9 on my death certificate, and I would too, the fact that the  
10 biggest event in my life is properly noted.

11 And that's all same-sex marriage, death certificate,  
12 remedial relief will say. Yes, that was the biggest event in  
13 John and James' life. That was a defining aspect of themselves  
14 as a couple. And they deserve to have the same dignity that my  
15 wife and I would have.

16 And the fact that it is a same-sex marriage shouldn't  
17 be the defining factor here. Especially in light of the double  
18 standard that Ohio has created when it comes to recognizing  
19 marriages that are celebrated in violation of Ohio rules but in  
20 other jurisdictions.

21 So what's the other criteria that the State has cited  
22 as a basis for defending this under a rational basis? They  
23 said, well, we should preserve the tradition, the traditional  
24 definition of marriage.

25 Well, that's like saying because we've always done it



1 this way. And that's not a very thorough or responsible way to  
2 address a big matter of public policy. And this was directly  
3 addressed in *Windsor* where the court said that wasn't good  
4 enough.

5           In fact, the court has said repeatedly that tradition  
6 can actually be a reflection of entrenched prejudice. I mean,  
7 one of the best examples is the case that went to the U.S.  
8 Supreme Court about the Virginia Military Institute. I mean,  
9 that's just an honored and storied institution but they didn't  
10 have any women. And it was a government-funded institution.  
11 And their main defense was, well, of course we don't have any  
12 women, this is the way we've always done it, this is the  
13 Virginia Military Institute. And the Supreme Court said, not  
14 good enough.

15           I mean, that is a tradition that has entrenched  
16 prejudice. And they struck it down and said, if you're going  
17 to use public money, you better open it up because there's no  
18 way to fix this problem other than to recognize it as prejudice  
19 against women. And that is true.

20           That was true in *Loving* as well. So the fact that  
21 something has been around a long time is not, in and of itself,  
22 a support for ongoing prejudice.

23           The other thing the State argued was religious  
24 liberty. And Doctor Wymyslo didn't actually say that that's a  
25 support or a defense on a rational basis. The brief simply

1 argued that we need to consider religious objections if we're  
2 going to make any change in the recognition ban, and we agree.

3 But that isn't a defense to what we're talking about.  
4 Rather, that's just a fix that needs to be adopted by the  
5 legislature if they want to explore further striking down the  
6 failure to recognize same-sex marriages. And we cite in our  
7 brief the Connecticut statute that seems to balance the  
8 interests of religion and people who have a problem with  
9 recognizing same-sex marriages.

10 Again, that's where you just shoot back to the  
11 legislature and let them solve the problem. That is not the  
12 problem before this Court.

13 One thing the State did not argue was the interest of  
14 children, and the amicus argued that CCV-- CCV was, of course,  
15 the primary motivator in the state for the anti-gay, you know,  
16 marriage amendments that we're challenging. And maybe the  
17 State didn't argue the interests of children because Ohio does  
18 permit gay people to adopt.

19 Now we have plenty of problems with the extent to  
20 which they permit it. We think there should be second-parent  
21 adoption, there should be stepchildren adoption, there's plenty  
22 of work to do on adoption.

23 But at its core, even the Ohio Supreme Court has  
24 already ruled that a gay person can be a parent and be an  
25 adoptive parent. And of, course, those adoptions in Ohio

1 routinely come with gay partners in the house and a gay  
2 household. So it would be sort of disingenuous for Ohio to say  
3 that children shouldn't be raised in same-sex households while  
4 they're at least starting to permit that to happen across the  
5 state.

6 THE COURT: This isn't really on point, but gay  
7 adoption in Ohio, a gay citizen can adopt a child.

8 MR. GERHARDSTEIN: Right.

9 THE COURT: But a gay couple cannot, as a couple.

10 MR. GERHARDSTEIN: Right.

11 THE COURT: Very well. It is not relevant to this,  
12 perhaps.

13 MR. GERHARDSTEIN: So it's certainly relevant to Dave  
14 Michener, who has three children.

15 THE COURT: And he and his partner adopted three  
16 children?

17 MR. GERHARDSTEIN: That's right.

18 THE COURT: I need to know more about those  
19 plaintiffs. I understand he's present, but were they  
20 Cincinnatians? They were a couple for 18 years, they adopted  
21 three kids. Were they Cincinnatians? Did they go to Delaware  
22 just to get married? Do you know?

23 MR. GERHARDSTEIN: They have interests in Delaware,  
24 property and so forth. They did go to Delaware to get married,  
25 as many people have been doing since *Windsor*, in order to get

1 advantage of the federal recognition of their marriage, if  
2 nothing else.

3 THE COURT: Does the fact that your couples are not  
4 traditional migratory couples have any impact on the analysis  
5 here?

6 MR. GERHARDSTEIN: You know, that's called an evasive  
7 marriage.

8 THE COURT: Right.

9 MR. GERHARDSTEIN: Which doesn't have any impact,  
10 especially after *Windsor*. I mean, you're only using common  
11 sense to say, wow, the federal government is going to recognize  
12 valid marriages from any of 17 states -- Illinois just started  
13 and their marriages will start in June of 2014 -- why shouldn't  
14 I get married, especially if it is pretty easy to do, so that I  
15 can at least get somebody in America, the federal government,  
16 to recognize my marriage?

17 So that doesn't matter. And it doesn't matter even  
18 under the place-of-celebration rule in Ohio because some of the  
19 cases involved so-called evasive marriages even under  
20 place-of-celebration rule, so that's not a serious factor.

21 But Dave Michener has three children that he's now  
22 raising alone. They are in school. They are -- they were a  
23 healthy couple that were raising very healthy children and  
24 they're all well balanced and doing well and grieving the loss  
25 of their other dad.

1           But it is a great example of a couple that is totally  
2           disrespected by the rule in this case. They will go forward  
3           with their remaining dad. And unless this Court had acted, the  
4           marriage between their parents wouldn't have been recognized.  
5           And that's a total affront to their sense of stability and  
6           normalcy and balance that they wouldn't have experienced except  
7           for the fact that they had same-sex parents.

8           THE COURT: And I would say this to anyone in any  
9           case, and I said it in this case before, and it is the first  
10          opportunity I've had to see Mr. Michener to express on behalf  
11          of the community and the court, I regret your loss.

12          MR. MICHENER: Thank you, Judge.

13          MR. GERHARDSTEIN: Thank you, Judge.

14          The other thing about this whole notion of focusing on  
15          children is there's absolutely no fit between this alleged  
16          purpose and its impact. I mean, refusing to recognize gay  
17          marriages doesn't promote opposite-sex marriages. I mean,  
18          refusing to recognize gay marriages doesn't make opposite-sex  
19          parents any better, or opposite second parents with their  
20          children any healthier as families.

21          Refusing to recognize gay marriages doesn't reduce or  
22          increase the number of same-sex couples that have children with  
23          them. They're still there, they're living in our midst and  
24          they're struggling to make sense of a law that doesn't respect  
25          them.

1           But even in spite of the discrimination that has  
2 occurred to date, every bit of science -- and this is where  
3 Doctor Fulcher's report is very important -- every bit of  
4 science that has looked at this conclusively establishes that  
5 children of gay and lesbian couples are just as well balanced  
6 as opposite-sex couples, and there's certainly no benefit to be  
7 gained by refusing to recognize the marriages of their parents.

8           So there's a couple other points that I think we  
9 should address: Number one is *Baker versus Nelson*. The State  
10 has said there's no case here because in *Baker versus Nelson* --  
11 in 1972, the U.S. Supreme Court dismissed a petition, an  
12 appeal, from the Minnesota Supreme Court saying that this  
13 couple that wants to have their marriage -- that wants to get  
14 married in Minnesota and were denied by the Minnesota Supreme  
15 Court, do not state a substantial federal question.

16           And all I can say to that, Judge, is that so much has  
17 happened since 1972, that that should not be a barrier to a  
18 thorough examination of the law in light of the subsequent  
19 precedent, both on the right to marriage, on equal protection,  
20 and on gay rights with respect to *Romer* and *Windsor* itself.

21           And maybe the most telling thing about the power of  
22 the *Baker* decision today is that I can't find it cited in the  
23 *Windsor* case at all. Not even the dissent cited *Baker versus*  
24 *Nelson*.

25           So, I really think it's appropriate, and we cited

1 another District Court that has taken a good look at this -- I  
2 think in Pennsylvania -- and concluded that *Baker versus Nelson*  
3 should not be a hindrance to a thorough review of these issues.

4 THE COURT: And that spoke to marriage creation as  
5 opposed to recognition?

6 MR. GERHARDSTEIN: The *Baker versus Nelson* case did.  
7 So in that sense, it doesn't even relate to a recognition  
8 argument. And, of course, *Windsor* was a recognition argument.  
9 And what we bring to this Court is a recognition argument as  
10 well.

11 THE COURT: Right. You're not asking this Court to  
12 order Ohio to perform gay sex marriages, correct?

13 MR. GERHARDSTEIN: That's correct.

14 THE COURT: You're asking this Court to require Ohio  
15 to recognize on death certificates valid marriages of same-sex  
16 couples out of state.

17 MR. GERHARDSTEIN: That's correct, based on its  
18 similar treatment of opposite-sex couples who couldn't  
19 accomplish a marriage in Ohio.

20 THE COURT: And the historical tradition of not  
21 striking down evasive marriages.

22 MR. GERHARDSTEIN: That's right. That's very true.

23 The other thing the State has cited is Section 2 of  
24 DOMA, which was not addressed by the U.S. Supreme Court except  
25 to say that this case doesn't involve Section 2.

1           And similarly, we would say that our case doesn't  
2 involve Section 2. It is not a defense to equal protection and  
3 due process.

4           Section 2, of course, says that no state need give  
5 effect to public records act or judicial proceedings that  
6 recognize same-sex marriages. But it is, first, very suspect  
7 under *Windsor* since in Section 2, again, Congress is doing that  
8 unusual discrimination. It is labeling some marriages as good  
9 and some as bad which, in Section 3, the Supreme Court said you  
10 couldn't do.

11           And secondly, and most importantly, the Full Faith and  
12 Credit principle must be addressed in light and consistently  
13 with other constitutional provisions.

14           So if this directive by Congress to states that they  
15 need not recognize public documents and orders that involve  
16 same-sex marriages, violates the Constitution, violates the  
17 Equal Protection Clause and the Due Process Clause for the  
18 reasons we stated, the fact that it is blatantly laid out in  
19 Section 2 doesn't enhance the argument. If anything, it simply  
20 is a further indication that these types of measures are  
21 written to punish, to identify, and to hurt this group of  
22 same-sex married people.

23           And we don't need to address whether DOMA Section 2 is  
24 constitutional or not because we're directly making our  
25 arguments under the Equal Protection Clause and under the Due



1 Process Clause. It cannot provide a defense, it cannot be the  
2 rational basis because Congress told us so. That's just a  
3 circular argument. And in that sense, it doesn't advance the  
4 analysis that this Court must proceed with.

5 THE COURT: And you think this Court can grant the  
6 relief you seek without striking down as unconstitutional DOMA  
7 Section 2?

8 MR. GERHARDSTEIN: Right, because we have not tried to  
9 invoke the Full Faith and Credit Clause. And we aren't  
10 leading -- our doctrinal analysis doesn't go through that  
11 passage. We're just saying -- and by the way, the  
12 place-of-celebration rule isn't based on Full Faith and Credit.  
13 I mean, this is just a longstanding practice between states  
14 that are trying to live together in a nation. And it isn't  
15 dependent upon Full Faith and Credit, and it need not be  
16 addressed.

17 Again, we're trying to do and suggest to this Court,  
18 limited judicial relief. You don't need to reach out and solve  
19 constitutional problems that are unnecessary to solve, and  
20 that's a basic doctrine that all courts try to follow.

21 So, Judge, you know, we do ask that you grant the  
22 permanent injunction and the declaratory relief for the married  
23 plaintiffs. This will protect their death certificates. It  
24 will protect the death certificate of John Arthur and William  
25 Ives from amendment, which could happen.

1           It will also allow the surviving spouses, David and  
2 James, if they should die and not be remarried, to be listed as  
3 widows, so they still have a viable issue here.

4           And then for Robert Grunn, it will provide the clear  
5 direction he needs to be able to record as married decedents  
6 who were spouses in same-sex marriages celebrated in  
7 jurisdictions where those marriages are authorized so that he  
8 doesn't have to run back to court, either a third-party  
9 standing or dragging a grieving spouse with him, to get  
10 direction on that issue next time around.

11           THE COURT: So what do you want the order to say as to  
12 Grunn?

13           MR. GERHARDSTEIN: Our proposed order as to Grunn --

14           THE COURT: I thought this was sort of an as-applied  
15 challenge relating to these four plaintiffs, one of whom he  
16 serviced as a funeral director. What are you asking that the  
17 Court do?

18           MR. GERHARDSTEIN: Declare that plaintiff, Robert  
19 Grunn, may, consistent with the Constitution, report that a  
20 decedent married in a state authorizing same-sex marriage is,  
21 quote, married, or widowed, and report the name of the  
22 decedent's surviving spouse on an Ohio death certificate he  
23 completes in the course of his work as a funeral director in  
24 Ohio.

25           That's from our proposed order at 53-2 of the record.

1 THE COURT: Very well.

2 MR. GERHARDSTEIN: And we've also asked that that  
3 declaration be accompanied by an injunction. And to be fair,  
4 our last paragraph also asks that Director Wymyslo and Jones be  
5 required to issue directives to other funeral directors  
6 consistent with this order.

7 That reaches a little further than just Robert Grunn.  
8 This Court need not do that, but it would be unfortunate if, as  
9 a result of this case, we had inconsistent rules about  
10 recognition across the state.

11 But I don't take that last paragraph to be nearly as  
12 important as the directive to Grunn himself, because we can  
13 always take up additional funeral directors and additional  
14 discussions with the State going forward.

15 THE COURT: Very well.

16 MR. GERHARDSTEIN: Thank you.

17 THE COURT: Did you reserve some time for reply? Or  
18 anticipate that?

19 MR. GERHARDSTEIN: Yes.

20 THE COURT: Very well.

21 Morning, Ms. Coontz.

22 MS. COONTZ: Good morning, Your Honor.

23 May it please the Court, counsel for plaintiffs have  
24 made very clear that this case is about recognition of  
25 out-of-state same-sex marriages in a very narrow context, death

1 certificates. That's it.

2           And accepting as a given that the plaintiffs are not  
3 challenging Ohio's right to define marriage as between a man  
4 and a woman, this case is very narrow.

5           So even if the plaintiffs get all of the relief that  
6 they seek, same-sex marriages will still not be permitted in  
7 Ohio and it won't be recognized in Ohio anywhere other than in  
8 the plaintiffs' death certificates and the death certificates  
9 that are issued by Mr. Grunn.

10           And even if plaintiffs get everything that they want  
11 in this case, Section 2 of DOMA, which gives Ohio the authority  
12 to define marriage as being between a man and a woman, will  
13 remain presumptively constitutional federal law.

14           So the question before this Court is a purely legal  
15 one, and that is whether Ohio can refuse to recognize same-sex  
16 marriages on death certificates only.

17           *Windsor*, Section 2 of DOMA, and *Baker versus Nelson*  
18 tell us that it can.

19           Six months ago, the court decided in *Windsor* that  
20 rational basis -- as plaintiffs concede -- rational basis  
21 applies to a classification based on sexual orientation. And  
22 the Court premised its decision on the same principles of  
23 Federalism and the unquestioned authority of states to define  
24 marriage that control in this case.

25           Because as the *Windsor* court stated, the whole subject

1 of domestic relations belongs to the laws of the state. And  
2 this is not a new concept. And it is why, in *Baker versus*  
3 *Nelson*, the Supreme Court said that there's no federal question  
4 when it comes to states' marriage laws in general.

5 *Windsor* did not overrule *Baker*. And in *Baker* --  
6 excuse me -- the Florida District Court recognized this and it  
7 is why, when faced with a similar recognition situation that we  
8 have today, the court refused to recognize -- Florida refused  
9 to recognize plaintiffs' Massachusetts marriage.

10 In our case, Ohio doesn't recognize plaintiffs'  
11 respective Maryland and Delaware marriages. And in accordance  
12 with *Baker*, that's okay. That is permissible under prevailing  
13 Supreme Court precedent.

14 And since *Baker*, the Supreme Court has never said that  
15 one state has to recognize same-sex marriages performed by  
16 another. It certainly didn't say that in *Windsor*.

17 THE COURT: In *Windsor*, what it said was that the  
18 federal government was required to recognize same-sex marriages  
19 that the -- under state law?

20 MS. COONTZ: Correct.

21 THE COURT: Yes?

22 MS. COONTZ: Correct, correct.

23 THE COURT: And they said that the federal government  
24 had to do that based on the Due Process and Equal Protection  
25 Clauses of the Federal Constitution, right?

1 MS. COONTZ: Correct.

2 THE COURT: So if the federal government can't violate  
3 the Due Process Clause or Equal Protection Clause, why can a  
4 state?

5 MS. COONTZ: Because the federal government's law did  
6 not satisfy a rational basis, which is the applicable standard  
7 in this case.

8 What the *Windsor* court looked at is the validity of  
9 the federal government's intervention into the area of marriage  
10 laws. And that's how the Court began its decision, because  
11 that's really what Section 3 of DOMA was. It was the  
12 federal -- excuse me -- federal government intervening into the  
13 state's well-established right to define marriage.

14 THE COURT: It was an unusual move.

15 MS. COONTZ: Absolutely. It was a move of an unusual  
16 character, as the Court said.

17 THE COURT: And in Ohio, wasn't it a movement of  
18 unusual characteristics when Ohio, for the first time ever in  
19 its history, picked out a type of marriage that Ohio wasn't  
20 going to recognize?

21 MS. COONTZ: It didn't change Ohio law. Before Issue  
22 1 was passed, same-sex marriage was not legal in Ohio. So when  
23 Issue 1 was passed, when the constitutional amendment was  
24 adopted, it was not a move of unusual character. It's not --  
25 it doesn't create the inference of animus that was present for

1 the *Windsor* court.

2           The *Windsor* court said, look, federal government,  
3 you've tread into waters that you have historically not tread.  
4 And they went over and above to give a long descriptive history  
5 of the principles of Federalism and how much this was  
6 exclusively left to the states. And because the federal  
7 government went there, the court inferred animus.

8           Ohio has never allowed same-sex marriages. So when  
9 Issue 1 was passed, it wasn't a change in direction, it was a  
10 reaffirmation of the public policy of the State of Ohio. It  
11 was not an unusual move by any stretch. It was the same --  
12 same law that had always been in place before the  
13 constitutional amendment was passed.

14           THE COURT: But wasn't it the first time ever that  
15 Ohio picked out a kind of marriage and said, we're not going to  
16 recognize that one?

17           MS. COONTZ: That doesn't change the fact that the law  
18 itself did not change. It does not change the fact that before  
19 Issue 1, same-sex marriage was prohibited, and after same-sex  
20 marriages -- excuse me -- after Issue 1, same-sex marriages.  
21 And that is clearly distinguishable from the situation in  
22 *Windsor*.

23           THE COURT: Issue 1 was the amendment of the Ohio  
24 Constitution?

25           MS. COONTZ: Yes, Your Honor. Yes, Your Honor. That

1 was the ballot name for Issue 1.

2           So what the *Windsor* court did is also as important as  
3 what it didn't do, because the *Windsor* court obviously knew  
4 about the *Baker* decision and clearly the *Windsor* court  
5 didn't -- from what plaintiffs' counsel is saying is correct.  
6 The *Windsor* court didn't address *Baker* in its decision. It  
7 didn't need to, because the *Windsor* decision addressed a  
8 federal statute.

9           Since *Baker*, the Supreme Court has never said that one  
10 state must recognize the same-sex marriages performed under the  
11 laws of another state. *Windsor* did not overrule *Baker*. But  
12 even if this Court is not convinced that *Baker* controls,  
13 Section 2 of DOMA does.

14           Section 2 is the presumptively constitutional federal  
15 statute that tells us that a state does not have to recognize  
16 the same-sex marriages performed in another state. And  
17 plaintiffs aren't challenging its constitutionality in this  
18 case. So no matter what happens in this case, Ohio will still  
19 have a federal statutory right to refuse to recognize same-sex  
20 marriages performed out of state.

21           THE COURT: But does that fact answer the question  
22 whether that's a rational basis for the marriage recognition  
23 ban?

24           MS. COONTZ: Ohio's reliance on a presumptively  
25 constitutional federal statute could be a rational basis for a



1 voter to vote for Issue 1. It could be a rational basis that  
2 supports Ohio's law itself. But even if Section 2 and DOMA  
3 don't -- excuse me Section 2 of DOMA and *Baker* don't foreclose  
4 this action, plaintiffs haven't negated every conceivable  
5 rational basis in support of Ohio's marriage laws in this  
6 narrow context, as they must.

7           The rational basis review is the most deferential  
8 standard of review. And as plaintiffs admit, it is the  
9 appropriate standard of review in this case.

10           The Sixth Circuit has recognized that under the  
11 rational basis standard for accepting legislative schemes are  
12 far from daunting, and the Court will be satisfied with  
13 rational speculation, and it's constitutionally irrelevant what  
14 reasons in fact underlay the legislative decision.

15           So the state doesn't have to prove that the reasons  
16 that it advances actually support the legislation at issue.  
17 Rational speculation is sufficient.

18           And in this case there are a number of conceivable  
19 rational bases in support of not recognizing an out-of-state  
20 same-sex marriage in the narrow context that plaintiffs are  
21 requesting this Court.

22           THE COURT: Okay. We'll get to those in a moment.

23           MS. COONTZ: Okay.

24           THE COURT: So the Court's not to consider what the  
25 primary sponsor of the constitutional amendment was out

1 advancing, which, in their description, was to fight the  
2 pro-homosexual community.

3 MS. COONTZ: To be clear, the plaintiffs are not  
4 before this Court challenging the entire scheme of Ohio's  
5 marriage laws. They're only asking this Court to declare them  
6 unconstitutional in a limited context.

7 But to answer the Court's question, no. In the Sixth  
8 Circuit, we don't look at the motivation behind the electorate  
9 in passing certain legislature. Because how do we? How do  
10 we reduce to one sentence the will of three million voters?

11 THE COURT: You look at what the sponsors were  
12 advertising and saying during the election season.

13 MS. COONTZ: But as the Court cautioned in *Arthur*, to  
14 take the motivations of the sponsors and infer that that was  
15 the motivation of the rest of the voters is improper. We  
16 simply can't do that. I can't stand before this Court and say  
17 what three million people were thinking. And the courts have  
18 to recognize the difficulty in doing that, which is why we  
19 don't look at the motivation when trying to determine what was  
20 the purpose behind a particular legislative scheme.

21 And again, in this case, there are a number of  
22 conceivable rational bases for this, for the legislative scheme  
23 that Ohio has enacted.

24 THE COURT: And you're about to tick right through  
25 them.

1           But you do acknowledge that voters can't pass  
2 unconstitutional stuff, right?

3           MS. COONTZ: Yes. Yes, I do.

4           THE COURT: Okay.

5           MS. COONTZ: The desire to have consistent legislation  
6 of a consistent legislative scheme is, in and of itself,  
7 entirely consistent.

8           Plaintiffs are before this Court asking it to carve  
9 out one separate sect of recognition about same-sex marriage:  
10 death certificates only. They're not saying that Ohio will  
11 have to recognize same-sex marriage in any other context. This  
12 request, in and of itself, demonstrates that there's a rational  
13 basis for Ohio's law because it is entirely rational for Ohio  
14 to want to remain consistent in its definition of marriage  
15 throughout Ohio law.

16           It's even more rational, in this as-applied challenge,  
17 as plaintiffs have made clear, when they're only asking for  
18 this relief for one particular funeral home director, to say,  
19 no, the recognition -- the Ohio's marriage laws with respect to  
20 death certificates apply equally among all funeral directors.

21           Ohio needs to be consistent. And it is entirely  
22 rational for Ohio to want to remain consistent in this  
23 legislative scheme and that, in and of itself, supports the  
24 rational basis for refusing to recognize same-sex marriages in  
25 recognition of death certificates alone.

1           The desire to use caution when making a dramatic  
2 shift in --

3           THE COURT: Is that a rational interest that arose  
4 simply because of this lawsuit?

5           MS. COONTZ: It doesn't matter under rational basis.  
6 The question is not whether -- I mean, did anybody -- would  
7 anybody who had voted for Issue 1, did anybody think that a  
8 plaintiff was going to be here asking for a single carve out in  
9 the context of death certificates? I don't know, but I highly  
10 doubt it.

11           But under a rational basis, it doesn't matter, because  
12 it's not whether the basis offered actually supports --  
13 actually supported the legislation when it was enacted. The  
14 question is whether it is a rational basis supporting the law  
15 as it exists today.

16           THE COURT: But you and I understand that the Court's  
17 order is going to relate to these plaintiffs, and then there's  
18 going to be a court order out there that people are going to  
19 reference, particularly if it is sustained on appeal, right?

20           MS. COONTZ: Yes.

21           THE COURT: So, I mean, I know the plaintiffs say it  
22 is just as-applied to them, but in the real world out there,  
23 the stakes are larger, are they not?

24           MS. COONTZ: Yes.

25           THE COURT: Very well.

1 MS. COONTZ: And ultimately, what the Court's question  
2 goes to is plaintiffs want to have to defend the rational basis  
3 of this very narrowly but really this seeks broader relief. I  
4 mean, the Court's question goes to, yeah, they're seeking a  
5 precedent that they don't have to establish the rational basis  
6 for that entire precedent they're trying to say, oh, this is  
7 narrowed to one limited context. But the limited context in  
8 which -- to which the plaintiffs have confined it, in and of  
9 itself, provides a rational basis for the consistency that Ohio  
10 wants to have with its laws.

11 Similarly, the desire to use caution when making such  
12 a dramatic shift in Ohio's policy is entirely rational. The  
13 terms "husband," "wife," and "spouse" collectively appear  
14 hundreds of times throughout the Ohio's Revised Code, so  
15 changing who is and who is not married under Ohio law has  
16 sweeping consequences. The voters' desire to evaluate and make  
17 that change deliberatively, if it's going to happen, is  
18 entirely rational.

19 And the *Jackson* court recognized this when it said  
20 that the State may rationally decide to observe the effects of  
21 allowing same-sex marriage in other states before changing its  
22 definition of marriage.

23 THE COURT: Who said that, *Jackson*?

24 MS. COONTZ: *Jackson*, 884 F.Supp.2d at 1118.

25 THE COURT: What court? District Court?

1 MS. COONTZ: Yes.

2 THE COURT: After or before *Windsor*?

3 MS. COONTZ: Before *Windsor*, Your Honor.

4 And again, Your Honor, it is entirely rational --

5 THE COURT: I mean, the need to act cautiously has  
6 never been a valid defense to stopping unconstitutional  
7 activity, has it?

8 MS. COONTZ: No, but that presumes that the statute is  
9 unconstitutional, and the State's position is that it's not.

10 THE COURT: Very well.

11 MS. COONTZ: Again, Your Honor, that -- the existence  
12 of Section 2 to DOMA itself is entirely rational. It is  
13 entirely rational for the State to say: We have a  
14 presumptively constitutional federal statute that allows Ohio  
15 to set its marriage laws as it has, and it provides a rational  
16 basis for Ohio's marriage policy.

17 Ohio's desire to retain the right to define marriage  
18 is rational. Ohio doesn't want Delaware or Maryland to define  
19 who is married under Ohio law. To allow that to happen would  
20 allow one state to set the marriage policy for all others.

21 THE COURT: This Court is not going to have anything  
22 to do with ordering Ohio to perform same-sex marriages. That's  
23 not before the Court. It is a very limited issue. It is when  
24 one state gives you something and you come to Ohio, can Ohio  
25 take it away without due process.

1 MS. COONTZ: It's recognition.

2 THE COURT: Right.

3 MS. COONTZ: It is. But what the plaintiffs are  
4 asking is that Ohio treat their marriages as valid in Ohio when  
5 Ohio law provides that they're not. And Section 2 of DOMA says  
6 that Ohio does not have to.

7 And Ohio -- no matter what happens in this case,  
8 Section 2 of DOMA will remain good law because plaintiffs are  
9 not challenging it. It is not before the Court today.

10 Ohio's desire to retain the right to define marriage  
11 within its borders is especially -- especially important in  
12 this case when just six months ago the *Windsor* court  
13 re-affirmed that right. It, again, went through the history of  
14 the principles of Federalism and the right of a state to define  
15 marriage for itself.

16 Ohio's desire to retain the right to define marriage  
17 through the democratic versus the judicial process is entirely  
18 rational.

19 As the *Mazzoleni* court made clear, absent a clear  
20 public policy statement, the definition of marriage could be a  
21 matter for courts. And wanting to retain the right to define  
22 marriage through the judicial practice -- excuse me -- through  
23 the democratic versus the judicial process is entirely  
24 rational.

25 And this case illustrates that changing laws through

1 the judicial process in the piecemeal fashion that plaintiffs  
2 seek can create inconsistencies through Ohio law. And it is  
3 rational for Ohioans to say, no, we want to do this through the  
4 democratic, not through the judicial process.

5 THE COURT: I mean, you can't say that we've got a  
6 rational state interest in this because we want to control it  
7 and we want to pass stuff that doesn't recognize the role of  
8 the United States Constitution in preserving our fundamental  
9 rights, like our liberty interests in who we associate with,  
10 and our right to have equal protection of the laws.

11 Just because you want to control it, and you want to  
12 vote on it, doesn't give you that right, does it?

13 MS. COONTZ: The *Windsor* court re-affirmed that right  
14 six months ago in the court's decision, when it talked of the  
15 states' rights to define marriage.

16 THE COURT: That didn't -- it didn't answer the  
17 question. It did talk about states' rights.

18 MS. COONTZ: Correct.

19 THE COURT: And I've always found the politicians say,  
20 I'll leave this to the states. But if the United States  
21 Supreme Court has said the federal government cannot fail to  
22 recognize valid same-sex marriages, why can't the states? And  
23 it is what Justice -- that dissenting guy --

24 MS. COONTZ: Scalia.

25 THE COURT: Scalia. That's what he predicted. And he



1 said, you know, they're going to cite this case, and he  
2 repeated the case and he struck "federal" government and wrote  
3 in "state" government. And that, you know -- and the shoe  
4 dropped, and now it's here. And I'm required to follow the law  
5 of the United States Supreme Court.

6 MS. COONTZ: And, again, the State's position is that  
7 *Windsor* is distinguishable because of the unusual character of  
8 the federal government's act in prohibiting recognition of the  
9 State's definition of marriage. It didn't strike down the  
10 State's right to define marriage, and it didn't touch Section  
11 2. Neither --

12 THE COURT: And it didn't deal with due process or  
13 equal protection. It said, you know, you don't need to pay  
14 attention to the Full Faith and Credit Clause when you do this,  
15 but that's not what is presented here, right?

16 MS. COONTZ: I --

17 THE COURT: Lost you? Continue your argument.  
18 You're doing fine.

19 You were running through these legitimate reasons, and  
20 you said tradition, and we want to prevail -- continue the  
21 Democratic tradition in voting campaigns.

22 What are the other legitimate reasons that you had not  
23 yet identified, or have you gone through them?

24 MS. COONTZ: Your Honor, the plaintiffs recognize and  
25 they agree that religious liberties need to be accommodated for

1 and balanced when setting forth a marriage policy in Ohio. And  
2 voters -- Ohioans' desire to assure that those accommodations  
3 are in place, before changing Ohio's marriage laws, if they're  
4 going to change, is entirely rational.

5 And as the Supreme Court told us in *Heller*, the fact  
6 that any one of these rationales is arguable is sufficient to  
7 immunize it from constitutional challenge.

8 THE COURT: Unless they're talking about intermediate  
9 review or Sixth Circuit.

10 MS. COONTZ: Which we're not. And plaintiffs agree  
11 that we're not.

12 THE COURT: I don't think plaintiffs agree. They say  
13 that, you know, it doesn't even pass rational basis. But their  
14 first argument is heightened scrutiny, a fundamental right.  
15 And you pretty quickly said, pay no attention to all those  
16 declarations from all those law professors.

17 MS. COONTZ: Well, plaintiffs want it to be heightened  
18 scrutiny.

19 THE COURT: Right.

20 MS. COONTZ: And I realize that. Plaintiffs agree  
21 that it is rational basis and that the *Windsor* court applied  
22 rational basis.

23 They also cite in their brief the controlling Sixth  
24 Circuit precedent which they argue that -- should be reexamined  
25 after *Windsor*. But they identify the controlling Sixth Circuit

1 precedent as *Davis* and *Scarborough*, which are both cases that  
2 applied rational basis scrutiny to a classification based on  
3 sexual orientation.

4 THE COURT: And they argued and relied on *Bowers*,  
5 which was overruled.

6 MS. COONTZ: Which was overruled by *Lawrence*.

7 However, what the Supreme Court said in *Lawrence* is that that  
8 case did not involve whether a government must give formal  
9 recognition to any relationship that homosexual persons seek to  
10 enter. That's 539 U.S. at 579. *Lawrence* did not deal with  
11 same-sex marriages. Expressly didn't deal with same-sex  
12 marriages.

13 Further, it wasn't an equal protection case that in  
14 any way changed the standard of review to apply to  
15 classification based on sexual orientation. The *Windsor* court  
16 obviously knew that *Lawrence* existed. And knowing that  
17 *Lawrence* existed, the *Windsor* court still applied rational  
18 basis.

19 So heightened scrutiny simply doesn't apply in this  
20 case. We have *Davis* from 2001, and we have *Windsor* from only  
21 six months ago. Both are binding and both apply rational basis  
22 to the classification at issue in this case.

23 THE COURT: And *Windsor* said that there was no  
24 rational basis for the federal law barring recognition because  
25 it was motivated by animus, hatred, and discrimination, right?

1 MS. COONTZ: Due to the unusual character of the  
2 federal government's intrusion into an area that was  
3 traditionally and historically left to the states.

4 THE COURT: You're telling me I can't look at what the  
5 purpose of the amendment in 2004 was?

6 MS. COONTZ: Not under Sixth Circuit precedent. It is  
7 not -- the Court cannot -- the State cannot look at the  
8 motivations -- the Court cannot look at the motivations behind  
9 Issue 1.

10 Because, again, how do we reduce to one sentence, to  
11 one thought, the thoughts of three million voters? We simply  
12 can't do it. And in doing so, would improperly infer -- could  
13 potentially improperly infer some sort of animus that voters  
14 didn't have. And that's why the court said, we don't go there.  
15 We don't look at the motivations behind a popularly enacted  
16 measure, such as Ohio's marriage laws.

17 So, yes, plaintiffs want heightened scrutiny to apply  
18 and plaintiffs say that *Lawrence* is controlling, but it simply  
19 is not.

20 Rational basis applies in this case. Again, the  
21 narrow relief that plaintiffs seek shows that rational basis is  
22 appropriate -- that there's a rational basis for applying  
23 Ohio's marriage laws consistently. And because plaintiffs have  
24 not negated every conceivable basis for Ohio's marriage laws,  
25 their motion for permanent injunction should be denied.

1           THE COURT: What do you make of the notion that if  
2 somebody gets married out of state, and now they've got a  
3 fundamental liberty interest in their status as married, and  
4 they move to Ohio, and Ohio takes that away by its ban, why is  
5 that not the deprivation of taking away a liberty interest  
6 based on due process of law?

7           MS. COONTZ: Well, the Court's question to plaintiffs'  
8 counsel was appropriate regarding the fact that no court has  
9 ever said that there's a fundamental right to same-sex  
10 marriage. So that's really the issue. Is there a fundamental  
11 right? No. And if the *Windsor* court felt there was a  
12 fundamental right, then six months ago they would have applied  
13 heightened scrutiny and it would be a different standard of  
14 review.

15           THE COURT: But that's a fundamental right as to  
16 getting married same sex.

17           I'm asking you about the fundamental right, the  
18 liberty interest that I got married here, I've got all of my  
19 benefits, and now I come to your state and you strip them from  
20 me without any procedural protection. That's a violation of a  
21 due process liberty interest, not equal protection. Why is  
22 that okay? Why can't Ohio, when faced with a bunch of co-equal  
23 states, decide that a marriage license from Delaware is  
24 worthless for this occurrence?

25           MS. COONTZ: Because Ohio has the right to define its

1 marriage policy pursuant to the constitutional federal marriage  
2 statute. The *Windsor* court recognized Ohio's right to define  
3 marriage. The *Windsor* court was clearly aware of this liberty  
4 interest that the Court has posed in its question. And even  
5 given that, that question, it still said states have the right  
6 to define marriage. Section 2 of DOMA still exists, and states  
7 have a historical right to do exactly what Ohio did.

8           And the outcome of this case will not change that. It  
9 will still exist.

10           THE COURT: Do citizens have a fundamental right, a  
11 liberty interest, in the right to remain married?

12           MS. COONTZ: Under the laws of Ohio or under the laws  
13 of the state in which the marriage was performed?

14           Ohio -- do citizens with a marriage performed out of  
15 state, that was against the public policy of Ohio, have a right  
16 to be considered married under the laws of Ohio? No. Are they  
17 still married under the laws of the state in which the marriage  
18 was performed? Yes.

19           Ohio is not invalidating someone else's marriage.  
20 We're simply saying that, for Ohio's purposes, their marriage  
21 is not recognized under the laws of the State of Ohio.  
22 Congress has said that we're allowed to do that, and that's the  
23 posture of this case.

24           THE COURT: Well, I suppose I better recognize it on  
25 the record. You're a good lawyer.

1 MS. COONTZ: Thank you, Judge.

2 THE COURT: Other issues?

3 MS. COONTZ: No, Your Honor. No issues from the  
4 State.

5 THE COURT: Very well.

6 MS. COONTZ: Thank you.

7 THE COURT: We'll ask the other lawyers: Do you feel  
8 compelled to reply?

9 MR. GERHARDSTEIN: Very briefly.

10 THE COURT: That's what they always say.

11 MR. GERHARDSTEIN: *Windsor* is not distinguishable. It  
12 really is adequate precedent for this marriage-recognition  
13 case. And we're getting closer because we're all focused on  
14 the same language.

15 There is an unusual character to what Congress did.  
16 It started picking between marriages among the states, and it  
17 had never done that before. That created the careful  
18 consideration.

19 Ohio has never picked among the states. If your  
20 marriage is valid where it is celebrated, Ohio will honor that.  
21 And now, because of same-sex marriage, they've started doing  
22 it. Same issue. It is a recognition case. *Windsor* is  
23 adequate precedent.

24 And it is interesting that now we're criticized for  
25 seeking too little. I guess if we had tried to hit a home run,

1 then, you know, somehow that would be a better equal protection  
2 argument.

3           We are proposing that this Court solve only the  
4 problem in front of it. It can cite to whatever legal  
5 principles are appropriate, which are equal protection and due  
6 process, and if the next case has to address some of the other  
7 issues, then it will.

8           We're not saying that Ohio law will stay the same  
9 after this case because there will probably be further legal  
10 actions, further attempts at repeal, further legislation, and  
11 that's the way the whole process works -- legislation,  
12 initiatives, and judicial review.

13           So the fact that we're seeking relief only for these  
14 plaintiffs is a recognition of judicial restraint and nothing  
15 that should be held against the plaintiffs.

16           The defense counsel said Ohio should not have dictated  
17 to it what marriages should be valid. They should have thought  
18 of that before they started following the place-of-celebration  
19 rule. I mean, they have the place-of-celebration rule, now  
20 when they suddenly see a type of marriage they don't want to  
21 honor, they abandon the rule. And that is just the type of  
22 unusual discrimination that causes, even under equal  
23 protection, the level of scrutiny that would strike it down.

24           And this is why it is also interesting to think about  
25 common-law marriage. Because we don't have a court order, we



1 don't have a marriage certificate, we don't have an edict. And  
2 so that clearly doesn't implicate Section 2 of DOMA. We simply  
3 have an Ohio place-of-celebration rule that says, if your  
4 common-law marriage is valid in whatever state you entered into  
5 it, and you come to Ohio, we'll give you a divorce. Or we'll  
6 recognize it on your death certificate. Or we'll let you  
7 appeal to the Probate Court as a surviving spouse. And that  
8 doesn't involve DOMA at all because there was no paperwork back  
9 there when they got the common-law marriage.

10           And yet Ohio went to the pain to amend its common-law  
11 marriage statute to say, well, we're not going to recognize  
12 this with respect to same-sex marriages, an unusual  
13 discrimination that triggers careful consideration.

14           DOMA is irrelevant, to that and to the rest of the  
15 argument, because you don't need to go through that passage if  
16 you choose not to. If we have the appropriate case where  
17 somebody is using the Full Faith and Credit Clause, will we  
18 attack Section 2? Absolutely. Do we need to here? No. And,  
19 again, that's an appeal to using judicial restraint and solving  
20 only the problem in front of you.

21           THE COURT: And you'll file that civil action in  
22 Columbus?

23           MR. GERHARDSTEIN: Well, we'll see where venue lies.

24           There was a question about religious liberty. We  
25 don't need to solve the religious problem before there's any

1 change in the law. This Court addresses constitutional  
2 problems and then the rest of the civic system, with  
3 legislatures and so forth, can come afterwards to address any  
4 additional problems that might come up.

5 Finally, Judge, there was this notion that Ohio law  
6 prohibited same-sex marriages before and that the law we're  
7 challenging didn't change anything. I just wanted to clear  
8 this up.

9 There was no reference in Ohio law to same-sex  
10 marriages before the statute which we're challenging, 3101, was  
11 passed and became effective in 2004. The amendment, Issue 1,  
12 became effective afterward, in November. So I suppose  
13 technically, the amendment didn't change what the statute did,  
14 but we're here challenging both.

15 We're here challenging the marriage recognition ban,  
16 both in the statute and in the Ohio Constitution. And, in  
17 fact, there was a major difference in Ohio law as a result of  
18 the bans recognized by those acts, and that was a huge change  
19 in how Ohio applied the place-of-celebration rule, which is  
20 deficient under heightened scrutiny, which we urge the Court to  
21 apply, and under rational basis as applied using that language  
22 we've been talking about in *Windsor* and *Romer*.

23 And even under other aspects of rational basis, we've  
24 cited in our brief at document 62, page 16, *Craigmiles versus*  
25 *Giles*. In that case, the Court, applying rational basis said:

1 All right, Tennessee cannot -- can't allow only licensed  
2 funeral directors to sell caskets because there are other  
3 stores out there that want to sell caskets. And this is a law  
4 that just simply favors one business person over another. That  
5 failed rational basis.

6 So rational basis is not crystal clear all the time.  
7 But clearly, when the purpose is to harm one to the benefit of  
8 another, especially when the target has historically been  
9 discriminated against, as the Court did in *Windsor*, we'd ask  
10 this Court to do here, and strike down the Ohio marriage  
11 recognition ban as applied in this context.

12 Thank you.

13 THE COURT: Very well. Well, oral argument has been  
14 helpful to the Court. It's been helpful all along. Briefing  
15 is excellent and the Court's preparing to act.

16 The current order expires December 31st. The Court  
17 needs to act before then. I would like to act before the  
18 holidays.

19 It's been helpful and I'm prepared to adjourn, unless  
20 there's more. Is there more from the plaintiff's perspective?

21 MR. GERHARDSTEIN: Nothing from the plaintiffs, Your  
22 Honor.

23 THE COURT: From the defendants?

24 MS. COONTZ: Nothing, Your Honor. Thank you.

25 MR. HERZIG: Nothing, Your Honor.

1 THE COURT: Very well. Thank you all. The Court  
2 prepares to recess.

3 THE COURTROOM DEPUTY: All rise.

4 (The proceedings concluded at 11: 24 a.m.)

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13 C E R T I F I C A T E

14 I, Jodie D. Perkins, RMR, CRR, the undersigned,  
15 certify that the foregoing is a correct transcript from the  
16 record of proceedings in the above-entitled matter.

17  
18 s/Jodie D. Perkins  
19 Jodie D. Perkins, RMR, CRR  
20 Official Court Reporter  
21  
22  
23  
24  
25