No. 14-1341

In the United States Court of Appeals
for the Sixth Circuit

APRIL DEBOER, *ET AL.*,
Appellees,
v.

RICHARD SNYDER, *ET AL.*,
Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan

Brief *Amicus Curiae* of Public Advocate of the United States, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center In Support of Appellants and Reversal

Of Counsel:
KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
Wyandotte, Michigan

JAMES N. CLYMER
CLYMER, MUSSER & CONRAD, P.C.
Lancaster, Pennsylvania

MARK BREWER
BREWER & PRITCHARD
Houston, Texas

MARK J. FITZGIBBONS
Manassas, Virginia

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
Counsel for *Amici Curiae*
*Attorney of Record

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
Ramona, California
Counsel for *Amicus Curiae*
U.S. Justice Foundation

May 14, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1341 Case Name: DeBoer v. Snyder

Name of counsel: William J. Olson

Pursuant to 6th Cir. R. 26.1, Public Advocate of the United States, et al.
Name of Party

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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No.

CERTIFICATE OF SERVICE

I certify that on May 14, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ William J. Olson
370 Maple Ave. W. Ste. 4
Vienna, VA 22180

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States and **The Abraham Lincoln Foundation for Public Policy Research** are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Each was established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research, and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law. **U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund**, and **Policy Analysis Center** are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3), and involved in educating the public on important policy issues. The **Institute on the Constitution** is an educational organization intended to reconnect Americans to the history of the American Republic.

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[1] No party's counsel authored this brief, and no party, party's counsel, or person other than the *amici curiae* contributed money to the preparation or submission of this brief. The parties have filed blanket consents to the filing of briefs *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

Various of these organizations have filed *amicus curiae* briefs in other important federal cases, including nine cases related to so-called "homosexual rights":

- Boy Scouts of America v. Dale, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 99-699 (Nov. 26, 1999);
- Boy Scouts of America v. Dale, On Writ of Certiorari, U.S. Supreme Court, No. 99-699 (Feb. 28, 2000);
- Hyman v. Louisville, Sixth Circuit, No. 01-5531 (July 9, 2001);
- Lawrence v. Texas, On Writ of Certiorari, U.S. Supreme Court, No. 02-102 (Feb. 18, 2003);
- Hollingsworth v. Perry, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 12-144 (Aug. 31, 2012);
- Hollingsworth v. Perry, On Writ of Certiorari, U.S. Supreme Court, No. 12-144 (Jan 29, 2013);
- U.S. v. Windsor, On Writ of Certiorari, U.S. Supreme Court, No. 12-307 (Jan. 29, 2013);
- U.S. v. Windsor, On Writ of Certiorari, on Jurisdiction and Standing, U.S. Supreme Court, No. 12-307 (Mar. 1, 2013); and

- Moose v. Macdonald, On Petition for Writ of Certiorari, U.S. Supreme Court No. 12-1490 (Aug. 26, 2013).

SUMMARY OF ARGUMENT

On March 21, 2014, District Judge Bernard A. Friedman ruled that the Michigan Marriage Amendment ("MMA") violates the Fourteenth Amendment's Equal Protection Clause, thereby imposing homosexual "marriage" on the people of Michigan. The judge's opinion is profoundly flawed for three reasons, any one of which would require reversal.

First, the district court erroneously elevated the opinion of certain "expert" witnesses, primarily a psychologist, over the collective judgment of the people of Michigan who adopted the MMA through Michigan's constitutional amendment process, as discussed in Section I, *infra*. Second, the district court purported to apply the Fourteenth Amendment to the MMA without conducting any analysis whatsoever of the text or meaning of the Fourteenth Amendment, or even applicable court precedents, as discussed in Section II, *infra*. Finally, the district court disregarded the pillars and foundations of the American Republic, including the Declaration of Independence, usurping the authority of the Creator to define the institution of marriage that He fashioned for mankind's protection and benefit, as discussed in Section III, *infra*.

Judge Friedman's decision comes at a particularly critical time in the history of the American constitutional republic. During a speech in San Jose, California, President Barack Obama — responding to a question from a member of the press on the National Security Agency's continued monitoring of American citizens — warned of the danger inherent in the American people's loss of faith in the federal government:

> [I]f people can't trust not only the executive branch but also don't trust Congress and don't trust federal judges to make sure that we're abiding by the Constitution, due process and rule of law, then we're going to have some problems here.[2]

With respect to Americans' distrust of government, one political commentator added "What really is regrettable is that government does much to earn distrust...."[3] Judicial decisions that do not rest upon a solid textual and historical basis, such as the one below, usurp power from the people to govern themselves, and create the precise crisis of confidence about which President Obama warned. The decision below cannot be allowed to stand.

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[2] "President Obama Makes a Statement on the Affordable Care Act" (June 7, 2013), https://www.youtube.com/watch?v=p73wK92R-0E, at 24:09. *See also* http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president.

[3] G. Will, "The heavy hand of the IRS seizes innocent Americans' assets," *The Washington Post* (Apr. 30, 2014), http://www.washingtonpost.com/opinions/george-f-will-the-heavy-hand-of-the-irs/2014/04/30/7a56ca9e-cfc5-11e3-a6b1-45c4dffb85a6_story.html.

ARGUMENT

I. THE DISTRICT JUDGE BASED HIS DECISION ON THE SHIFTING SANDS OF SOCIAL SCIENCE.

Plaintiffs filed a Motion for Summary Judgment, representing to the court that "all parties" agreed that "the Court is presented with a purely legal issue," and there were no factual issues to be resolved.[4] Nevertheless, Judge Friedman scheduled a trial in an apparent effort to base his opinion upon purported factual findings rather than legal principles. DeBoer at *6-7. Although the existence of factual findings would appear to invite this Court's review only for clear error, it is submitted that none of these factual findings was material. The constitutional issue decided by Judge Friedman — whether the MMA violates the Fourteenth Amendment's Equal Protection Clause — can in no way be resolved by the current state of social science research. Yet, in order to assess MMA's legitimacy as a matter of policy, not as a matter of law, Judge Friedman laid the ground rules for trial, requiring the state to identify the "governmental purposes" behind MMA, and inviting each side to put on evidence concerning those purposes.

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[4] Plaintiffs' Motion for Summary Judgment (Aug. 14, 2013), RE #67, p. 6 n.5.

Judge Friedman's opinion primarily relied on the testimony of David Brodzinsky, Ph.D., a psychologist[5] with a clinical practice in the San Francisco Bay area. Dr. Brodzinsky is a member of the American Psychological Association ("APA"), an organization which has taken the position, since 1975, that homosexuality is not a disorder. In shifting its position that year, the APA followed the lead of the American Psychiatric Association, which had considered homosexuality a *per se* mental disorder until the issuance of the seventh edition of the Diagnostic and Statistical Manual of Mental Disorders II (DSM-II) (American Psychiatric Association, 1975).

Psychologist Dr. Philip Hickey, a critic of the DSM approach, has explained the reason for the change:

> the removal of homosexuality from the list of mental illnesses was not triggered by some scientific breakthrough.... Rather, it was the simple reality that gay people started to kick up a fuss.... And the APA reacted with truly astonishing speed. And with good reason. They realized intuitively that a protracted battle would have drawn increasing attention to the spurious nature of their entire taxonomy. So they quickly "cut loose" the gay community and forestalled any radical scrutiny of the DSM system generally.... Only about 55% of the members ... voted favored the change. [Philip Hickey, Ph.D.,

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[5] Judge Friedman's court biography identifies his wife's profession as psychologist. http://www.mied.uscourts.gov/judges/guidelines/topic.cfm?topic_id=62.

"Homosexuality: The Mental Illness That Went Away," Behaviorism and Mental Health (Oct. 8, 2011).[6]]

Distinguished psychologists Rogers H. Wright, Ph.D., and Nicholas Cummings, Ph.D., Sc.D., former president of the APA, have written a powerful book explaining the effect of "political correctness" on "distorting the science and corrupting the profession." R. H. Wright & N. Cummings, Destructive Trends in Mental Health: The Well-Intentioned Path to Harm, Routledge (2005), pp. 4, 65-82. Psychologists who opposed "normalizing homosexuality" were demonized and even threatened, rather than scientifically refuted. *Id*. at 9. Even Congress has recognized the extreme politicization of the APA, rendering it the "only professional society in the history of America to be censured by Congress."[7] *Id*. at xvii.

The politicization of psychology notwithstanding, Judge Friedman found "Brodzinsky's testimony to be fully credible and [gave] it considerable weight.

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[6] http://www.behaviorismandmentalhealth.com/2011/10/08/homosexuality-the-mental-illness-that-went-away/.

[7] Congress unanimously passed a concurrent resolution "Expressing the sense of the Congress rejecting the conclusions of a recent article published by the American Psychological Association that suggests that sexual relationships between adults and children might be positive for children," passed by the House of Representatives, 355-0, and passed by the Senate, 100-0. *See* H.Con.Res. 107 (106th Cong.).

He testified convincingly...." DeBoer at *9. This same mantra was invoked by Judge Friedman to evaluate the testimony of each of plaintiffs' expert witnesses — including a sociologist (*id.* at *12-13), a law professor (*id.* at *16), a historian (*id.* at *18), and even a lay witness (*id.* at *19). At the same time, Judge Friedman rejected out of hand the testimony of each of defendants' experts.

Judge Friedman rejected the credentials of the State's first witness, a member of Phi Beta Kappa and a Rhodes Scholar, and barred his testimony.[8] The judge found the testimony of Dr. Mark Regnerus, an associate professor of sociology, to be "unbelievable and not worthy of serious consideration." DeBoer at *22. Judge Friedman denigrated Dr. Regnerus' 2012 "New Family Structures Study"[9] because funding had been provided by a pro-family organization.

> While Regnerus maintained that the funding source did not affect his impartiality as a researcher, the Court finds this testimony unbelievable. The funder clearly wanted a certain result, and Regnerus obliged. [DeBoer at *23.]

However, the judge ignored the funding received by plaintiffs' psychologist, Dr. Brodzinsky, even though his *curriculum vitae* reveals that he received a $100,000

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[8] http://oaklandcounty115.com/2014/03/24/state-spent-40000-on-testimony-in-deboer-case-plans-appeal-2/; http://www.loveandfidelity.org/recommended-speakers/sherif-gergis/.

[9] http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/34392?q=nfss&searchSource=icpsr-landing.

award to facilitate adoption by LGBT persons, and a $20,000 award from the Rainbow Endowment to study gay and lesbian adoption.[10] The Rainbow Endowment funding organization describes itself as follows:

> Through its grantmaking program, the Rainbow Endowment works to promote health, visibility and full access to social, cultural and civic life for the lesbian, gay, bisexual and transgender (LGBT) community.[11]

Had Judge Friedman applied the same standard to Dr. Brodzinsky, he would have found that Dr. Brodzinsky's funding sources impaired his "impartiality," and rejected his testimony as he did that of Dr. Regnerus.

Another defense witness Family Studies Professor Loren Marks described the views of "sociologists and psychologists who endorse the 'no differences' viewpoint as 'group think,' by which he said he meant a politically correct viewpoint that the majority has accepted without subjecting it to proper scientific scrutiny."[12] DeBoer at *29. Judge Friedman disregarded the problem, having

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[10] http://www.aclu-il.org/wp-content/uploads/2011/07/CV-David-Brodzinsky.pdf.

[11] https://www.guidestar.org/organizations/23-2821712/rainbow-endowment.aspx.

[12] "Group think" is not a new phenomenon, and it regularly infects many, perhaps all, professions and disciplines. General Billy Mitchell was court-martialed for his views on air power, but today he is revered as the father of the U.S. Air Force. http://www.nationalmuseum.af.mil/ factsheets/

already described Marks' testimony as "largely unbelievable." DeBoer at *29. Yet Marks' testimony questioning such supposed unanimity is shared by former APA president Nicholas Cummings, Ph.D., who was:

> dismayed to see activists exploit the stature of the [APA] to further their own social aims — pushing the APA to take positions in areas where they have no conclusive evidence.
>
> **When APA does conduct research, Dr. Cummings said, they only do so "when they know what the outcome is going to be ... only research with predictably favorable outcomes is permissible." ...** [13]

While Judge Friedman believed that credible members of the psychology profession are all in accord, he was either unaware of or deliberately ignored that 20 years ago another professional organization, the National Association for Research & Therapy of Homosexuality ("NARTH"), was organized by professionals to represent a non-politicized view of homosexuality:

> Sadly, many mental health professionals have been disappointed as the drift into politics and policy making has generally discredited a once proud association that now finds itself defending gay marriage,

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factsheet.asp?id=739. Dr. Ignaz Semmelweis, the physician who advised obstetricians simply to wash their hands to reduce the spread of disease to their patients, was ridiculed by his colleagues who were unwilling to believe that they had been responsible for the deaths of many women. *See* H. L. Coulter, IV Divided Legacy, North Atlantic Books (1994), pp. 22-23.

[13] "Psychology Losing Scientific Credibility, Say APA Insiders" [emphasis added]. http://www.narth.com/docs/normalization.html#!narth-and-the-apa---a-brief-history/c226l.

> taking positions on United States foreign policy and promoting left leaning social policy in spite of the lack of science that would justify such public stands.[14]

Ignoring such warnings, Judge Friedman rejected the views of all of the defense experts as "fringe." DeBoer at *30. In fact, however, the views of defense experts would be considered moderate compared to the views of the father of psychoanalysis, Sigmund Freud, who taught during the early 20th century that homosexuality is a perversion:

> [I]t is a characteristic common to all the perversions that in them reproduction as an aim is put aside. This is actually the criterion by which we judge whether a sexual activity is perverse – if it departs from reproduction in its aims and pursues the attainment of gratification independently.... Everything that occurs before [reproductive purposes is disregarded] and everything which refuses to conform to it and serves the pursuit of gratification alone, is called by the unhonoured title of *perversion* and as such is despised. [S. Freud, General Introduction to Psycho-Analysis, Twentieth Lecture, The Major Works of Sigmund Freud, 54 Encyclopedia Britannica (1952) at 575.]

Freud further explained homosexuality as follows:

> Inhibitions in the course of its development manifest themselves as the various disturbances of sexual life. Fixations of the libido to conditions at earlier phases are then found, the trend of which, moving independently of the normal sexual aim, is described as *perversion*. One example of an inhibition in development of this kind

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[14] "NARTH and the APA – A Brief History," NARTH website. http://www.narth.com/ docs/normalization.html#!narth-and-the-apa—a-brief-history/c226l.

> is homosexuality, if it is manifest. [S. Freud, An Outline of Psychoanalysis, W.W. Norton & Co. (1940), p. 31.]

These quotations from Freud are offered to pose the question — was the father of psychoanalysis wrong? Were psychologists and psychiatrists wrong until quite recently when the consensus position was to view homosexuality as a mental disorder? If by their positions these experts demonstrated that they were wrong before, how do we know they are right now?

Is reliance on the shifting sands of social science a firm foundation on which to establish the meaning of the written words of the U.S. Constitution, and establish the rule of law? According to Marbury v. Madison, 3 U.S. (1 Cranch) 137 (1803), judicial review must be based upon the original right of the people "to establish, for their **future** government, such principles as, in **their** opinion, shall most conduce to their own happiness, [and] [t]he principles, therefore, so established, are deemed fundamental [and] designed to be **permanent**." *Id.* at 176 (emphasis added). Marbury also established that, in reviewing the constitutionality of any act by a government official, a judge is bound by the rules as they are written in the Constitution. *Id.* at 179-80. Judge Friedman's opinion and order violate both of these principles. Instead of honoring and obeying the

sovereign will of the people expressed in their constitutions, he has substituted the evolving opinions of social science "experts."

Ironically, the consequences of resting law on the opinions of "experts," drawn from the social science community, was fully illustrated in the Loving v. Virginia, 388 U.S. 1 (1967), case, relied on by Judge Friedman. In Loving, the miscegenation law was exposed then to be rooted in the same social science community that today endorses homosexuality as an equal, alternative lifestyle:

> The authority which the new and popular science of **eugenics** provided for this concept was eagerly received in Virginia.... Race-conscious Americans seized upon immature conclusions of eugenicists.... [Loving, Brief for Appellants, Docket No. 1966-395 (Feb. 17, 1967), p. 21 (emphasis added).]

Lawyer and bioethicist Paul A. Lombardo agreed that Virginia's Racial Integrity Act of 1924, challenged in Loving, can be traced to eugenic advocacy.[15]

The eugenics movement drew significant involvement of and support from the psychology profession. *See, e.g.*, M. Tartakovsky, "Eugenics and the Story of Carrie Buck," PsychCentral[16] ("Psychology has a fascinating and rich history,

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[15] P.L. Lombardo, "Eugenic Laws Against Race Mixing," Image Archive on the American Eugenics Movement. http://www.eugenicsarchive.org/html/eugenics/essay7text.html.

[16] http://psychcentral.com/blog/archives/2011/01/24/eugenics-the-story-of-carrie-buck/. The eugenics movement also motivated enactment of another Virginia law, "An ACT to provide for the sexual sterilization of inmates of State

filled with amazing advances. But it wasn't all progress. Psychology has a painful past — with many victims. One of the most devastating times in psychology was a movement called eugenics....") During that period, the psychologists and other social scientists who embraced these shocking views sincerely believed that they had discovered undeniable scientific truth.

Judge Friedman built his opinion solely on the tenuous foundation of plaintiffs' five witnesses. If we are to base constitutional law decisions on the shifting sands of favored professional opinions, the rule of law will have come to an end, trumped by judicial policy-making based upon the evolving opinions of so-called "experts." *See* F.V. Cahill, Judicial Legislation, Ronald Press (1952), pp. 22-23.

II. THE DISTRICT JUDGE ERRONEOUSLY RULED THAT THE MICHIGAN MARRIAGE AMENDMENT VIOLATED THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

A. The District Court Ruled by Emotion and Predilection.

The decision by a federal judge to overturn a provision of a State constitution is a matter of great import. In State constitutions are found the fixed and enduring rules imposed by the people upon their government servants. At

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institutions in certain cases," March 20, 1924, and upheld by the U.S. Supreme Court, based on a consensus of the best scientific minds of that day. *See* Buck v. Bell, 274 U.S. 200 (1927).

stake here is a constitutional provision enacted by vote of the People,[17] and a decision by a federal judge to strike it down, unless clearly required by the U.S. Constitution, would rob the People of Michigan of the authority to govern themselves.[18] Indeed, the U.S. Supreme Court recently overruled this Court's invalidation of a different Michigan constitutional amendment initiated and ratified by the people because:

> the **courts may not disempower the voters** from choosing which path to follow.... By approving Proposal 2 and thereby adding §26 to their **State Constitution**, the **Michigan voters exercised their privilege to enact laws** as a basic exercise of their democratic power....
>
> Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject.... Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate ... that holding would be an **unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common**. [Schuette v. BAMN, 572 U.S. ___, 188 L. Ed. 2d 613, 627-28 (Apr. 22, 2014) (emphasis added).]

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[17] The MMA was passed in 2004 by 58.6 percent of Michigan voters.

[18] Judge Friedman dismissively "rejects the contention that Michigan's traditional definition of marriage possesses a heightened air of legitimacy because it was approved by voter referendum" based on his presumptions about the Fourteenth Amendment. DeBoer at *49.

Similarly, since the decision below addresses the constitutionality of an institution as foundational to the society as marriage, it too has profound significance. When a decision overturns thousands of years of revealed truth as confirmed by human experience, one would have hoped that the district court would exercise judicial restraint. Quite to the contrary, Judge Friedman justified his ruling by poetic appeals to emotion,[19] chastising the State of Michigan for deigning to defend against what he apparently believed to be a righteous challenge to a cruel constitutional provision:

> [S]tate defendants lost sight of what this case is truly about: **people**. No court record of this proceeding could ever fully convey the personal sacrifice of **these two plaintiffs** who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex couples. It is the **Court's fervent hope** that these children will grow up "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Windsor, 133 S.Ct. at 2694. Today's decision is **a step in that direction**, and affirms the enduring principle that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail. [DeBoer at *51 (emphasis added).]

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[19] In revealing his emotional attachment to plaintiffs' cause, Judge Friedman embraced the error of Chief Justice Charles Evans Hughes, who once admitted in private: "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." W.O. Douglas, The Court Years (Random House 1980), p. 8.

This Court must not be deluded by Judge Friedman's lyric refrain of how good he felt to override the citizens of Michigan and mandate homosexual marriage. This case most certainly is not about the "people" who brought this challenge, or Judge Friedman's personal "fervent hope[s]," or the utopian egalitarian society for which he longs. Indeed, his decision substitutes his will for the will of the people, as expressed in the MMA.

Judge Friedman's enthusiasm for his own decision reveals no concern about the appearance that his personal views on homosexuality affected his decision. The *Detroit Free Press* reported that, in 1995, now U.S. District Judge Judith Levy came to work for Judge Friedman as an openly lesbian law clerk. During her three-year clerkship, Judge Levy had two children by artificial insemination. Judge Friedman reportedly took a special interest in Levy's growing family, and "[h]e became more than a casual friend to them... It's almost like he's their grandfather."[20] Indeed, the morning that the DeBoer trial began, Ms. Levy and her children watched from the courtroom gallery and, "[s]hortly after noon, the 15-year-olds slipped into Friedman's chambers for a quiet lunch with the judge and

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[20] *See* "Brian Dickerson, What Judge Friedman learned about gay families from a lesbian law clerk," *Detroit Free Press*, Mar. 23, 2014. http://www.freep.com/article/20140323/COL04/303230067/judge-bernard-friedman- gay-marriage-michigan.

his staff." Judge Friedman apparently had no qualms about the appearance of impropriety in meeting in his office during trial with personal friends who were in the class of persons who would be directly affected by his decision. *Id*.

In return, Judge Levy showed no reticence in actively helping implement Judge Friedman's decision. Only hours after Judge Friedman issued his opinion, on Saturday morning, newly-sworn-in federal judge Levy "was on hand at the Washtenaw County Clerk's Office to certify the marriages of same-sex couples who sought to take early advantage of Friedman's ruling" before this Court could impose a stay on the order that Judge Friedman himself refused to stay.[21] *Id*.

Indeed, Judge Levy's actions went beyond Judge Friedman's order which enjoined only the governor and the attorney general from enforcing MMA. DeBoer at *51. By assisting the county clerks to issue marriage licenses to same-sex couples, without any directive from the governor or attorney general, Judge

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[21] Prior to Judge Friedman's order striking down traditional marriage, other federal district courts had granted stays of their own orders pending appeal. *See, e.g.*, Henry v. Himes, Case No. 1:14-CF-129 (S.D.OH. Apr. 16, 2014), Order Granting Stay, p. 1. Since then, an Arkansas state judge followed the Friedman model by striking down traditional marriage without a stay on a Friday afternoon (May 9, 2014), thereby facilitating Saturday homosexual weddings before a stay from an appellate court could be obtained. USA Today, "First gay marriage license issued in Arkansas" (May 10, 2014), http://www.usatoday.com/story/news/nation/2014/05/10/gay-couples-in-arkansas-line-up-outside-courthouse/8936763/.

Levy was aiding and abetting a violation of Michigan law which authorizes the county clerks to issue marriage licenses only to opposite sex couples. She treated the order as if it were an emergency statute enacted by the Michigan legislature, enforceable immediately upon enactment by both houses of the legislature and signed by the governor. But "courts have no power to repeal or abolish a statute, and notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books." 39 Ops. Atty. Gen. 22 (1937).

B. In Guiding Plaintiffs' Litigation Strategy, Judge Friedman Ceased to Act as a Judge.

Based on the court opinion's description of the course of litigation, the manner in which Judge Friedman shaped this case is nothing short of remarkable. First, it was Judge Friedman, not the plaintiffs, who conceived the idea that this case could be a vehicle for challenging the MMA. Plaintiffs commenced this litigation against the State of Michigan "requesting that the Court enjoin ... enforcing section 24 of the Michigan Adoption Code," making no challenge whatsoever to the MMA. It was Judge Friedman who invited such a challenge, which plaintiffs accepted, amending their complaint to include a second cause of action challenging the validity of the MMA. DeBoer at *4-5. Having manufactured a challenge to MMA, and then guiding plaintiffs' litigation, Judge

Friedman violated the bedrock principle of *nemo iudex in causa sua*, that "no man shall be a judge of his own cause."

Second, although both parties filed motions for summary judgment, implicitly demonstrating that neither side believed there were triable issues of fact, Judge Friedman disregarded plaintiffs' filing, ruling *sua sponte* "that plaintiffs raised triable issues of fact" (DeBoer at *6) and setting the case for trial, directing the parties:

> to address a narrow legal issue: whether the MMA survives rational basis review. In other words, does the MMA proscribe conduct in a manner that is rationally related to any conceivable legitimate governmental purpose. [DeBoer at *7.]

Third, Judge Friedman appears to have skipped the stage of determining whether the subject of homosexual marriage is addressed by the Fourteenth Amendment or, assuming that it is, whether homosexuals and heterosexuals are similarly situated under an equal protection analysis. DeBoer at *31.

Lastly, Judge Friedman created a circumstance whereby many homosexual marriages would occur based on his say-so alone. He issued his decision on a Friday (March 21, 2014) afternoon at 5:00 p.m., and refused to stay his own order. This forced the State of Michigan to obtain a stay from this Court, which was not

obtained until Tuesday, March 25, 2014. Thus, before that stay could be obtained, and even:

> [k]nowing that a stay was inevitable, County Clerks in Oakland, Ingham, Washtenaw and Muskegon Counties rushed to give residents the chance to marry. They opened for special hours and waived waiting periods.... Statewide the total [couples taking vows] is 323.[22]

It would be difficult to believe that Judge Friedman did not intend such marriages to take place. Now that they have occurred, if Judge Friedman's order is overturned, the status of these 323 homosexual marriages predicated on an erroneous order becomes problematic.

In all these ways, Judge Friedman moved out of the lawful realm of judicial judgment, into the dangerous realm of personal will, ignoring Chief Justice Marshall's admonition that:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.... Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law. [Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 866 (1824).]

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[22] http://oaklandcounty115.com/2014/03/22/first-gay-marriages-in-michigan- video/.

C. Judge Friedman Paid Only Lip Service to Principles of Federalism.

Judge Friedman acknowledged that marriage has always been a matter within the province of the State:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.... The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities".... [DeBoer at *44, citing Windsor, 570 U.S. 12, 133 S.Ct. 2675, 2691 (2013) (citation omitted).]

However, Judge Friedman found Windsor's observations about state regulation of marriage was trumped by Loving, again quoting from Windsor that:

> domestic relations "laws defining and regulating marriage, of course, must respect the constitutional rights of persons ... but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states," id. (citing Loving) (internal quotations omitted), and that "[t]he states' interest in defining and regulating the marital relation [is] subject to constitutional guarantees...." Id. at 2692... Loving has profound implications for this litigation. [DeBoer at *45-46, 48.]

From these two quotes, Judge Friedman fashioned his own view that Loving:

> stand[s] for the proposition that, without some overriding legitimate interest, the state cannot use its domestic relations authority to **legislate families out of existence**. Having failed to establish such an interest in the context of same-sex marriage, the MMA cannot stand. [DeBoer at *49 (emphasis added).]

It is a figment of Judge Friedman's imagination to have concluded that the Virginia anti-miscegenation statute was found in Loving to be unconstitutional because it "legislat[ed] families out of existence." Rather, Loving involved a challenge to a state-erected racial barrier to traditional, opposite-sex marriage, not a challenge, such as here, to the very definition of marriage itself. Additionally, because it involved race, Loving rested directly on the text and history of the Fourteenth Amendment's equal protection clause. *See* Loving at 10.

Even though Judge Friedman refrained from ruling that the Due Process guarantee forbade the MMA, he gratuitously added a footnote that "the Supreme Court has repeatedly recognized marriage as a fundamental right [citations omitted]." DeBoer at *30-31. Citing Loving for the proposition that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (DeBoer at *31), Judge Friedman again handles the Loving decision loosely.

The Loving Petitioners identified the issue in that case much more narrowly, as "whether the United States Constitution invalidates those laws of Virginia which prohibit and penalize the marriage of a man and a woman and their subsequent living together...." Loving, Brief for Appellants, p. 1. The Supreme Court addressed the issue as "cohabiting as man and wife." Loving, 388 U.S. at 4.

Clearly, Chief Justice Warren's opinion did not include homosexual relationships, having concluded his opinion by focusing on marriage's procreative function: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." Loving at 12. There is not the slightest indication in Loving that "freedom of personal choice in matters of marriage"[23] meant "freedom of personal choice to redefine marriage," as Judge Friedman has extrapolated.[24]

Rejecting appellants' urging to "proceed with caution" (DeBoer at *40-41), Judge Friedman has opened the door wide to the complete federalization of family law under the supervision and oversight of the federal courts. If they redefine marriage, federal judges inevitably will be expected to rewrite the rest of family law, beginning with eliminating terms such as "man" and "woman" and "husband" and "wife," "father" and "mother" for more neutral words such as "partner" and "parent."[25] Further, redefining marriage to accommodate homosexual unions no

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[23] DeBoer at *31 n.5.

[24] *See also* Brief *Amicus Curiae* of Citizens United's National Committee for Family, Faith and Prayer, *et al.*, Hollingsworth v. Perry, Supreme Court, No. 12-144, pp. 12-21, http://www.lawandfreedom.com/site/constitutional/CU_Prop8_Amicus.pdf.

[25] The California legislature is even now trying to determine the full impact of same sex marriage on that state's Family Code, and litigation will not end with allowing homosexual marriage. *See* "California Aims to Ditch 'Man and Woman' Language in Family Code," Breitbart (May 3, 2014),

doubt will lead to challenges to state laws prohibiting polygamy and even incestuous couples. *See, e.g.,* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (invaliding state statutes prohibiting polygamous marriage).[26]

D. The Fourteenth Amendment Was Neither Written Nor Ratified to Force Homosexual Marriage on the People of Michigan.

1. The Fourteenth Amendment Does Not Support Homosexual Marriage.

Not once did Judge Friedman address the language of the Fourteenth Amendment, beyond reciting the words "due process" and "equal protection." Never did Judge Friedman look to the purpose of enactment of the Fourteenth Amendment, or statements by the framers or ratifiers of that amendment. Of course, had he done so, he would have been forced to conclude that the Fourteenth Amendment contains no mandate for homosexual marriage. In Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1879), the Supreme Court ruled that the equal protection guarantee "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to

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http://www.breitbart.com/Breitbart-California/ 2014/05/02/Man-and-Woman-Language-to-Be-Removed-from-CA-Family-Code.

[26] *See* C. Sisto, "The Odd Throuple: Is a lesbian threesome any less legitimate than a lesbian twosome," National Review Online (Apr. 28, 2014). http://www.nationalreview.com/article/376709/odd-throuple-christine-sisto.

that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." *Id*. at 306. Demonstrating the immutability of the Fourteenth Amendment's purpose, Justice Douglas explained 101 years after Strauder: "[t]he Fourteenth Amendment was passed to give blacks first-class citizenship." The Court Years, p. 154.

The Fourteenth Amendment can be applied to support homosexual marriage only if one skips over its text and context. Judge Friedman assumed, but never established, that the federal constitution requires, supports, or even addresses homosexual marriage. Virtually all of Judge Friedman's Equal Protection Clause analysis is contained in one paragraph on pages 31-32 of his opinion. There, he frames the issue as one of striking a "balance" between (i) the right of similarly situated persons to be treated alike, and (ii) the role of states in "adopting regulations which distinguish between certain groups within society." DeBoer at *31. As the court-sanctioned method to strike the right "balance," he offers the Supreme Court's "three-tiered framework": (i) strict scrutiny, (ii) intermediate or heightened scrutiny, and (iii) rational basis review "which assesses the propriety of legislation that does not implicate either suspect or quasi-suspect classes." DeBoer at *32-33. Judge Friedman admits that "governing Sixth Circuit precedent does not consider gay, lesbian, bisexual or transgender persons to

constitute suspect or quasi-suspect classes," but believes that irrelevant, finding that MMA does not survive even rational basis review. DeBoer at *33. With the stroke of his pen, Judge Friedman ruled 6,000 recorded years of marriage being an institution between persons of opposite sex to be "irrational."

2. Same-Sex Couples Are Not Similarly Situated to Opposite-Sex Couples.

Assuming, *arguendo*, the legitimacy of applying the Equal Protection Clause beyond race, Judge Friedman would have been required to determine that plaintiffs have asserted a legitimate claim of being "similarly situated" to others differently treated. *See*, *e.g.*, Lindsey v. Bowen, No. 13-15085, Slip Op. at 7-8 (9th Cir. May 6, 2014). Without analysis or explanation, Judge Friedman presumed that a person in a same-sex relationship is "similarly situated" to a person in an opposite-sex relationship. If persons are not similarly situated, however, then the Equal Protection Clause is not even implicated, and the courts have no jurisdiction to apply any of the Supreme Court's balancing tests. *See* Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Indeed, there are at least three distinct biological and physiological dissimilarities between same-sex and opposite-sex couples that demonstrate that a person desirous of marrying

another person of the same sex is **not** similarly situated with a person who is desirous of marrying a person of the opposite sex.

First is the basic, undeniable fact that mankind is biologically classified as male and female in accordance with their natural design to reproduce sexually.[27] Regardless of other distinctions among humans, such as nationality or color of skin, the simple distinction between male and female is immutable. This is the basic factor that distinguishes same-sex marriage from opposite-sex marriages. The very biological categorization of male and female dictates that a person who wants to marry another person of the same sex is not similarly situated with a person who wants an opposite-sex relationship.

Second, the natural, physiological differences between the respective reproductive organs of males and females goes to the very nature of the physical intimacy between two human beings. To state the obvious, opposite-sex couples include a male with a penis and a woman with a vulva/vagina, which even a casual student of nature can see were designed by our Creator to complement each other. Unable to engage in natural sexual intercourse, homosexual couples must resort to

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[27] *See* Genesis 1:27 ("male and female created he them").

other practices for sexual gratification, including oral or anal intercourse, or utilizing artificial devices to achieve sexual intimacy.[28]

Third, same-sex couples cannot under any circumstances procreate without extrinsic assistance — either donated sperm (female/female), or a surrogate mother (male/male). Modern technology is generally involved to artificially force a pregnancy. Only opposite-sex couples have the intrinsic and natural design and capability to procreate without need of outside assistance.

These basic, objective differences have longstanding recognition and they have been found for untold generations as being of such a character that they have formed the foundation for a rule of law: fixed, uniform, and universal.

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[28] The often health-threatening sexual practices of homosexual couples are catalogued in K. Jay & A. Young, The Gay Report: Lesbians and Gay Men Speak Out About Sexual Experience & Lifestyles Summit Books (1977). Moreover, monogamy is certainly not the norm, according to a study published by the Institute for Sex Research (The Kinsey Institute), nearly half of the "white homosexual males" had over 500 different sexual partners in a lifetime, and another third had between 100 and 500. A. Bell & M. Weinberg, Homosexualities: A Study of Diversity Among Men & Women, Simon & Schuster (1978), p. 85. The partners of homosexual males varied widely but "tended to be strangers...." *Id*., p. 92. In a speech to the 2011 NARTH Conference, Dr. Nicholas Cummings described the homosexual lifestyle in San Francisco as he observed it from his vantage point of being Chief of Mental Health for Kaiser Permanente during the 1960's and 1970's, as well as the politicization of the APA, https://www.youtube.com/watch?v=BKxYBch2LVM.

Blackstone described sodomy as "the infamous crime against nature ... an offense of so dark a nature ... the very mention of which is a disgrace to human nature ... a crime not fit to be named."[29] Yet, Judge Friedman would overrule the law of nature, elevating a sexual practice contrary to the very nature of mankind into a constitutional right, based solely upon transient and tendentious expert opinion.

III. THE DISTRICT COURT WRONGFULLY REJECTED MORALITY AS A BASIS FOR MMA.

Although Judge Friedman refrained from finding that the "the voters who approved the MMA were motivated by animus" against gays and lesbians, he nonetheless concluded that the voters "cannot strip other citizens of the guarantees of equal protection under the law" because of any moral standard mandated by "established religion." DeBoer at *43-44. Judge Friedman purports to resolve with finality the age-old issue as to the relationship between law and morality. His ruling against traditional marriage is predicated on his view that laws based on morality are irrational and unconstitutional. *Id*. at *44, 4.

Judge Friedman does not appear to recognize that the principle he advances, that law must be divorced from religion, if taken to its logical conclusion, would also undermine the Fourteenth Amendment's principle of equal protection of the

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[29] W. Blackstone, IV Commentaries on the Laws of England, pp. 215-16.

laws, which is based on the moral and Biblical principle that all of mankind is created in the image and likeness of God. Judge Friedman's principle also would undermine the Declaration of Independence, the nation's legal and political charter,[30] which articulates the "self-evident" truth "that all men are created equal [and] endowed by their Creator, with certain unalienable Rights [of] Life, Liberty and the pursuit of Happiness." That Creator made man in His own image, both male and female, and designed marriage for all mankind's benefit and protection as an institution between one man and one woman. *See, e.g.,* Genesis 1:27 and 2:22-24; Matthew 19:4-6. As the Supreme Court long ago recognized:

> the union for life of one man and one woman in the **holy** estate of matrimony [is] the sure foundation of all that is stable and noble in our civilization; the best guaranty of that **reverent morality** which is the source of all beneficent progress in social and political improvement. And to this end, **no means** are **more** directly and immediately **suitable** than those provided by this act, which **endeavors to withdraw all political influence from those who are practically hostile to its attainment**. [Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added).]

In striking down MMA on the ground that it is unconstitutional for the People of Michigan to rest the institution of marriage on a religious moral code, Judge Friedman would deny to the People of Michigan their sovereign power to

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[30] The Declaration occupies first place in the United States Code as preeminent among the "Organic Law of the United States."

conform their state constitution to the Laws of Nature and of Nature's God on which the American constitutional republic was founded, and to secure marriage as a union of one male and one female, to the end that the very foundation of the social and civic order be protected.

Judge Friedman's order and opinion, to the contrary, is truly an outlier which requires reversal by this Court.

CONCLUSION

For the reasons stated herein, the decision of the district court below should be reversed.

Respectfully submitted,

/s/ William J. Olson

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
Counsel for *Amici Curiae*
*Attorney of Record

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Suite 3
Ramona, California 92065

Of Counsel:
KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100

JAMES N. CLYMER
CLYMER, MUSSER & CONRAD, P.C.
408 West Chestnut Street
Lancaster, Pennsylvania 17603
(717) 299-7101

MARK BREWER
BREWER & PRITCHARD

Three Riverway, 18th Floor
Houston, Texas 77056
(713) 209-2950

(760) 788-6624
Counsel for *Amicus Curiae*
U.S. Justice Foundation

MARK J. FITZGIBBONS
GENERAL COUNSEL
AMERICAN TARGET ADVERTISING
9625 Surveyor Court, Suite 400
Manassas, Virginia 20110
(703) 392-7676

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains _____ words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

Dated: May 14, 2014

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Appellants and Reversal, was made, this 14th day of May 2014, by the Court's Case Management/Electronic Case Files system upon the all parties or their counsel of record.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*