February 24, 2017

Blake Hawthorne, Clerk
Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Rm. 104
Austin, Texas 78701

Re: No. 15-0688, *Pidgeon v. Turner*

Dear Mr. Hawthorne:

Please receive the attached Amicus Curiae Brief of the *De Leon* Plaintiffs—Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss—in Support of Respondents, and forward it to the Justices for their consideration in deciding *Pidgeon v. Turner*, No. 15-0688.

Respectfully,

/s/ Jason P. Steed

Jason P. Steed
Counsel for the *De Leon* Plaintiffs as Amici

No. 15-0688

In the Supreme Court of Texas

Jack Pidgeon and Larry Hicks,
Petitioners,

v.

Mayor Sylvester Turner and the City of Houston,
Respondents.

On petition for review from the
Fourteenth Court of Appeals, Houston, Texas
Nos. 14-14-00899-cv & 14-14-00932-cv

Amicus Curiae Brief of the *De Leon* Plaintiffs— Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss— in support of Respondents

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Interest of Amici

Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss were the four plaintiffs in *De Leon*—the Fifth Circuit case that applied the U.S. Supreme Court's decision in *Obergefell* to strike down the Texas laws that discriminated against individual Texans based on their sexual orientation. Petitioners ask this Court to ignore *De Leon* and to "narrowly construe" *Obergefell* to enable government employers to deny employee benefits to individuals in a same-sex marriage, while providing those benefits to individuals in an opposite-sex marriage. In other words, Petitioners ask this Court to ignore *Obergefell* and *De Leon* so government employers can resume discriminating against individual Texans based on their sexual orientation.

All four of the *De Leon* Plaintiffs have a personal interest in how this Court treats the decisions in *Obergefell* and *De Leon*. But Victor Holmes works for the University of North Texas Health Sciences Center, and his husband, Mark Phariss, is on the health-care plan that is provided to Holmes as an employee benefit. Thus, two of the *De Leon* Plaintiffs also have an immediate personal and financial interest in Petitioners' effort to discriminate in the denial of equal access to public-employee benefits.

For these reasons, the *De Leon* Plaintiffs respectfully submit this amicus brief for the Court's consideration.[1]

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[1] No fee was paid for the preparation of this brief. See Tex. R. App. P. 11(c).

Summary of Amici's Argument

Petitioners want to discriminate against individual Texans based on their sexual orientation. Specifically, Petitioners want to enable government employers to treat married same-sex couples worse than married opposite-sex couples by denying them equal access to employee benefits. Petitioners think this discrimination is permissible because they think *Obergefell* gives same-sex couples only the right to marry, and not the right to be treated like other married couples. And Texas's governor, lieutenant governor, and attorney general have joined Petitioners in claiming that *Obergefell* does not require government employers to provide the same benefits to married same-sex couples that they provide to married opposite-sex couples.

Petitioners and Texas's elected executives are wrong. Treating same-sex couples unequally and disfavorably is precisely what the U.S. Supreme Court deemed unconstitutional in *Obergefell*. In *Obergefell*, the U.S. Supreme Court held that the Fourteenth Amendment guarantees individuals not only the right to enter into a same-sex marriage but also the right to have "equal dignity in the eyes of the law"—or, in other words, the right to enter into and enjoy their same-sex marriage "on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges*, --- U.S. ---, 135 S.Ct. 2584, 2604, 2608 (2015). This means that, under *Obergefell*, denying benefits to married same-sex couples while providing those benefits to married opposite-sex couples is unconstitutional. It is not possible—in good faith—to construe *Obergefell* any other way.

And *De Leon* is simply the vehicle that brought *Obergefell* to Texas. See *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) ("*Obergefell*…is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court."). Petitioners ask this Court to ignore *De Leon*. And it's true: where the U.S. Supreme Court has not yet determined a question of federal law, a lower federal court's decision is not binding on a state court's determination of that question. But that is not the situation here. In *De Leon*, the Fifth Circuit waited for the U.S. Supreme Court to decide *Obergefell*, then directly applied *Obergefell* to strike down discriminatory Texas laws for the same reasons that the U.S. Supreme Court struck down similar state laws in *Obergefell*. Ignoring *De Leon* is equivalent to ignoring *Obergefell*.

And it is well established that state courts cannot ignore—or overrule, or rewrite—U.S. Supreme Court opinions. *State of South Carolina v. Bailey*, 289 U.S. 412, 420 (1933) (declaring state courts have "duty…to administer the law prescribed by the [U.S.] Constitution…as construed by this court"). Moreover, it is well established that the U.S. Supreme Court's recognition of a substantive constitutional right is always retroactive. See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89, 94–98 (1993) ("Both the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court." (internal quotations omitted)). There is no authority for Petitioners' assertion that *Obergefell* is not retroactive—nor is there authority to support Petitioners' audacious invitation to usurp the U.S. Supreme Court's authority by ignoring or rewriting portions of *Obergefell* to enable state-sanctioned discrimination in Texas.

For the reasons offered above and expounded upon below, the Court should reject Petitioners' invitation—and should condemn Petitioners' pursuit of state-sanctioned discrimination—by holding (1) that *Obergefell* and *De Leon* are controlling federal law, (2) that the rights they recognize are retroactive, and (3) that, under *Obergefell* and *De Leon*, treating married same-sex couples unequally, such as by denying them access to the same benefits provided to married opposite-sex couples, is unconstitutional.

Argument

1. *Obergefell* was about more than a limited right to participate in a marriage ceremony.

The cases that were consolidated at the U.S. Supreme Court and decided under *Obergefell* involved not only couples who were being denied the right to marry, but also couples who were already married and being denied equal access to the benefits and protections that come with marriage.[2] Indeed, *Obergefell* itself involved an already-married couple—James Obergefell and John Arthur—where Obergefell had sued for legal recognition of his marriage, after Arthur's death, because he was being denied equal access to the benefits and protections that come with marriage. See *Obergefell v. Hodges*, --- U.S. ---, 135 S.Ct. 2584, 2594 (2015).

When the U.S. Supreme Court consolidated these cases and granted certiorari, it was to answer **two** questions: (1) whether same-sex couples have a right to marry, and (2) whether already-married same-sex couples have a right to be "recognize[d]" as married—*i.e.*, treated as equal to other already-married couples. *Id.* at 2593. And when the U.S. Supreme Court discussed the Fourteenth Amendment and the constitutional protections provided to individuals in same-sex relationships, it discussed not only the right to marry but also the right to have equal access to the personal, social, economic, and familial benefits and protections that come with marriage. See *id.* at 2599–2601 ("[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.").

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2 *E.g.*, *Tanco v. Haslam*, 7 F. Supp. 3d 759, 762, 764 (M.D. Tenn. 2014) (noting suit involved already-married couples seeking "recognition" of their marriages, and describing harm of nonrecognition as including denial of equal access to benefits and protections available to other married couples); see *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015) (consolidating cases and granting cert petition); *DeBoer v. Snyder*, 135 S.Ct. 1040 (2015) (same); *Tanco v. Haslam*, 135 S.Ct. 1040 (2015) (same); *Bourke v. Beshear*, 135 S.Ct. 1041 (2015) (same).

"Indeed," said the U.S. Supreme Court in *Obergefell*, "while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities"—including, among other things, "inheritance and property rights; rules of intestate succession;...workers' compensation benefits; health insurance; and child custody, support, and visitation rules." *Id.* at 2601. In the past, "by virtue of their exclusion from that institution [of marriage], same-sex couples [have been] denied the constellation of benefits that the States have linked to marriage." *Id.* And, according to the U.S. Supreme Court, this is unacceptable. "Under the [U.S.] Constitution, same-sex couples seek in marriage **the same legal treatment as opposite-sex couples**, and it would disparage their choices and diminish their personhood to deny them this right." *Id.* at 2602 (emphasis added). Simply put: it violates the Fourteenth Amendment when a state enforces marriage laws unequally, so that "same-sex couples are denied all the benefits afforded to opposite-sex couples." *Id.* at 2604.

In sum, the U.S. Supreme Court held that state laws are unconstitutional if they "exclude same-sex couples from civil marriage **on the same terms and conditions as opposite-sex couples**." *Id.* (emphasis added). In other words, *Obergefell* recognized not merely the limited right of same-sex couples to obtain a marriage license and participate in a marriage ceremony, but rather the comprehensive right to marry and to receive and enjoy the same legal status, recognition, benefits, and protections that other married couples receive. See *id.* at 2602 (recognizing right to "the same legal treatment as opposite-sex couples") & 2604 (recognizing right to marriage "on the same terms and conditions as opposite-sex couples"). Under *Obergefell*, if a state like Texas—or any of its local governments—decides to confer benefits on individuals based on their marital status, then it must confer those benefits on **all** married individuals equally, or run afoul of the U.S. Constitution.

Petitioners think *Obergefell* "is poorly reasoned and has no basis in constitutional text or history." See Petitioners' Br. 12. So they openly ask this Court to ignore portions of *Obergefell* and to construe it as though it recognizes only the limited right of same-sex couples to marry, and not the broader right of married same-sex couples to be treated like other married couples. *Id.* at 12–13. And Texas's highest elected executives have joined Petitioners in this invitation to rewrite *Obergefell*. See Amicus Curiae Br. of Gov. Greg Abbott, Lt. Gov. Dan Patrick, and A.G. Ken Paxton ("Amicus Br.") at 7. Indeed, Texas's elected executives have even suggested that the U.S. Supreme Court's opinion in *Obergefell* should not be regarded as law. See *id.* at 4, 8–9.

The explicitly stated goal, here, is to enable state and local governments to resume open discrimination against individual Texans, based on their sexual orientation. Petitioners' Br. at 14–15 (asserting government employers should be able to provide benefits to opposite-sex couples without providing those same benefits to same-sex couples); Amicus Br. at 7 (same). In other words, after the *De Leon* plaintiffs won recognition of their rights—and after Mark Phariss specifically won recognition of his right to equal access to the health-care coverage that his husband's employer offers to married couples—Petitioners and Texas's elected executives want to once again deprive these individuals of their right to equal treatment. And they hope to accomplish this goal by convincing this Court that open discrimination is still permissible after *Obergefell*.

But petitioners and Texas's elected executives are wrong.[3] As demonstrated above, *Obergefell* recognizes an individual's right to enter into a same-sex marriage "**on the same terms and conditions as opposite-sex couples**." 135 S.Ct. at 2604 (emphasis added). And *Obergefell* recognizes the right of same-sex couples to "**the same legal treatment as opposite-sex couples**." *Id.* at 2602 (emphasis added). Thus, there is no way—in good faith, or without animus—to construe *Obergefell* as recognizing anything less than the comprehensive right of individuals to enter into same-sex marriages and to have equal access to all the same benefits and protections provided to individuals in opposite-sex marriages.

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[3] Not just legally, but also ethically and morally. See, *e.g.*, Luke 6:31; James 2:8–9.

2. *De Leon* simply brought *Obergefell* to Texas.

Like the cases consolidated under *Obergefell*, *De Leon* involved not only a couple being denied the right to marry (Phariss and Holmes) but also a couple that had married in Massachusetts and was being denied equal access to the benefits and protections that come with marriage (De Leon and Dimetman). *De Leon v. Perry*, 975 F. Supp. 2d 632, 640 (W.D. Tex. 2014). Consequently, the *De Leon* Plaintiffs challenged not only the constitutionality of Article I, section 32 of the Texas Constitution (denying same-sex couples the right to marry), but also the constitutionality of section 6.204 of the Texas Family Code (denying married same-sex couples the right to be treated like other married couples). *Id.* at 639, 641–642.

Before it was stricken as unconstitutional, section 6.204(c)(2) of the Texas Family Code purported to deny individuals in a same-sex marriage any "right or claim to any legal protection, benefit, or responsibility asserted as a result of [their] marriage." In other words, section 6.204 sought to treat individuals in a same-sex marriage worse than individuals in an opposite-sex marriage—by denying them equal access to the benefits and protections that state and local governments provide to individuals who are married.

Throughout the litigation in *De Leon*, the State of Texas agreed the case was about not only the right of same-sex couples to marry but also the right of married same-sex couples to have equal access to all the benefits and protections provided to married opposite-sex couples. The *De Leon* Plaintiffs filed an expert report that listed all the benefits and protections to which they were being denied access, and the State never disputed that evidence. See Dec. of Lee Badgett (Doc. 24-9, filed 11/22/13), *De Leon v. Perry*, No. 5:13-cv-982-OLG (W.D. Tex.). The district court, in issuing its preliminary injunction against the enforcement of section 6.204, explicitly recognized that "marriage conveys a host of rights, responsibilities, and benefits beyond the mere act of engaging in the ceremony of marriage." 975 F. Supp. 2d at 661. And on appeal, the State itself argued repeatedly that marriage is not merely a ceremony but also a "subsidy"—what the State called "a package of benefits conferred on the married couple." See, *e.g.*, Tr. of Fifth Cir. Oral Arg. (1/9/15), attached as Ex. 1, at 7–8.

After *Obergefell* was decided, the Fifth Circuit rightly concluded that, under *Obergefell*, this "package of benefits" could not be withheld from same-sex couples, and section 6.204 of the Texas Family Code was unconstitutional because it sought to deny married same-sex couples equal access to this "package of benefits." See *De Leon v. Abbott*, 791 F.3d 619, 624–625 (5th Cir. 2015). In other words, in *De Leon* the Fifth Circuit applied *Obergefell* to affirm the district court's injunction—not only against Texas's attempt to deny same-sex couples the right to marry (Tex. Const. Art. I, § 32), but also against Texas's attempt to deny married same-sex couples the right to be treated like other married couples (Tex. Fam. Code § 6.204). *Id.*

Despite the fact that the constitutionality of section 6.204 and the denial of equal access to marital benefits were clearly at issue in *De Leon*—and despite the fact that (a) the denial of equal access to marital benefits was ruled unconstitutional in *Obergefell* (see Section 1, above), and (b) section 6.204 was therefore ruled unconstitutional in *De Leon*—Petitioners and the State's elected executives would now have this Court believe that neither *Obergefell* nor *De Leon* precludes a state or local government employer from relying on section 6.204 to deny individual Texans equal access to marital benefits.[4] For obvious reasons, this requires convincing the Court that *De Leon* should be ignored altogether, and portions of *Obergefell* should be ignored or rewritten.

Notably, however, if *De Leon* had made it to the U.S. Supreme Court before *Obergefell* was decided, it would have been either (1) consolidated with and decided under *Obergefell* or (2) held and GVR'd, with explicit instructions that it be decided by the Fifth Circuit in light of *Obergefell*.

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[4] The State's elected executives continue to refer to the benefits and protections provided to married couples as a "subsidy"—and they continue to argue that, even after *Obergefell* and *De Leon*, state and local governments are not required to "subsidize" married same-sex couples in the same way they "subsidize" married opposite-sex couples. See Amicus Br. at 7. In other words, the State's elected executives make exactly the same argument that they made in *De Leon*, and that the Fifth Circuit rejected under *Obergefell*.

Thus, it is only an accident of chronology that separates *De Leon* from *Obergefell*. In substance—regarding the interpretation of individual rights under the Fourteenth Amendment—*De Leon* and *Obergefell* are inseparable. *De Leon* simply became the vehicle that delivered *Obergefell* to Texas. See 791 F.3d at 625 ("*Obergefell*…is the law of the land and, consequently, the law of this circuit.").[5] To ignore or diverge from *De Leon* would be to ignore or diverge from *Obergefell*. And this Court cannot ignore or diverge from *Obergefell*. (See Section 4, below.)

3. *Windsor* further precludes any effort to "narrow" *Obergefell*.

In their push to "narrowly construe" *Obergefell*, Petitioners ignore *Windsor*. The reason is obvious: *Windsor* was about denying married same-sex couples equal access to the benefits and protections provided to married opposite-sex couples. *United States v. Windsor*, --- U.S. ---, 133 S.Ct. 2675, 2695 (2013) (striking federal statute as unconstitutional because it denied individuals in same-sex marriage "equal protection of the laws"—specifically, equal access to tax benefit provided to individuals in opposite-sex marriage). Thus, Petitioners ignore *Windsor* because it further precludes their effort to "narrow" *Obergefell*.

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[5] The shortness and simplicity of the *De Leon* opinion shows that it is effectively an addendum to *Obergefell*—applying *Obergefell* directly to Texas law, with no need for further analysis or discussion.

According to the U.S. Supreme Court in *Windsor*, even where there is no universal right to enter into a same-sex marriage, there is the right of already-married same-sex couples to have equal access to the benefits and protections that are provided to already-married opposite-sex couples. See *id.* at 2692–2696. A government that refuses to treat same-sex marriages and opposite-sex marriages with "equal dignity," by providing benefits to one and not to the other, "violates basic due process and equal protection principles" under the U.S. Constitution. *Id.* at 2693–2696. Thus, a statute that enables the government to treat same-sex couples unequally, by denying them equal access to benefits that are otherwise available based on marital status, is unconstitutional. *Id.*

Windsor was about a federal statute, but its logic applies likewise to a state statute that would enable a government entity to deny same-sex couples "equal dignity" and equal treatment. And because *Windsor* preceded *Obergefell*, Petitioners' contention that *Obergefell* can be "narrowly construed"—to enable the same sort of unequal treatment that was already deemed unconstitutional in *Windsor*—makes no sense. (See Section 5 & note 7, below.) *Obergefell* itself precludes Petitioners' effort to narrow *Obergefell*. (See Section 1, above.). And *Windsor* only further precludes it.

4. This Court should decline Petitioners' invitation to ignore or rewrite *Obergefell*.

It is well established that state courts must follow—and cannot ignore, overrule, or rewrite—U.S. Supreme Court opinions. See *State of South Carolina v. Bailey*, 289 U.S. 412, 420 (1933) (declaring state court has "duty…to administer the law prescribed by the [U.S.] Constitution…as construed by this court"); *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220–221 (1931) (holding U.S. Supreme Court's determination of federal law "is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding"); *e.g.*, *Kansas v. Cheever*, --- U.S. ---, 134 S.Ct. 596, 601–602 (2013) (vacating judgment of Kansas Supreme Court for "misconstru[ing]" and failing to properly apply "settled rule" of U.S. Supreme Court's prior opinion); *Gunn v. Minton*, --- U.S. ---, 133 S.Ct. 1059, 1066 (2013) (reversing Texas Supreme Court for misapplying test from U.S. Supreme Court's prior opinion); *Padilla v. Kentucky*, 559 U.S. 356, 364–366 (2010) (reversing Kentucky Supreme Court for improperly narrowing scope of U.S. Supreme Court's prior opinion); *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (reversing Missouri Supreme Court for failing to "take account" of key statement in U.S. Supreme Court's prior opinion).

Thus, this Court should reject petitioners' audacious invitation to ignore or rewrite portions of *Obergefell*.

5. The rights recognized in *Obergefell* are fundamental and retroactive.

It is well established that the U.S. Supreme Court's recognition of a substantive constitutional right is always retroactive. See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89, 94–98 (1993) ("Both the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court." (internal quotations omitted)). Some exceptions have been made for certain **procedural** rights in the criminal context. See *id.* at 94 (noting exception); see also *Welch v. United States*, --- U.S. ---, 136 S.Ct. 1257, 1264 (2016) (discussing distinction between substantive and procedural rights, in determining retroactivity in criminal context). But there is no authority for Petitioners' assertion that there is no retroactivity for the fundamental, substantive right of all individuals to enter into and enjoy the benefits of marriage.

Petitioners cite several cases to support their contention that not all rights are retroactive. See Petitioners' Reply at 6–7; Petitioners' Brief on the Merits at 10; Petitioners' Reply Brief on the Merits at 10–11. But Petitioners cite only criminal-procedure cases. They cite no authority—and there is none—for the notion that the recognition of a fundamental, substantive constitutional right is not retroactive.[6]

[6] Texas's elected executives have refrained from joining Petitioners in their fight against retroactivity, having previously conceded *Obergefell*'s retroactivity in the Stone-Hoskins case. See "Texas AG Avoids Contempt Bid Over Same-Sex Death Papers," Law360 (Aug. 10, 2015), at https://www.law360.com/articles/689242.

Indeed, Petitioners' notion that a substantive right might not be retroactive is nonsensical and contrary to the premise that rights precede any written law or constitution. Not every individual right that exists has been explicitly written into the U.S. Constitution. See U.S. Const. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."). In fact, the right to marry is not mentioned in the U.S. Constitution, and was not explicitly recognized by the U.S. Supreme Court until 1923. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (recognizing for first time—under Due Process Clause of Fourteenth Amendment—"the right of the individual…to marry").[7] Yet, presumably, Petitioners would not suggest that the fundamental right to marry did not exist until the U.S. Supreme Court "created" it in 1923, and has existed only prospectively since then. Instead, it is natural and proper to conceive of the right as having always existed, prior to any explicit recognition—and as having effect both retroactively and prospectively from the date of its recognition.

[7] Previously, the U.S. Supreme Court had recognized rights "acquired by" marriage, or "attached to the contract of marriage," but no actual right to marry. See, *e.g.*, *Osborn v. Nicholson*, 80 U.S. 654 (1871); *Conner v. Elliott*, 59 U.S. 591 (1855). Interestingly, this reinforces the order of things as they played out from *Windsor* to *Obergefell*, where the recognition of an individual's right to the legal benefits and protections that come with marriage (*Windsor*) preceded the recognition of an individual's right to marry (*Obergefell*). And it reinforces the conclusion that Petitioners' effort to "narrow" *Obergefell*—by stripping it of any recognition of the right to equal benefits and protections—is backwards, and ignores *Windsor* as *Obergefell*'s precursor. (See Section 3, above.)

If this is true of the right to marry someone of the opposite sex, then it is likewise true of the right to marry someone of the same sex—for in each scenario we are talking about the fundamental right to marry. See generally *Obergefell*, 135 S.Ct. 2584. Thus, it is natural and proper to conceive of this right as having always existed, prior to its explicit recognition in *Obergefell*—and as having effect both retroactively and prospectively from the date of its recognition.

This is how the U.S. Supreme Court sees it—which is why the Court has recognized that the nature of the "judicial role," and of judicial review, is generally "incompatible" with prospective-only rulemaking. See *Harper*, 509 U.S. at 95–96 (noting judicial consensus on this view, including agreement from Justice Scalia). The Court does not create new rights that have only a prospective effect; rather, the Court recognizes rights that already existed and thus have both retroactive and prospective effect from the date of their recognition. On rare occasions, for complex practical reasons, the Court may determine that a **procedural** right cannot be applied retroactively. See *id.* at 94; *Welch*, 136 S.Ct. at 1264. But the act of prospective-only rulemaking is "quintessentially" a legislative prerogative—not a judicial one. *Id.* at 95–96.

For these reasons, the rights recognized in *Obergefell* and *De Leon*—*i.e.*, the fundamental right to marry and to have equal access to the benefits and protections that come with marriage—are retroactive.

Conclusion

It is not possible to apply Article I, section 32 of the Texas Constitution or section 6.204 of the Texas Family Code in a way that would not run afoul of the Fourteenth Amendment under *Obergefell*—because these provisions of Texas law, on their face and by design, seek to treat same-sex couples unequally. This is why the Fifth Circuit affirmed the injunction against these laws in *De Leon*. And this is why Petitioners must ask this Court to ignore *De Leon*, and to ignore or rewrite *Obergefell*, to enable Petitioners' pursuit of unequal treatment.

For the reasons provided, this Court should reject Petitioners' audacious invitation to usurp the authority of the U.S. Supreme Court—and should condemn Petitioners' pursuit of state-sanctioned discrimination—by holding (1) that *Obergefell* and *De Leon* are controlling federal law, (2) that the rights they recognize are retroactive, and (3) that, under *Obergefell* and *De Leon*, treating married same-sex couples unequally, such as by denying them access to the same benefits that are provided to married opposite-sex couples, is unconstitutional.

Respectfully submitted,

/s/ Jason P. Steed

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 4,264 words, according to MS Word's word-counting tool, and therefore complies with Texas Rule of Appellate Procedure 9.4(i)(3).

/s/ Jason P. Steed

Jason P. Steed

CERTIFICATE OF SERVICE

I hereby certify that this brief was submitted electronically and served on all parties through the Court's electronic filing system.

/s/ Jason P. Steed

Jason P. Steed

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CLEOPATRA DELEON, NICOLE, DIMETMAN, VICTOR HOLMES, and **MARK PHARISS,** — **CASE NO. 14-50196**

Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas; **GREG ABBOTT,** in his official capacity as Texas Attorney General; **GERARD RICKHOFF,** in his official capacity as Bexar County Clerk; and **DAVID LAKEY,** in his official capacity as Commissioner of the Texas Department of State Health Services,

Defendants.

IN ORAL ARGUMENT

BEFORE THE UNITED STATES COURT OF APPEALS
FIFTH DISTRICT

Friday, January 9, 2015

Before:

The Honorable Patrick Higginbotham
The Honorable Jerry E. Smith
The Honorable James Graves

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APLST

EXHIBIT

1

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January 9, 2015 · New Orleans, Louisiana

ARGUMENT ON BEHALF OF THE DEFENDANTS

MR. MITCHELL: May it please the Court.

I'd like to begin, if I could, by addressing the questions that Judge Higginbotham and Judge Graves addressed to my colleagues from Louisiana and Mississippi, starting with the question of why Texas' marriage laws would allow infertile opposite sex couples to marry, and how can the laws be Constitutional by defending them on the ground that they promote procreation?

There are many answers to that objection, each of which is decisive and none of which the Plaintiffs have been able to answer.

First, as Judge Smith rightly points out, is that rational basis review does not require a perfect fit between means and ends. The fact that the distinction drawn by the Legislature is imperfect does not make it irrational.

The second point is more important. There are two different interests in procreation that are advanced by Texas' marriage laws, each of which is explained and distinguished in our briefs.

The first interest in procreation is the interest in encouraging couples to produce new offspring. And the marriage laws are rationally related to that interest, because opposite sex couples are far more likely than same-sex couples to produce children.

But there's a second procreation interest, which is distinct from the first. And that is the State's interest in discouraging unplanned out-of-wedlock births that impose negative externalities on society and burden tax payers by requiring them to pick up the costs of supporting children that should be borne by their natural fathers.

Opposite sex marriage advances the State's interest in reducing unplanned out-of-wedlock births, and same sex marriage does not.

Judge Higginbotham noted in the earlier case that Judge Posner was unimpressed with this argument. But with all respect to Judge Posner, he was not applying rational basis review.

Judge Posner did not take issue with the State's empirical claim that same sex marriage will do nothing to advance the State's interest in reducing unplanned out-of-wedlock births. He simply thought that that was not a valid justification. He thought it was unjust to withhold the benefits of marriage from same sex couples on account of that distinction.

But that's where Judge Posner crossed the line from applying rational basis review into second guessing the

Legislature's policy judgment.

And there's no disagreement between the Plaintiffs and the State over these empirical questions. Everyone acknowledges that same sex couples are biologically incapable of producing children, and everyone, therefore, acknowledges that opposite sex marriage will advance these two interests' appropriation to a greater degree than same sex marriage will.

And this leads into another question raised by Judge Graves. Judge Graves asked one of my colleagues, --

JUSTICE GRAVES: But it's not that they're going to advance it in some independent way. The question is: If they co-exist, where are we?

MR. MITCHELL: If they co-exist, the State is extending a subsidy of marriage to relationships that are less likely to advance the State's interests than opposite sex marriage will.

And that's what establishes a rational basis for our law.

Judge Graves was asking one of the lawyers from the other states what harm will arise from recognizing same sex marriage, or what benefit will the State gain from withholding the recognition of same sex marriage.

With all respect, that's not the right question to ask on rational basis review. Consider subsidies for school lunches. The State would withhold them from -- yes?

JUSTICE GRAVES: I'm not following what you're saying. Are you saying that if you allow same sex marriage, that the Legislature is justified in concluding that that will increase the number of children born out of wedlock?

MR. MITCHELL: No, that's not our contention at all.

JUSTICE GRAVES: No?

MR. MITCHELL: It's a different argument. What we're saying is that marriage is a subsidy, and the State is entitled to reserve that subsidy for the relationships that are more likely to advance the State's interests in reducing unplanned out-of-wedlock births.

And withholding that subsidy from marriages that will do nothing to advance the State's interests in reducing unplanned out-of-wedlock births.

This is no different from the State deciding that subsidies for school lunches should --

JUSTICE GRAVES: So, is that a marriage is a subsidy and there is no right to marry, it's just a subsidy?

MR. MITCHELL: We're not saying there's not a right.

JUSTICE GRAVES: The State can either confer or withhold?

MR. MITCHELL: It is a subsidy. It is a benefit. And it takes different forms in different states.

For example, tax laws may vary from state-to-state as far as what the specific benefits of marriage will be.

But it is a benefit for --

JUSTICE HIGGINBOTHAM: Pardon me.

MR. MITCHELL: Sure.

JUSTICE HIGGINBOTHAM: So what you said is that there is no right to marry?

MR. MITCHELL: No, we're not denying that there's a right to marry. The Supreme Court has held that there is a fundamental right to opposite sex marriage, which it held in *Loving*.

But what that means, what marriage means from the State's perspective, is that there will be a package of benefits conferred on the married couple, including tax benefits, a spousal testimonial privilege, and those will vary from state-to-state.

The State gets to decide exactly what the benefits are, but a State --

JUSTICE HIGGINBOTHAM: But there are benefits that flow from the right to marry?

MR. MITCHELL: Yes, that's correct.

JUSTICE HIGGINBOTHAM: And the State can decide when to confer or withhold the benefits?

MR. MITCHELL: Well, it has to be a rational distinction.

JUSTICE HIGGINBOTHAM: But that doesn't justify denial all together of the right, does it?

MR. MITCHELL: Well, it will justify it if there's a rational reason for withholding the subsidy.

So, Your Honor was asking one of my colleagues "what does the State gain from withholding the right of same sex marriage from same sex couples?"

And, with all respect, on rational basis review, that's not the proper question to ask.

All we have to show to prevail on rational basis is that conferring these benefits on opposite sex couples will advance some State interest to a greater degree than conferring these rights on same sex couples.

JUSTICE SMITH: By the same token, you're not going to discontinue the benefits that are now afforded to married couples -- opposite sex, I mean. Heterosexual, or married couples. That's going to continue.

The question is: If you then also give this new group the same benefits, that that will, in turn, have its impact upon the people? That's the way you have to frame the question.

MR. MITCHELL: We're not contending, and we don't need to argue, that the recognition of same sex marriage will be harmful. That is not what we need to show to prevail on rational basis.

All we have to show is that same sex marriage will not advance the State's interests to the same extent that opposite sex marriage will, and that proposition is undeniable when it comes to the State's interest in procreation.

The Plaintiffs have pointed out in their brief, for example, that same sex female couples might be able to produce children through assisted reproductive technologies. And they are correct.

JUSTICE SMITH: You know, they're unlikely to procreate so we can withhold those benefits?

MR. MITCHELL: They are less likely to procreate, and that --

JUSTICE SMITH: I mean, you're not arguing that that's going to have any effects upon marriage itself as it goes forward?

MR. MITCHELL: We're not arguing that, and we don't need to show that.

JUSTICE SMITH: I don't want to subsidize something that doesn't further this interest of --

MR. MITCHELL: That's exactly right. That's the argument, and that is the acceptable argument to make on rational basis review.

So, if the State Legislature decides --

JUSTICE HIGGINBOTHAM: We'll hear about it.

MR. MITCHELL: Yes. If the State Legislature decides, for example, that it will subsidize school lunches only for children of poor parents, and withhold those subsidies from children of middle class parents or wealthy parents, the State is not required to show that withholding that subsidy will advance the State's interests in nutrition.

In fact, it would probably advance the State's interests in nutrition to subsidize school lunches for everyone, but the State is deciding to reserve the subsidy to the group of people who will most likely benefit from the subsidy, and for whom the State's interest in nutrition is more likely to be advanced, and advanced to a greater extent.

It's the same type of rational distinction that's being made here with the State's marriage laws.

And the Plaintiffs, in the District Court, throughout this litigation, have mischaracterized the nature of rational basis review. It is not our burden to show --

JUSTICE HIGGINBOTHAM: I'm trying to follow your analogy, because the lunch analogy sounds like I'm not denying you the right to eat lunch, I'm just telling you I'm not going to pay for it.

MR. MITCHELL: Not going to subsidize it. Not going to confer a government benefit.

JUSTICE HIGGINBOTHAM: All right. But in this instance, you're saying not only am I not going to confer any benefits to marriage, I'm going to deny you the right to marry.

MR. MITCHELL: The State is not denying the right to live together, it's not denying the right to choose their names or hold a wedding ceremony, it's simply --

JUSTICE HIGGINBOTHAM: You just can't get married?

MR. MITCHELL: They won't get government recognition or subsidies of that relationship and have it treated as a marriage, and that's the same thing as the State deciding that it will withhold benefits or recognition or subsidies in other particular contexts.

So, it's not a situation like *Loving* where the plaintiffs actually were thrown in jail for living together as husband and wife. And that is actually an affirmative imposition on liberty. This is just a withholding of government recognition and subsidies, and the government can decide to reserve subsidies for the behaviors that are more likely to promote the benefits that the government is seeking to promote.

And that's all that's needed on rational basis.

So, for the Plaintiffs to win, they need to get to strict scrutiny somehow, and there's only two ways they can do that.

One, is the fundamental right route under substantive due process.

And the other is to show that sexual orientation is somehow a suspect class entitled to strict scrutiny.

And --

JUSTICE HIGGINBOTHAM: To conserve resources, that's the State's objective?

MR. MITCHELL: Conserve resources, or simply to say that we want to confer and reserve the benefits for the behaviors that are more likely to generate the interests in procreation that the State is seeking to promote.

JUSTICE GRAVES: In an area that's traditionally reserved to the States.

MR. MITCHELL: That's it. Yes, of course. The States have always held the prerogative to impose other limitations on who can get married and what the definition of marriage will be.

Judge Higginbotham asked some questions to the Louisiana attorney about immutability and other questions about whether strict scrutiny should apply under equal protection analysis.

We should be clear: We are not conceding that sexual orientation is immutable. In the Paul McCue amicus brief filed in our case in our support, cites the relevant scientific authorities on this question.

There is a dispute in the scientific literature.

JUSTICE HIGGINBOTHAM: There is?

MR. MITCHELL: Yes, there is.

JUSTICE HIGGINBOTHAM: I thought that every medical association since 1974 dropped that as listing it as a disease.

MR. MITCHELL: That's different. That's a different question. Whether it's --

JUSTICE HIGGINBOTHAM: That's just one piece of it.

MR. MITCHELL: Whether it's immutable --

JUSTICE HIGGINBOTHAM: Is the State maintaining that it is not immutable?

MR. MITCHELL: Our contention is that there is a scientific debate on the question. We are not taking a position on that scientific debate because it's a complicated one, and it's outside the technical expertise of the lawyers.

JUSTICE HIGGINBOTHAM: Is that a basis for the State's action, or not?

MR. MITCHELL: Well, it's a basis to distinguish race and sex. No serious person contends that race is not an immutable --

JUSTICE HIGGINBOTHAM: Arguing that is an abstract proposition. The question here is: Why is Texas doing what it's doing? And are they doing it because they think that this is an illness that can't be cured?

MR. MITCHELL: No, of course not. That's not the reason. The reasons were explained earlier, Judge Higginbotham, I explained earlier.

JUSTICE HIGGINBOTHAM: Then what are you arguing, then?

MR. MITCHELL: We're arguing that strict scrutiny should not apply.

Earlier, I was explaining why rational basis review is easily satisfied, because the State's distinction can be defended as a way of reserving the benefits of marriage for the opposite sex relationships that are more likely than the same sex relationships to advance the State's interests in procreation.

But to win, we have to show that rational basis is the proper standard, and to make that claim, we have to show why strict scrutiny should not apply.

And the immutability question is one of the factors the Supreme Court considers.

JUSTICE HIGGINBOTHAM: You're arguing that it's not an immutable characteristic, but you're trying to make the legal argument that whatever legal consequences in terms of level of scrutiny that flow from being immutable are not available.

MR. MITCHELL: We're arguing rational basis applies. And the Plaintiffs have said it's immutable. The scientific literature, there are articles that go both ways on this question. All of the authorities are cited in the Paul McCue amicus brief, and none of them are acknowledged by the courts that have said, without surveying the literature, that sexual orientation is an immutable characteristic.

Now, there's another question Your Honor asked, which is: "Does sexual orientation have any relevance to one's ability to contribute to society?"

Again, we respectfully suggest that's not the proper question when challenging a State's marriage laws, because sexual orientation is surely relevant to the benefits and subsidies that the State is providing in marriage, and it's surely relevant to the purpose of why the State provides those benefits and subsidies in the first place.

JUSTICE HIGGINBOTHAM: Well, it is relevant directly to the purpose, and the question is whether there is -- it's really a product of animus, or in fact, or not.

MR. MITCHELL: Well, the reason it can't be a product of animus is because sexual orientation is relevant to the State's interests in procreation.

Someone who wants to marry a person of the same sex is not going to be likely to produce new offspring. And recognizing a marriage between persons of the same sex is not going to in any way advance the State's interests in reducing unplanned out-of-wedlock births.

That's the rational basis for the State law that refutes any accusation of animus. The State is proceeding from a view of marriage, that the Plaintiffs do not share. The Plaintiffs believe the State's laws are irrational because they view the institution of marriage as existing only to celebrate the mutual love and commitment of two people.

The State's marriage laws reflect a different view.

The celebration of love component is important, but it's secondary to the interests in generating positive externalities and positive benefits for society in the form of encouraging the creation of new offspring and in reducing the incidents of unplanned out-of-wedlock births that put a strain on the State.

When marriage is viewed --

JUSTICE HIGGINBOTHAM: How does it do that?

MR. MITCHELL: It does that by subsidizing and encouraging opposite sex couples to get married --

JUSTICE HIGGINBOTHAM: But you're going to continue to do that, --

MR. MITCHELL: Of course, yes.

JUSTICE HIGGINBOTHAM: You'll continue to do that, and you said it's been very effective.

MR. MITCHELL: Yes.

JUSTICE HIGGINBOTHAM: That's not going to stop.

MR. MITCHELL: That's right.

JUSTICE HIGGINBOTHAM: The question is: If you also extend that to someone else, the fact that you also extend these subsidies to these other people, that will, in turn, end what benefits are adverse to the benefits that you're getting by the subsidy.

MR. MITCHELL: No, we're not arguing that at all. We're not saying --

JUSTICE HIGGINBOTHAM: Of course you are.

MR. MITCHELL: No, Judge Higginbotham, we're not asserting that recognizing same sex marriage would undermine the State's interests in procreation. We're saying that it would not advance the State's interests in procreation to the same extent.

And that point is undisputed between the parties. The Plaintiffs do not contend that same sex couples are as likely as opposite sex couples to produce new offspring. And same sex couples aren't biologically capable of doing that.

JUSTICE HIGGINBOTHAM: The point that somehow or another if you extend this benefit to same sex couples we're going to have a lot more illegitimate children over here because people aren't going to get married, --

MR. MITCHELL: That's not our argument.

JUSTICE HIGGINBOTHAM: That's not your argument?

MR. MITCHELL: That's not our argument, no. Here's our argument.

JUSTICE HIGGINBOTHAM: It sure sounded like it.

MR. MITCHELL: Recognizing marriage between opposite sex couples reduces the incidence of unplanned out-of-wedlock births, because it channels procreative sexual intercourse into marriage.

Recognizing same sex marriage does not advance that State interest.

If we didn't have opposite sex marriage, we would have --

JUSTICE HIGGINBOTHAM: It doesn't hurt it, it just doesn't --

MR. MITCHELL: It doesn't hurt it, that's correct, but it doesn't advance it, either.

And on rational basis review, that's enough.

If the Court were applying strict --

JUSTICE HIGGINBOTHAM: There's no consequence, then, other than the fact that you save State resources?

MR. MITCHELL: I'm not saying that it would have no other consequence.

JUSTICE HIGGINBOTHAM: We've illuminated all of the benefits. Your reason for the State doing this is that they just do not want to support this particular process here because it's not advancing a goal it wants to advance.

And it's not going to harm anything else, we just don't want to spend the money that way.

MR. MITCHELL: That's enough to pass rational basis review.

Now, Judge Higginbotham, --

JUSTICE HIGGINBOTHAM: I'm not too sure it does or not. But, I'm trying to understand what your argument is. Is that it?

MR. MITCHELL: That's one of the arguments, and that's enough to pass rational basis review.

Now, Your Honor was asking what will happen if same sex marriage is recognized. It's too early to answer that question.

Same sex marriage hasn't been around long enough for anyone to know with any certainty what the ultimate effects will be.

JUSTICE GRAVES: What is the magic number, 20?

MR. MITCHELL: I don't know what the magic number is.

JUSTICE GRAVES: 25?

MR. MITCHELL: I think that's a decision for the Legislature, Judge Graves. The Legislature has the right to decide when it feels comfortable making such a dramatic change to a social institution that has existed from millennia, and is essential to the survival of the human race.

The people of Texas have every right to proceed with caution, and they can decide to wait and see how this social experiment plays out in the countries and states that have recognized same sex marriage.

It is certainly rational to conclude on rational basis review that it's too early for Texas to join the fray when same sex marriage has existed only for a few years, no more than 15 years anywhere in the world.

JUSTICE GRAVES: Do you think passing a ban is evidence of a wait and see approach?

MR. MITCHELL: Of course, because the ban can always be repealed. This is a democratic decision made by democratically accountable officials who can always change their mind later, once the evidence is in.

JUSTICE SMITH: What is the concern or the fear that we're waiting to -- that we should wait to see if it's real?

MR. MITCHELL: Here's the concern that I think under guards much of the support for traditional marriage laws.

As we mentioned in our brief, there are two ways to conceive of the institution of marriage.

One way is to view it primarily, or almost exclusively, as a celebration of love and commitment between two people. There's nothing wrong with that view. Many people hold it.

Another way to view marriage is to see the purpose primarily to generate positive consequences and externalities for society by encouraging the creation of new children, and, of course, by preventing the incidence of unplanned out-of-wedlock births.

Those who oppose same sex marriage are animated by a concern that it will reinforce the notion that marriage exists not only primarily, but perhaps almost exclusively, as an institution to celebrate the love and commitment of two people.

And in doing that, it could undermine the idea that marriage is existing to encourage procreation and to encourage the creation of new offspring.

It's a theoretical fear. It's a hypothetical concern. But it's certainly one that is rational, and it's also rational for the State to decide it wants to see how the experiment plays out in Western Europe and in Massachusetts and New England and other states where it has been made legal over the past 10 or 15 years.

Western Europe, for example, has a fertility crisis.

JUSTICE SMITH: So, your point is we don't have to agree with the rationale to uphold it if we determine that there is such a rationale?

MR. MITCHELL: That's right, of course. I mean, all one has to ask is whether it's possible to imagine a rational reason for the State to proceed with caution when changing the definition of the institution of marriage.

And it could very well be that same sex marriage not only will be harmless, it could very well be beneficial. And there are many respectable arguments that have been made.

For example, people have argued that same sex marriage will increase household wealth, they've argued that it will provide a good child rearing environment for the children of same sex couples.

These are all respectable policy arguments that the Legislature should consider in deciding whether to make same sex marriage legal. But they are not a basis in which a Federal Court can declare the people of Texas irrational for deciding to adopt a view of marriage that is procreation centered, and wanting to wait and see how same sex marriage will play out in other jurisdictions.

JUSTICE GRAVES: I guess it's your assertion that there's some kind of declaration that the people of Texas are irrational, which was made by the Lower Court.

But rational basis review just says you've got to show some rational relationship between the law and the purposes articulated for the passage of that law.

I'm just not so sure I agree that to find a law un-Constitutional is tantamount to finding that the people who passed it are irrational.

MR. MITCHELL: Well, I think to declare it un-Constitutional on rational basis review would mean that there's no conceivable rationale that could be imagined that could support the Legislature's decision.

JUSTICE GRAVES: That's not the same as declaring that the people --

MR. MITCHELL: Maybe not. Maybe not. But there certainly are thoughtful defenses of same sex marriage that have been offered by scholars and others.

JUSTICE SMITH: There are limits, though, hypothesizing its doctrine. Do you agree with that?

MR. MITCHELL: There are limits in terms of what the State can do on?

JUSTICE SMITH: We have said in other contexts, even in most deferential areas of economic regulation, that it can't be fantasy.

MR. MITCHELL: Of course.

JUSTICE SMITH: It has to be something of -- admittedly, extraordinarily deferential is a rational basis test, and it is whatever the lawyers and the litigants can dream up.

But it still has to be footed in some basis that is fantasy, and my question to you is that at what point does this hypothesis fade into animus? To what extent is this fear or concern borne of a hostility to homosexuality and same sex marriage, as such?

And when is it -- in other words, that's, I think, a fair question, and I'm not -- don't take from my question my views about that. I just think that dances very close to pushing the animus to one side, which Justice Kennedy certainly was not doing in his earlier writings.

MR. MITCHELL: Well, we certainly don't think it's accurate or fair to suggest that the supporters of traditional marriage laws are acting out of animus. They are acting out of a deeply held belief of what the purposes of the institution of marriage are for.

And this is no different from disagreements in other areas of law. Some people think that anti-trust law should be concerned exclusively with economic efficiency and protecting consumers. That's a Chicago school of anti-trust.

And then other people think that anti-trust laws should protect small dealers and worthy men from competition.

People don't think that you're irrational if you belong to the Chicago school of anti-trust versus the Rufus Peckham opinion that was talking about small dealers and worthy men. It's just two different ways of thinking about what --

JUSTICE GRAVES: What is your definition of animus?

MR. MITCHELL: Animus would be irrational prejudice or hatred, and --

JUSTICE HIGGINBOTHAM: As opposed to rational prejudice?

MR. MITCHELL: What was that? I suppose, yes. The reason these laws are not borne of animus is because they're rooted in scientific fact. They are rooted in the biological reality that same sex unions cannot produce new offspring.

JUSTICE GRAVES: But, fear of the unknown or lack of understanding of people who are different and insensitivity to the preferences of people who are different, those are not things that you would equate with animus?

MR. MITCHELL: Well, we certainly wouldn't offer those as a rational basis for the law, and we're not offering them as a rational basis for this law.

And we respectfully suggest that's an unfair caricature of the supporters of traditional marriage laws. They are not acting out of irrational fear of the unknown, or hiding --

JUSTICE GRAVES: No, my question was: Whether or not those are the kinds of things that would fit a definition of animus? That's all I asked.

MR. MITCHELL: Animus means hatred. I mean, if you look up the word animus in the dictionary, that's --

JUSTICE GRAVES: So the answer to my question is "no?" Those aren't --

MR. MITCHELL: I wouldn't say -- I might say those are irrational under rational basis review, and I certainly wouldn't try to defend a state law simply by saying we enacted this because we fear the unknown.

But, I wouldn't put those in the animus category. Animus is something worse than that. Animus is hatred, prejudice, bigotry, those sorts of things.

And it's been all too common for animus to become used as a label for impugning the motives or defaming the character of those who may disagree with a certain view that's fashionable.

JUSTICE HIGGINBOTHAM: But it's not confined to the malignant animus of things like racism of a sort, this hardcore racism, and bigotry, as you say. It is the uncertainty that is the fear of this strange animal that's new to them, et cetera.

In other words, it's a softer standard than I think I hear being articulated.

MR. MITCHELL: Even if it were, Judge Higginbotham, that's not what's going on here. And it's possible to imagine a rational basis for these laws.

JUSTICE HIGGINBOTHAM: I'm not suggesting it's present or absent, I'm just trying to keep our eye on what the metrics are for animus.

MR. MITCHELL: Yeah. It is a loose term, and I think courts --

JUSTICE HIGGINBOTHAM: Well, I know, but you were characterizing in other ways that I would not agree with on the law.

MR. MITCHELL: It's our view that the term animus should be construed narrowly, because it is such a loose term, and it can be used in a very conclusory way simply for impugning people's motives or defending their character.

I see my time is expired. Unless you have further questions, I'll save time for rebuttal.

JUSTICE HIGGINBOTHAM: You can save time for rebuttal. Thank you.

MR. MITCHELL: Thank you.

JUSTICE HIGGINBOTHAM: Mr. Lane?

ARGUMENT ON BEHALF OF PLAINTIFFS

MR. LANE: May it please the Court, Neel Lane of Akin

Gump Strauss Hauer & Feld on behalf of the Plaintiffs.

I represent four individuals who wish to be married in Texas, and have their marriage recognized in Texas, but they are denied that right because the laws of Texas have created a caste system abhorrent to the core values of the Fourteenth Amendment.

My clients are denied those rights, privileges, and ultimately wealth, enjoyed by other citizens with whom they work, live, and worship side-by-side.

As the Court knows, my client, Nicole, is expecting a child in March. She and Cleo were married in Massachusetts, and they are expecting that child. As matters stand, when that child is born, on that birth certificate, there will be Nicole's name. But where Cleo's name should appear, there will be a blank, as it was with their first child.

And God forbid if Mark, one of my other clients, dies tomorrow, when he dies, where there should be a surviving spouse named, Vic, his partner of 17 years, there will be a blank space.

And those two examples are just emblematic of the inferior status that restricting same sex marriage results in, and has a very real impact. And we've named numerous examples in the brief. There are numerous examples below of the types of economic deprivation and stigmatizing differentiations that my clients suffer.

JUSTICE GRAVES: Counsel, in connection with that, and you may have heard this question asked already this morning. It's been a long morning.

MR. LANE: Yes.

JUSTICE GRAVES: Would it be legally inconsistent, a conclusion that Texas should recognize same sex marriages from other states, but at the same time a conclusion that Texas was perfectly free to ban same sex marriage in Texas? Would those two conclusions be legally inconsistent?

MR. LANE: I believe those are legally inconsistent, as they would have been legally inconsistent in *Loving v. Virginia,* which was a case where it involved recognition of a marriage that had taken place in another state.

The Court didn't distinguish between the right to have a recognition of your marriage --

JUSTICE GRAVES: So as regards to your Plaintiffs, it's an everybody wins or nobody wins?

MR. LANE: It's everybody wins, Your Honor.

JUSTICE HIGGINBOTHAM: Don't you think it's -- I mean, you've mentioned *Loving,* and it's perfectly legitimate that you've mentioned *Loving*, but don't you find it striking that only four or five years after *Loving* the Court took the action it did in *Baker v. Nelson?*

MR. LANE: Well, *Baker v. Nelson,* and I'm glad you raise that, Your Honor, *Baker v. Nelson* found that there was not a substantial Federal question. And this has been addressed numerous times, and I would just add to that discussion.

The fact is, it's been discussed, as Judge Posner said. That was 42 years ago, 43 years ago.

JUSTICE HIGGINBOTHAM: But that wasn't my question. I mean, you're certainly entitled to go into that, and it's a legitimate line of argument that you make on that.

But, you mentioned *Loving.*

MR. LANE: Yes, Your Honor.

JUSTICE HIGGINBOTHAM: And then very, very shortly after *Loving,* in the wake of *Loving,* the Court decided what it did in *Baker v. Nelson* upholding an absolute strong categorical ruling by the Minnesota Supreme Court that said that there's no Constitutional protection for same sex marriage.

So, to the extent that *Loving* made the distinction for discrimination, or distinctions based on race, it didn't make that distinction when it had the very quick opportunity after *Loving* when it decided *Baker.*

MR. LANE: Well, Your Honor, as was noted earlier, *Baker* was decided at a time when homosexual conduct was actually illegal. It was decided not only before *Lawrence,* but before *Bower v. Hardwick.*

And, as the Court recently observed in 2010 in *Christian Legal Society v. Martinez,* the decisions of the Court had failed to distinguish between status and conduct, and it actually noted that when homosexual conduct is made criminal by the law of the state, that declaration, in and of itself, is an invitation to subject homosexual persons to discrimination.

And in that, I would suggest that prior to -- and this is a long time ago, at the time of *Baker v. Nelson,* there was criminalized conduct and there was -- it was a different world, and it's changed now, and it was a different circumstance.

JUSTICE HIGGINBOTHAM: The Minnesota Supreme Court never mentioned the criminalization factor. They only addressed whether it was a violation of any of the several amendments that were being asserted.

MR. LANE: Well, I would say, Your Honor, that I would agree with counsel previously who observed that you can be blinded by your age, but blinded by the age that you're in, and that views do evolve. And that was expressly recognized in *Windsor* that artifacts from a previous time, which may have seemed at that time acceptable, over time become unacceptable.

That was as Judge Posner said.

JUSTICE HIGGINBOTHAM: You do acknowledge that that was, at least immediately after it was issued, that was binding precedent on the specific question that we're addressing -- that you're addressing today.

MR. LANE: Until it was wholly undermined by subsequent doctrinal developments. I agree with you, Your Honor.

JUSTICE HIGGINBOTHAM: Well, there has been no other Supreme Court case even nearly on point on that specific question, which was whether it's Constitutional for a state to limit marriages to heterosexual couples.

So, under *Rodriguez v. Shearson,* the Court will let us know when it has changed its mind on this.

MR. LANE: I would suggest that in *Perry,* it was considered and denied on standing. That case was decided on standing, not on lack of a substantial Federal question.

And there was an issue, a specific issue, relating to restrictions on same sex marriage within a state.

I can't add much more than what's already been stated.

I will say that five Circuit Court decisions, and something like 25 District Court decisions, have found that the substantive doctrinal developments have undermined the applicability and force of --

JUSTICE GRAVES: And I'll just note that all of this talk about *Baker* in the 1970s is making me nostalgic for my Afro and my 8-track tapes.

MR. LANE: Now, Your Honors, the State of Texas has now responded to our challenge, saying that these laws are not about depriving homosexuals of rights at all; they are about channeling opposite sex couples who are capable of child bearing and to responsible procreation.

Even though, as counsel said moments ago, that restriction actually doesn't promote that end, it doesn't stop births to single parents.

But, in any event, what you've heard, that definition of marriage from this lectern, it's an incredibly narrow blinker view of marriage that would be unrecognizable really to anyone who has experienced it, witnessed it, or aspires to it.

And it's amazing. Really, it's quite amazing. Because one of the consistent accusations has been to us in our case, and others like us, is that we are attempting to redefine marriage.

And I have never seen as radical a redefinition of marriage as I heard at this lectern and the papers of the State of Texas. And I assure you that that radical redefinition of marriage is not present in the Legislative record anywhere.

Now, in the District Court, the State asserted more broadly that the Statute, the restriction that we're challenging, was intended to promote -- well, for the purposes of responsible procreation and child rearing.

But they've walked that back on appeal, because the reality is they couldn't answer the question: If marriage is good for children, why deny marriage to same sex couples with children?

The reality is that this law depriving same sex couples of the right to marry is not intended to modify or guide the behavior of opposite sex couples at all. Everyone knows that this law is really about the moral disapproval of homosexuals.

But since the Supreme Court has explicitly rejected that as a rationale that can support the law, counsel for the State has to come up here and attempt to redefine it with this somewhat, I would suggest, half-baked justification that narrows what actually marriage is and attempts to redefine it, and convince you that this is what the people of Texas believe marriage is.

They also attempt to tell you that marriage is about subsidies, and this is about subsidies. And I invite a discussion of *Plyler* on that topic in a moment.

But the fact that it's a subsidy rather than a restriction does not cloak it in immunity from challenge under the Fourteenth Amendment.

Unfortunately, the law's real effect is not only to harm the homosexuals, the gays and lesbians who are not permitted to marry, but also the children they are raising.

But children born to same sex couples, children born to heterosexuals, whom the same sex couples end up raising, the Supreme Court in *Windsor* recognizes the effect on children, and that's one reason why Judge Posner in the Seventh Circuit case said that at a deeper level this type of challenge is about the welfare of American children.

An amicus brief from Gary Gates suggests that there are 11,000 same sex households raising 19,000 children in the State of Texas. Beyond that, there are 600,000 adults who fall into this stigmatizing restriction, and 93,000 of those are in acknowledged same sex relationships.

This notion that we should wait and see and evolve, and that some day perhaps they will have the right to marry, is galling. In the long run, as Cain has observed, we're all dead.

But the reality is that my clients live every day under the cloud of a stigma. They are not permitted to have access to marriage, and some of them die before they are allowed to do that, and some of them will until this Court acts.

Now, for equal protection purposes, the State argues that the same sex prohibition should be judged according to the most lenient standard when used for judging economic regulations.

Let's discuss that.

Beach Communication set forth that standard that a statutory classification can be upheld against challenge if there's a reasonably conceivable set of facts that could provide a rational basis for it.

But it also went on to say that that statutory classification has to be one that neither proceeds along suspect lines, nor infringes fundamental Constitutional rights.

Now, in *Baskin,* Judge Posner observed that he thought that this was exactly the sort of classification that would fall into the rubric of along suspect lines.

But let's step -- let's consider for a moment the actual way in which that test has been applied here in this Circuit.

The *St. Joseph Abbey* case was mentioned, a recent case involving irrational basis test. A unanimous panel considered an equal protection challenge to a state regulation requiring that caskets be sold by funeral directors.

Obviously no more like this case than the *Beach Communications* case. It's an economic regulation case.

But the Court made clear that in the Fifth Circuit the Fifth Circuit will not merely rubber stamp just any asserted rational basis for a statutory restriction. A hypothetical rationale, even post-hoc, cannot be fantasy. That's a direct quote. And the Court will actually examine whether the chosen means rationally relate to the State or to interests that it articulates.

Well, we've already heard that the chosen means of restricting same sex marriage do not, the State concedes, rationally relate to one of the State interests that he suggested, promotes.

Now, the Court will also examine the rationale "informed by the setting and history of the challenged rule."

The challenged law will not survive if there's no rational relationship, if it doesn't exist between the restriction. In that case, it was restricted who could sell caskets in the articulated state interest.

And there were several. And the Court found that there was no connection.

But let's do what in that most simple rational basis case asks us to do, *St. Joseph Abbey.* Let's look at the setting and the history of the restriction.

The setting and the history: In 1973, Texas first expressly limited marriage to opposite sex couples, after several same sex couples attempted to be wed.

In fact, two men actually obtained a marriage certificate.

The State went on and defined that marriage should only be between a man and a woman, and it was clearly intended, this history suggests, not to protect opposite sex couples and channel their behavior, but to prohibit homosexuals from marrying.

Texas again later limited marriage to opposite sex couples, by Statute, in 2003, and then by amendment in 2005. And these measures were in response, and it was noted at the time in the record, and it is before the Court, they were in response to a same sex marriage case in Massachusetts where it was asserted there was a State right under the Constitution, the State Constitution.

And in that case, again, it was in response not to protecting or channeling, or these sorts of arguments that you've heard, the setting and the history make clear that it was in response to denying same sex couples' access to marriage when they wanted it.

Also, the amendment in that statute departed from prior -- an unusual departure from prior law, in which it removed recognition of a broad class of marriages duly executed by other states, that is, same sex marriage. It explicitly said "we will not recognize that." Something Texas had not done before.

Now, the history and background of these measures exposes the State's rationale as this sort of post-hoc hypothetical fantasy that the Court rejected in *St. Joseph Abbey.*

There is no evidence that the State passed the measures that are challenged here and that were struck down by Judge Garcia, to channel opposite sex couples into marriage for purpose of procreation.

JUSTICE HIGGINBOTHAM: Believe me, you don't need to talk about the evidence. It's whatever the law is and whatever inventive lawyer as able as you have sitting over here can come up with. I mean, that's the law.

MR. LANE: That is, actually. But, what this Court said in *St. Joseph Abbey*, which I know Your Honor is familiar with, is that you wouldn't merely accept any asserted rationale. You'd look at the setting and the history, and then you'll examine whether the chosen means rationally relate to the State interests. And that's the next thing you have to do.

And the merest examination exposes that the purported justification is ludicrous.

And you heard in argument restricting same sex couples, as was done, does not, for instance, discourage out-of-wedlock child births. Counsel acknowledged that.

The rationale that he puts forth, that the State puts forth, is that because many opposite sex couples will procreate, even though many won't or can't or can only do so with some intervention of some kind, the law will prohibit all same sex couples from marrying, even though many will procreate like our clients, or adopt children, like many others.

The State simply can't explain why prohibiting same sex couples, that restriction from marrying, will somehow encourage opposite sex couples who otherwise wouldn't do so, to procreate within marriage or marry before procreating. There's a disconnect.

And so even under the simplest standard, you have to say -- and I believe it was discussed earlier the notion that, well, the State -- there doesn't have to be a perfect fit, there can be an imperfect fit.

But when you have a law that's both under-inclusive and over-inclusive, it might suggest that that's a case where it's not a matter of an imperfect fit, but no fit at all, as I believe Your Honor observed.

JUSTICE HIGGINBOTHAM: That was all addressed in Minnesota in *Baker v. Nelson.* There was a discussion in that opinion, as you know, about the fact that some elderly couples, for example, can't procreate, but the Court discounted that because you don't have to have a perfect fit. And the Supreme Court said that did not raise a substantial Federal question.

MR. LANE: Well, in 1972, that was a case in which the plaintiffs sought a right -- recognition of a right for same sex couples to be married at a time when any intimate sexual relationship between same sex couples was a criminal act.

JUSTICE HIGGINBOTHAM: As a matter of completeness, Minnesota, at the time, had no laws for or against same sex. I don't think it occurred to anybody, and the application was made to the Clerk of the Court, and not a decision by some Legislature through all of the political processes. They said "I've never seen one of these things before," which is because this is a very new phenomenon, and said "no."

And then it went up at the same time when it was -- and made the comment about common sense because they -- how do you issue a marriage license to someone to go commit a criminal act?

MR. LANE: I think that history and that context --

JUSTICE HIGGINBOTHAM: That doesn't really answer the question of *Baker,* because -- but it does put it a little more in perspective, I think, to keep in mind exactly what was going on in Minnesota.

MR. LANE: Well, the history and the context is certainly instructive, Your Honor, I would agree. And --

JUSTICE HIGGINBOTHAM: Well, again, the point of the question I asked you was that irrespective of the criminal aspect of it, which was never mentioned in the Supreme Court opinion, the Court specifically addressed the imperfect fit of authorizing marriages by those who, for whatever physical reason, cannot or will not procreate.

The Court addressed that as part of the analysis, and said that's not an issue, that's not a problem.

MR. LANE: Your Honor, as I believe it's been addressed before, I completely agree that that is what the Court did in 1972.

I would suggest that the -- that decision, the summary dismissal in that regard for lack of a Federal -- a substantial Federal question, has been undermined by subsequent doctrinal developments.

But, in any event, so I would suggest that under the most forgiving rational basis standard, this restriction must fail when challenged.

But we don't really have -- if it doesn't, I think the Court has to consider the line of cases: *Claiborne, Moreno, Plyler, Romer, Windsor.* They are all cases that involve rational basis tests being applied.

But it has been discussed, was it the same rational basis test? The laws of this kind that were challenged in the context raised the inevitable inference that there was a disadvantage imposed or borne of animosity towards the people who are the subject of those statutes.

In this case, what occurs when we see these circumstances, is that a more searching form of review is required, when the rights of an unpopular minority group, when there's undocumented aliens, or whether it's homosexuals.

When their rights are at stake. That was Justice O'Connor's description in her concurrence in *Lawrence,* and she was echoing the language of *Caraling Products,* footnote number four.

We don't have to generalize to that extent, though. Specifically, the Court has taken that kind of review, which we'll call -- I would call a more searching form of review. And *Windsor* is referred to as a more careful form of review.

It's called rational basis with a bite in some corners, if that's preferred.

But it definitely takes into account the context.

Now, for instance, in *Romer,* the State of Colorado specifically excluded homosexuals from the benefit of anti-discrimination laws. And the Court said that laws of this kind raise the inevitable inference that the disadvantage imposed is borne of animosity.

It applied a form of rational basis to insure that classifications are not drawn for the purpose of disadvantaging homosexuals in that case.

In *Windsor,* the Court, as we know, did not specify the specific level of review, but it noted that there was a discrimination of an unusual character, and that required careful consideration.

And there, the Court found that where DOMA deprived same sex couples of the benefits and responsibilities of Federal benefits, it was strong evidence of the law having the purpose and effect of disapproval of homosexuals.

And although the Court didn't provide a label for its review, it struck down the law upon careful consideration. And that's what should occur here, as well. There's similarly strong evidence here.

Now, I want to discuss the heightened scrutiny factors.

In particular, in its briefing and below, the State never challenged -- and let me just say in the event that somehow this restriction could survive rational basis review, or rational basis with a bite review, whatever careful scrutiny, whatever you want to call it, the Court should consider the heightened scrutiny factors specifically.

JUSTICE HIGGINBOTHAM: Now, you referred properly to the reference in *Windsor* to discriminations of an unusual character.

MR. LANE: Yes.

JUSTICE HIGGINBOTHAM: But, as you know, that sentence immediately followed the sentence that said that DOMA departs from this history and tradition of reliance on State law to define marriage. You have to take those two sentences together, because they're adjacent in the opinion.

MR. LANE: Well, I would say, Your Honor, that certainly that departure and that circumstance require the Court to give that careful consideration. But that's not the only circumstance that would require careful consideration, and there's a long line of cases -- of other cases that have that, and in this context.

JUSTICE HIGGINBOTHAM: But you can't -- you surely can't assert that discrimination against same sex marriage was of an unusual character. In fact, throughout the world, it was pretty well predominant, or, if not, exclusive.

So, what the Court is referring to here, discrimination of an unusual character, is what the Congress had done in enacting DOMA in light of the history and tradition of reliance on state law to define marriage.

MR. LANE: Well, I certainly -- a couple of things about that.

One thing the State did in Texas, completely withdraw recognition of valid legal marriages in other states in a way that it had never done before, and that's certainly a departure.

Secondly, the refusal to recognize --

JUSTICE HIGGINBOTHAM: In Texas, they didn't need to. They saw a cloud on the horizon, and wise or unwise, that's what they were responding to.

MR. LANE: Yes. Well, Your Honor, I think if you look at *Windsor* and its import, and I know there's been some question as to its opinion's applicability, I would say its reasoning certainly is something that is instructive.

But if you look at what the Court saw, and the same occurred in *Plyler, Claiborne, Moreno,* is the Court sees circumstances that lead it to believe in those circumstances that an unpopular minority is being subject to a restriction of some kind, or a disadvantage of some kind, and therefore, undertakes this careful searching scrutiny.

And in that circumstance, the Court struck down the restriction.

Now, the heightened scrutiny factors include -- I think the State addressed specifically immutability, which was a bit of a surprise. It hadn't challenged it below as a factor requiring heightened scrutiny.

But I want to make clear that on immutability the question is whether or not the person who is subject to the restriction has to change in order not to be discriminated against. And that was Judge Jacobs' formulation in *Windsor* that was ultimately affirmed.

In their briefing and below, the only issue, the only factor that the State of Texas addressed was political power. Whether gays and lesbians had sufficient political power to protect themselves.

But in the first --

JUSTICE HIGGINBOTHAM: Do you think this movement would be better off without any judicial involvement?

MR. LANE: Well, Your Honor, I represent individuals who actually, I believe, have a present Constitutional right to relief. And I don't represent a movement.

JUSTICE HIGGINBOTHAM: I understand that, but when Justice Ginsberg was pressing the gender as a suspect criteria, she came very close, but she failed on that because Justice Bower looked at the ERA and said "well, political process is taking care of this," and let it go.

And then, of course, it turned out that ERA was not enacted, so she did not achieve that. I think that's a fair description of what happened.

MR. LANE: I think there have been numerous discussions in terms of what it means to let this ride, or these issues percolate. Some of them are that the Supreme Court should not step in before the Lower Courts.

JUSTICE HIGGINBOTHAM: Exactly. I'm just talking about this has moved so fast, and I just wondered.

MR. LANE: Your Honor, the quickness of the movement, so to speak, does not bear on whether my clients have a present Constitutional right. They are discriminated against. They are not treated the same as their fellow citizens.

JUSTICE HIGGINBOTHAM: It does bear on timing, and it's just always been there. When do you challenge classic -- when do you take that -- that was a great fear for years, fear that that decision would get there too quickly, and it was a great reluctance. You remember that history, so.

MR. LANE: Your Honor, I feel certain that had the Court not overturned *Plessy* that it might very well be good law and the ills that were sought to be redressed in the State of Texas might still be present.

JUSTICE HIGGINBOTHAM: I'm suggesting to you there is a lot of discussion out there, and has been for a long time among political peers and whatever, as to what the consequences on the movements that seem to be moving on their own to judicial intervention.

MR. LANE: Let me say in the context of another great struggle, and that was the struggle of Civil Rights. There were great discussions as to when certain lines of cases should be brought.

But, there was a absolute certainty that their clients had a Constitutional right to equal protection, and the only question was a matter -- was a question of strategy and not of right.

And if there's a right, I don't believe anyone who is involved in those discussions would have said "let's wait, some day, we don't have a right now. Our right will evolve." They had a present right, and the question was a matter of strategy.

Now, from our perspective, --

JUSTICE HIGGINBOTHAM: The question is not within my compass, so I don't want to comment on it, it's just that we're talking about a political process that's out there, and there is that concern. And I'm sure -- I don't know the answer to it, and it's not my decision. We're here to make a decision, and we will, perhaps. I rather suspect that the junior varsity is not going to get to get on the field.

MR. LANE: Well, Your Honor, I would join with the State of Texas in urging you to decide this case, even if today at the conferences it results in granting review of other cases, because my clients have a present interest and need to have their rights vindicated and to be treated like all of their fellow citizens who are permitted access to marriage.

JUSTICE HIGGINBOTHAM: Thank you, Mr. Lane.

Mr. Mitchell, you've saved time for rebuttal.

REBUTTAL ARGUMENT ON BEHALF OF DEFENDANTS

MR. MITCHELL: If I could begin where I left off with my opening argument on the issue of animus.

And even if the Plaintiffs could somehow prove that the recent enactments were motivated by animus, they still cannot prevail because they need further to show that the common law background definition of marriage, which pre-dates these enactments and has existed since time in memorial, was also motivated by animus.

And they do not try to make that showing, and they cannot make that showing.

And the reason for that background understanding of marriage as a union between a man and a woman was rooted not in animus, but in the biological reality that only opposite sex couples are capable of producing children.

Now, Judge Higginbotham was also asking about the State's rationale for its marriage laws on rational basis review, in asking whether the withholding of subsidy rational was the sole basis on which we were relying.

It's the only basis we need to show to prevail on rational basis review, but it's not the only ground on which we are relying.

And if I could make a request of Your Honor respectfully, I would ask that you please read the two statements cited on page 16 of our opening brief. One is from the Witherspoon Institute, one is from the Institute for American Values.

These are statements by distinguished scholars of marriage law explaining why the recognition of same sex marriage might have other unanticipated effects.

And, at this point in time, there's no reliable empirical data by which to judge this question. And that's why rational basis review allows the State to rely on rational speculation, unsupported by empirical data, and we have provided that.

We have not only provided rational speculation for the distinction between same sex and opposite sex couples, but we've provided in our brief rational reasons for why one might believe that a state should proceed with caution before recognizing same sex marriage, and why one might believe that recognition of same sex marriage could not only fail to advance, but perhaps even undermine the State's interest in procreation.

JUSTICE HIGGINBOTHAM: That's not our prerogative. The Supreme Court has the power to decide when to decide, and that may be the most powerful weapon it has in this arsenal, to decide when to decide. And it will do that.

MR. MITCHELL: Clearly, right now they have not decided.

JUSTICE HIGGINBOTHAM: This is a little more than just -- it's a discussion on that point, but none of us have control over that.

MR. MITCHELL: Fair.

JUSTICE HIGGINBOTHAM: We're here to do what we've got to do.

MR. MITCHELL: But at this time, the Appellate Court is bound by the Supreme Court's decisions.

And the reason our State marriage laws must be upheld ultimately comes down to two simple reasons:

First, nothing in Texas' marriage laws conflicts with any holding of the Supreme Court. Indeed, there is no dispute on that.

As Judge Smith pointed out, the holding of *Windsor* was carefully limited to the decision that invalidated the Federal Defense of Marriage Act. And the Justices were careful not to express any opinion on the Constitutionality of state opposite sex marriage laws.

There is no conflict between Texas' laws in any holding of the Supreme Court.

Second, Texas' marriage laws do not contradict any language in the Constitution. Equal protection of the laws does not require a state to confer equal treatment on things that are different.

And the differences between same sex and opposite sex couples are rooted in biological reality.

Now, to be sure, the Plaintiffs think that same sex couples should be treated the same as opposite sex couples, notwithstanding this difference. But that is a value judgment, and it does not establish a denial of equal protection. The Fourteenth Amendment does not say that states must confer equal treatment on whatever Federal Judges think should be treated equally.

So, a State law cannot be declared un-Constitutional absent a conflict with either a holding of the Supreme Court, or absent a conflict with actual text in the Constitution.

Not only have the Plaintiffs not shown such a conflict, they have not even argued that such a conflict exists.

And that is why in the end the Court must uphold the State's marriage laws no matter how much a judge may disagree with them, as a matter of policy.

If the Court has further questions, I'm happy to answer them. Otherwise, I'll yield my time back to the Court.

JUSTICE HIGGINBOTHAM: All right, thank you, Mr. Mitchell.

MR. MITCHELL: Than you.

JUSTICE HIGGINBOTHAM: Your case and all three of today's cases are under submission.

I want to particularly thank our court staff, Lyle Casey, our Clerk of Court and his staff, and all of the others who have assisted in going to really extraordinary efforts to make today's hearings run smoothly.

And I thank everyone here also for your cooperation in that.

And the Court is in recess under the usual order.

(Proceeding adjourned)

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I, Randel Raison, certified electronic court transcriber, do hereby certify that I typed the proceeding in the foregoing matter from audio recording, or the transcript was prepared under my direction, and that this is as accurate a transcript of what happened at that time and place as best as is possible, due to conditions of recording and/or duplicating.

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