IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:15CV578-DPJ-FKB

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES, ET AL. DEFENDANTS

MOTIONS HEARING

BEFORE THE HONORABLE DANIEL P. JORDAN III
UNITED STATES DISTRICT JUDGE
NOVEMBER 6TH, 2015
JACKSON, MISSISSIPPI

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR
Mississippi CSR #1253

---

501 East Court Street, Suite 2.500
Jackson, Mississippi 39201
(601) 608-4187

APPEARANCES

FOR THE PLAINTIFFS:

MS. ROBERTA A. KAPLAN
MR. JOSHUA D. KAYE
MR. ROBERT B. MCDUFF
MS. SIBYL C. BYRD
MS. MEGHANN K. BURKE

FOR ATTORNEY GENERAL HOOD:

MR. JUSTIN L. MATHENY

FOR GOVERNOR PHIL BRYANT, MDHS AND DIRECTOR RICHARD BERRY:

MR. TOMMY D. GOODWIN

FOR CHANCERY COURT AND CHANCELLOR DEFENDANTS:

MR DOUGLAS T. MIRACLE

TABLE OF CONTENTS

BRIAN POWELL

(COURT CALLED TO ORDER)

THE COURT: Thank you. You may be seated. All right. Good afternoon.

(ALL RESPONDED "GOOD AFTERNOON")

THE COURT: All right. My understanding is that Ms. Kaplan and Mr. Matheny are going to start things. So let me ask you to introduce yourselves and anybody else that you need to introduce in the courtroom. We'll start with the plaintiff.

MS. KAPLAN: Roberta Kaplan, your Honor, from the Paul, Weiss Firm for the plaintiffs. I'm here with my colleague Josh Kaye and my Mississippi colleague Rob McDuff.

THE COURT: All right. Thank you.

MR. MATHENY: Your Honor, Justin Matheny for Mississippi Attorney General Jim Hood. And I have with me Tommy Goodwin with the AG's Office who's here on behalf of the Governor and Executive Director Berry and the Department of Human Services, and also Mr. Doug Miracle who's here on behalf of the defendant judges that have been named.

THE COURT: All right. Thank you. All right. Let me start I guess by coming up with a game plan for how we're going to proceed. I will tell you that I normally in a case like this will break up the legal issues. So, for example, on the Eleventh Amendment issue I will hear from both parties on that, you know, before we switch to standing, for example. Just it's

easier for me to keep things straight if I hear from everybody at the same time on the same issue.

I think that logically it makes more sense to take up the motion to dismiss before we take up a motion for injunctive relief. So I'm going to start with the motion to dismiss. I'm going to start with the executive defendants' motion. And I want a little clarification from the parties. That motion is filed under 12(b)(1).

Ms. Kaplan, you had a -- you had a notation in one of your briefs that the court is required to accept the averments of the amended complaint, which is true to an extent. But it is a Rule 12(b)(1) motion where the defendants have offered record evidence. You didn't respond with any record evidence, and I'm wondering whether you wish to put on any evidence today.

MS. KAPLAN: Yeah. We actually are here with witnesses, your Honor. But as I read the standing cases cited in our brief, for purposes of deciding standing, the court must accept the allegations sworn to in the amended complaint as true.

Most of what this other side puts on, the other side, as I recall, is basically saying our clients say one thing and that's not true. And that's not the kind of back and forth that courts feels appropriate in determining a motion to dismiss based on standing.

THE COURT: Well, let me -- let's explore that for a minute.

MS. KAPLAN: Sure.

THE COURT: The cases that you cited, were they facial attacks on standing?

MS. KAPLAN: I think -- to be facial attacks on the statute, your Honor?

THE COURT: No, on the standing issue.

MS. KAPLAN: Yeah. The cases that we cited are cases like this where the defendants have taken the position either that the plaintiffs did not have sufficient injury to establish standing for purposes of Article III in federal court or their second set of arguments, that none of the defendants' conduct was sufficiently traceable.

THE COURT: Right. But a facial attack is when they say, as pleaded, there's no standing. That would be a facial attack. And the Fifth Circuit distinguishes between facial attacks and then attacks where the defendant comes forward with record evidence.

And I'm looking at *Crane v. Johnson* from this year, which is a standing case. It says the trial court has the power to dismiss for lack of subject matter jurisdiction -- then this case was based on standing -- on any one of three separate bases: One, the complaint alone, which would be a facial attack to the complaint; two, the complaint supplemented

by undisputed facts evidenced in the record, and so, there again, I would take the averments of the plaintiff as true; and, three, the complaint supplemented by undisputed facts. So, again, I'm looking at -- I take the facts I think as true in the complaint, but, in addition, the court's resolution of disputed facts. And that's -- seems like every case I look at in the Fifth Circuit that's the test.

MS. KAPLAN: Your Honor, I don't think there's much dispute about the facts with respect to standing, frankly, other than, as I recall, the facts concerning the plaintiff couples who live in the northern part of the state. They are here and if your Honor wants to decide that testimony as to which side is telling the truth, we're more than happy to put them on the stand.

THE COURT: And you're referring to the couple that stated in the complaint that they had gone to a training session and were told that they couldn't participate.

MS. KAPLAN: Yeah, exactly, the couples who are seeking to foster children who live farther up north.

THE COURT: All right. First, Mr. Matheny, do you agree that this is a case where I have those three options?

MR. MATHENY: Yes, your Honor. I think you correctly stated the standard as far as the three: The complaint alone; the complaint, undisputed facts; and complaint, resolution of disputed facts. And I think that, really, the point here for

the executive branch defendants is is that you've got the allegations of the complaint and then you've got what was submitted by us in the declarations and then other things that we've referred to that's outside of the complaint, such as the department's policies and procedures and the like.

And our position is that you can consider all of those things, resolve any disputed issues of fact as necessary, to evaluate our standing and Eleventh Amendment jurisdiction argument.

THE COURT: All right. So it seems that it would make sense then to allow the plaintiffs at this point to put on their evidence.

MS. KAPLAN: Do the defendants have witnesses in terms of the affidavit they put on countering that evidence?

MR. MATHENY: No, your Honor. And I would say this, when we set this hearing, my understanding was that it was going to be everybody files everything they're supposed to file and that it was going to be an oral argument on the legal issues. So I don't know who their witnesses are.

And it's certainly not the first time I've ever been to court and had the lawyer stand up and say, *Hey, we're going to put on some witnesses*. But we don't have any witnesses. We have our proof that's in the record, and I think that the motion -- both motions, actually, should be decided on that basis.

THE COURT: Are you objecting to them calling a witness?

MR. MATHENY: Yes. That's a -- that was a long way of objecting. Sorry.

THE COURT: Well, my concern -- give me a second.

(PAUSE)

THE COURT: In *Martin v. Morgan Drive Away, Inc.*, the Fifth Circuit reversed where the district court ruled based on Rule 12(b)(1) and did not have an evidentiary hearing, and they cited the lack of an evidentiary hearing as the basis for reversal.

I think that Ms. Kaplan is probably correct that in large measure there are no -- there are few disputed facts, but there are a couple, and I think that they're probably relevant to the standing issue with respect to Mr. Berry. They're probably not relevant to anybody else, but I think they're relevant to him. So I'm going to allow her to put on her witness and, of course, you can cross-examine them.

MS. KAPLAN: Your Honor, can you give us a second just so I can -- a five-minute recess just to organize my witnesses?

THE COURT: All right. So I guess before we do that, let me -- so everybody knows what we're doing, we'll hear the witnesses. Then we're going to hear the argument on the 12(b)(1) motion. I'm going to start with the executive defendants.

I will tell you that what I'm most interested in is the arguments with respect to the attorney general and Mr. Berry. I'll hear whatever arguments you want to hear on the others; but in all candor, I think that the closer questions deal with those two as opposed to the governor.

I also -- Ms. Kaplan, I guess I'll quickly hear from you now maybe. I'm not sure that you substantively responded with respect to the claims against the chancery courts themselves and MDHS, both of which seem to be arms of the state.

MS. KAPLAN: I agree with that, your Honor. And we're willing -- and I was going to suggest -- actually, your Honor and I are on the same page. I think the two crucial -- we only need one defendant in this case to have this case be justiciable. And I think the two crucial defendants are the executive director of MDHS and the attorney general.

We are happy to focus on those arguments, and we don't need to argue about MDHS as a governmental entity or the chancery courts themselves.

THE COURT: All right. So in light of that, the way I'll take it up, I will start with the standing question, and then we will go to the Eleventh Amendment issue, and then we will hear argument on the plaintiffs' motion.

We'll take a five-minute recess. Court's in recess.

(RECESS)

THE COURT: Thank you. You may be seated. All right, Ms. Kaplan.

MS. KAPLAN: Thank you, your Honor. Plaintiffs call to the stand Tinora Sweeten-Lunsford.

TINORA SWEETEN-LUNSFORD,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. KAPLAN:

Q. Good afternoon, Ms. Lunsford.

A. Good afternoon.

MS. KAPLAN: I'm sorry, your Honor. Is it okay to start?

THE COURT: Please.

MS. KAPLAN: Thank you.

BY MS. KAPLAN:

Q. Can you state your name for the record, your full name, please.

A. Tinora Sweeten-Lunsford.

Q. And how old are you?

A. I am 45.

Q. And where do you live currently?

A. I live in Starkville, Mississippi.

Q. And where were you born, ma'am?

A. In Petaluma, California.

Q. And do you have a job?

A. I do.
Q. What's your --
A. I'm the director of the Columbus Arts Council.
Q. And are you married?
A. I am.
Q. And what is the name of your spouse?
A. Kari Lunsford.
Q. And for how long have you been married?
A. Well, legally married for two years. We've been together for 20.
Q. And when you say "legally married for two years," when did you first get married and where?
A. May 31st of 2013, I think, in Seattle, Washington.
Q. And what does your spouse do?
A. She's a professor of veterinary medicine.
MS. KAPLAN: Your Honor, I have a copy, if I could hand it to your Honor, of the first amended complaint. May I approach?
THE COURT: You may.
MS. KAPLAN: Would you prefer that I mark it as an exhibit or -- it's a document in the record.
THE COURT: I don't know that you need to. It's in the record.
MS. KAPLAN: Yeah. Do you guys have one?
MR. MATHENY: (Nods head affirmatively)

MS. KAPLAN: Okay.

BY MS. KAPLAN:

Q. Ms. Lunsford, I just handed you a document and I'll ask you if you recognize it.

A. I do.

Q. And what is it?

A. It is the complaint, I believe, or the amended complaint.

Q. Do you see your name on the first page?

A. I do.

Q. And do you understand what that means?

A. Yes.

Q. What does it mean?

A. I'm a plaintiff.

Q. In this case?

A. In this case, yes.

Q. Now, why did you agree to be a plaintiff in this case, ma'am?

A. Well, my partner was adopted and we have always wanted to adopt. And ten years ago when we moved here we attempted to adopt and could not. So we want to make that possible.

Q. And taking you back to ten years ago, can you tell me in your own words what those attempts were and what happened.

A. Sure. A friend of mine that worked with me had adopted from the state, and she suggested that we contact her caseworker who works out of the West Point office. And so we

did. And she invited us to come to a training session.

So we went to the training session. That was a Saturday. We sat through the first half of the training session. And towards the end of that first half, she told us that you had to be eligible to be a foster parent and to adopt; and the eligibility was that you either had to be single or married. If you lived with another person in your home, they had to either be related to you by blood or by marriage. And we didn't fit those qualifications.

So at the break we asked her why she had asked us to come to the training since we didn't fit those qualifications.

Q. And what did she say?

A. She said that if one of us were willing to move out of our home for six months while the process went through for us to get a home study and all of that, that they could probably work it out where we could become foster parents.

Q. Did you say anything in response?

A. Yes. We said that we didn't want to do that because we had been in a relationship for a long time and if we were going to do this, we wanted to do it as a family.

Q. You mentioned this person was a friend of yours. Does this friend have a name?

A. Actually, this person was not a friend. This was the case manager.

Q. Case manager.

A. Yeah.
Q. Do you remember that person's name?
A. I don't. I'm sorry.
Q. What happened next? After -- you said you were in a training session, certain things were explained to you about eligibility to become foster and then adoptive parents. You spoke to the caseworker during the break. You had the conversation you just described. What did you do next?
A. We left because we didn't feel like we needed to be there for the rest of the training. And then it was probably two weeks later I received a phone call from the case manager and she said that they had some medically fragile children that they couldn't place anywhere else and they may talk to us about doing that. And we made the decision not to move forward because if we were going to do this, we wanted to be treated like everybody else.
Q. When she said "medically fragile children," do you have any understanding of what she meant?
A. Well, she said children that may not live to adulthood.
Q. And did you -- to the best of your recollection, ma'am, what did you say to her in response to that phone call about the medically -- the disadvantaged children?
A. I said that when we had walked into that training, we had no preconceived idea what child we wanted to adopt, that we were open to children with disabilities, we were open to any

child; but if our choice was that we could only be eligible for these certain kids, that we didn't want to do that because we wanted to be treated like everybody else.

Q. And do you recall her saying anything in response?

A. No.

Q. Now, you said that that call -- anything else happen in connection with those series of events ten years ago?

A. No.

Q. And you said it was ten years ago. So to the best of your recollection, about 2005?

A. Yes.

Q. Are you aware, Ms. Lunsford, of a decision by the Supreme Court that -- under the caption *Obergefell v. Hodges*?

A. Yes.

Q. And do you know what that decision held by the Supreme Court? You're not a lawyer, but in colloquial terms.

A. *Hodges*. That -- I'm sorry.

Q. Okay. Are you aware that last summer the Supreme Court --

A. Yes.

Q. -- in the *Obergefell* case held that gay people have a right under the Constitution to be married nationwide?

A. Yes.

Q. And are you aware that decision is called the *Obergefell* decision?

A. Yes.

Q. Following the *Obergefell* decision, did you and your wife make any subsequent efforts to adopt children in the state of Mississippi?
A. I sent a text message to a friend who works at the Department of Human Services and just said, now that marriage is legal, would we be eligible to adopt.
Q. And you sent a text message on your phone?
A. Yes.
Q. Is that phone here with you today?
A. No. I wasn't allowed to bring it into court.
Q. And did you -- what happened in response?
A. Her response was, *I don't know. I'm trying to find out. Let me get back to you*. And then a few hours later --
Q. Let me just interrupt for a second. Was that response by text as well?
A. Yes. Yes.
Q. Continue.
A. And then a few hours later I talked to her own the phone, because she didn't want to text it back, that she had been told that it wasn't a decision that could be made by DHS, that it was a law; and so until the law was changed, there wouldn't be a change in their policy.
Q. And that was a phone call in which she called you?
A. Yes.
Q. And in the -- we note that in the -- there's a discussion

of this in the amended complaint. Do you recall that?
A. Yes.
Q. And we don't mention this person's name.
A. Correct.
Q. Was that at your request?
A. It was at my request.
Q. And why did you make that request, ma'am?
A. She requested her name not be placed in the complaint because she fears for her job.
Q. And since you're sitting here under oath, can you please tell me that person's name?
A. Shelia Nabors.
Q. After Shelia Nabors had that phone call with you where she told you that the law was the law and that there weren't going to be any changes in MDH policy, did she say anything else on that phone call?
A. Not on that phone call.
Q. Did you speak to her subsequently?
A. I did.
Q. And can you tell me how that came about.
A. Well, we're friends. We both belong to a fellowship program and so we see each other. We travel together. So we -- I mean, we're just friends. So that's how the conversation happened.
Q. And was it at a restaurant or do you recall?

A. No. It was a private conversation.
Q. Okay.
A. On the phone.
Q. On the phone?
A. Uh-huh (indicating yes).
Q. And to the best of your recollection, how did the call start and what -- who said what to whom?
A. Shelia called me and told me that she had talked to one of the case managers in the Tupelo area who had an application from a gay couple, and the caseworker was told to bury the application and wait.
Q. Did you say anything in response to that?
A. I expressed frustration.
Q. Without going into any swear words, how long ago was that last conversation?
A. I would say it was probably two months ago.
Q. Can you -- do you know what position Shelia holds sat MDHS?
A. She's the director of training.
Q. Any other information that I haven't asked you about, to be honest, that you know in terms of conversations with Shelia or anyone else about the possibility of you and your wife being able to adopt children in the state of Mississippi?
A. No.
Q. Sitting here today, ma'am -- withdrawn. You understand, do you not, that in this case what we are seeking is a declaration

that the Mississippi adoption ban, the statute that says that a gay couple cannot adopt in the state of Mississippi, should be declared unconstitutional.

A. Yes.

Q. And should we prevail in this case, what is your intention with respect to adopting a child in the state of Mississippi?

A. Well, our intentions have changed slightly since ten years ago. We were younger then. But we have also found out that there are a lot of LGBT kids in the system. We're interested in being foster parents for those children and potentially adopt.

Q. And when you say "we," is this something that -- a decision or intention that you and your wife share?

A. Yes.

Q. And -- let me just check one second.

(COUNSEL EXAMINED DOCUMENT)

Q. Now, the defendant MDHS has -- may have taken the position here that it would be okay under Mississippi statutes for gay couples -- married gay couples to foster but not to adopt because of the Mississippi statutory ban. What's your reaction to that, ma'am?

A. Well, I don't understand what the difference between fostering and adopting would be. I mean, if I -- if they're going to allow me to have those children in my house to foster, then why can't I become their legal parent?

MS. KAPLAN: One second.

(COUNSEL CONFERRED)

MS. KAPLAN: Your witness.

CROSS-EXAMINATION

BY MR. GOODWIN:

Q. Ms. Lunsford, how are you?

A. I'm fine.

Q. My name is Tommy Goodwin. I'm an attorney from the Mississippi Attorney General's Office, and I represent in this case the governor, the Mississippi Department of Human Services and its director, Richard Berry. Now, as I appreciate your testimony, you said that you attended a training session some ten years ago.

A. Yes.

Q. Is that right?

A. Yes.

Q. And at that training session you were told you could not be a foster parent because you were an unmarried couple living together.

A. Yes.

Q. They didn't reject you because you're gay. They rejected you and said you cannot because our policies do not allow unmarried cohabitating people to foster. Is that right?

A. We specifically asked the caseworker if gays and lesbians could foster and adopt, and she said no.

Q. Ten years ago were you married?
A. We were not legally married. No.
Q. And then two weeks after the training session when you were called, were you married then?
A. No, sir. It wasn't legal to be married then.
Q. You stated that you were married -- correct me if I'm wrong -- was it May of 2013?
A. Correct.
Q. And where did you marry? What state?
A. Seattle, Washington.
Q. And why did you not marry in Mississippi?
A. It was not legal at that point to marry in Mississippi.
Q. So when you returned from Seattle, your marriage in Washington was not recognized by the State of Mississippi. Is that right?
A. Yes.
Q. I'm sorry?
A. Yes. Correct.
Q. Now, you said you sent a text message to a friend at DHS. That friend was Shelia Nabors?
A. Yes.
Q. And tell me again, you said she is the director of training?
A. Yes.
Q. Is she the director of training -- or where is she

stationed?
A. Well, she lives in Tupelo, but -- so her office is up there, but she actually works for the Jackson office.
Q. So she's employed by DHS.
A. She's the state training director.
Q. But she's stationed in Tupelo. Correct?
A. Yes.
Q. Do you remember when it was that you texted her?
A. I believe it was the day that we found out that the Supreme Court had ruled in favor of same-sex marriage.
Q. And how did you find out about the *Obergefell* decision? In the news?
A. Yes.
Q. Would it be fair to say that was the last week of June?
A. I believe so.
Q. Are you aware that Judge Reeves did not enter a permanent injunction in the Mississippi marriage case until July 1?
A. Yes.
Q. So you're aware of that?
A. Yes.
Q. Okay. And so the permanent injunction had not been entered when you texted your friend. Is that right?
A. I guess not.
Q. Are you -- strike that. Have you been furnished with the briefs in this case, the filings in this case by your attorney

or have you looked at them?
A. Yes.
Q. Have you read all of them?
A. Yes.
Q. Are you aware of the affidavit from DHS, specifically Mark Smith's affidavit, where he states -- well, it's a declaration. He states that you and your partner will not -- you and your wife will not be -- your application to foster will not be denied because you're a same-sex couple. Are you aware of that?
A. Yes.
Q. Are you aware of his declaration that also states that he invites you to apply to be foster parents?
A. Yes.
Q. Did you see the application to be a foster parent that was attached?
A. Yes.
Q. Have you filled out that application and submitted it?
A. I have not.
Q. You have not?
A. Unh-unh (indicating no).
Q. Is it your understanding that the first step in becoming a foster parent would be to submit an application?
A. Yes.
MR. GOODWIN: One moment, your Honor. Court's

indulgence.

(COUNSEL CONFERRED)

MR. GOODWIN: No more questions, your Honor.

THE COURT: All right. Any redirect?

REDIRECT EXAMINATION

BY MS. KAPLAN:

Q. Just a couple of more questions, Ms. Lunsford. You just heard a series of questions from my friend about an affidavit that was submitted from an MDHS officer in this case. Do you recall that testimony?

A. Yes.

Q. And sitting here today, is it your understanding that MDHS has offered in that affidavit you and your wife the ability to adopt a child in the state of Mississippi?

A. No.

Q. And the couples that you were -- you referenced during my direct testimony -- or during my questioning of you, ma'am, some information that you heard from your friend Shelia about gay couples up in the area where you live who actually have applied to become foster parents. Is that correct?

A. That is correct.

Q. And is it your understanding that they filled out this kind of application?

A. Yes.

Q. And, again, just so the record is clear, what did Shelia

tell you was being done with their application?
A. That the caseworker in charge of that area told her that the applications were just being held, that they had been asked to just bury them and not deal with them at this point.
Q. And were those her words, to the best of your recollection?
A. Yes.
MS. KAPLAN: No further questions, your Honor.
THE COURT: All right. Thank you. You can step down.
MS. KAPLAN: Your Honor, we have two other witnesses -- it's really at the pleasure of the court, obviously -- who would testify on standing. They are the two other -- or members of the two other plaintiff couples who are also the movants in the PI motion, both couples with children. And they are prepared to testify on the standing issues.
I'm not sure any of those issues -- matters are in dispute. So it's really up to your Honor and whether the other side thinks they're in dispute, but we're happy to put them on should you desire.
THE COURT: Mr. Matheny, I don't -- I don't recall any specific factual disputes with respect to those two couples, but I'm -- you know, I don't know the case as well as the two of you do.
MR. MATHENY: Your Honor, I think that's correct. It's not a factual dispute as to what they say in their complaint. I think that there may be some disagreements about

what Mississippi law provides and those sort of things, but not factual.

THE COURT: It's a legal dispute based on undisputed facts.

MR. MATHENY: That's correct, your Honor.

THE COURT: All right.

MS. KAPLAN: Thank you, your Honor.

THE COURT: All right. Give me one second.

(PAUSE)

THE COURT: All right. So, Ms. Kaplan, that's it in terms of your evidence today?

MS. KAPLAN: Yeah. That's my testimony on the disputed fact.

THE COURT: Okay. Mr. Matheny, is there anything that -- I do have your affidavits. Is there anything else you wish to put on?

MR. MATHENY: I think just the attachments to the executive branch defendants' pleadings, your Honor.

MS. KAPLAN: Your Honor, what I would say -- I don't know if we can do it. We may undertake during an appropriate recess to see if we can go down and look for the text. I don't know if that's possible or not, but there's no need to do it right now.

THE COURT: Okay. All right. Mr. Matheny, are you arguing your motion?

MR. MATHENY: I will be arguing on behalf of the attorney general, your Honor. Yes.

THE COURT: All right. Why don't you come on forward.

MR. MATHENY: Your Honor, may it please the court. And as I understand it, the court wanted to address this issue by issue. And so I'd like to focus in on the issue of the plaintiffs' standing to sue the Attorney General of Mississippi.

And I think a good place to start when you're looking at justiciability and, specifically, standing is where the plaintiffs start in their brief with *Marbury v. Madison*. And they quote the famous language that -- I'm paraphrasing, but the language is that, basically, where there's a right, there's a remedy.

And I think that it's important to put that quote in context. "Where there's a right, there's a remedy." The court did not say where there's a right, there's a federal remedy, or certainly not where there's a right -- or where there's a federal right, that there's a federal remedy. There's a string cite of cases in their brief that identifies other -- other lawsuits where state officers have been parties to state laws that have been challenged.

Frankly, I don't think that that proves anything other than there have been cases where state officers have a connection to a particular law and that they were proper

defendants in those cases. I could certainly come up with my own string cite where cases and claims against various state officers are dismissed upon standing and Eleventh Amendment grounds.

I think what it boils down to here, your Honor, is the fact that -- is that the mere existence of a state statute does not make state officials amenable to a federal suit challenging it. Specifically, it brings to mind the standing Article III principle from the *Valley Forge Christian College* case from 1982 that pointed out Article III power of federal courts is not an unconditional authority to determine the constitutionality of legislative and executive acts.

Now, specifically as to standing -- and it's no secret from my briefs -- I think that the most important case to look at here is the *Okpalobi* decision from the Fifth Circuit. And it's a little hard to follow through along. Of course, it was an en banc decision. And as I appreciate the way that that --

THE COURT: Let me stop you just for a second because that case obviously hits the second and third prongs of the test. With respect to the injury prong, the plaintiffs have cited these barrier-type cases where the statute that creates a barrier to a specific individual or groups of individuals. And in cases where there have been concrete steps towards seeking something that the statute would prevent, the courts have generally said that that's enough in terms of the injury prong.

In this case looking at the different plaintiffs, they sort of fall into different categories. I believe that there's one engaged couple that haven't -- they have not taken any direct steps that I'm aware of. But you have others that have made calls or attended training, like the testimony we just heard. So under the barrier-type lines of case or the target line of cases, why wouldn't that be enough to get past the third prong, the injury prong?

MR. MATHENY: Well, first let me say this, your Honor. I think you're very correct in saying that there are differences between the different plaintiffs' situations. Kind of working in reverse, building off what you were saying, I think the unmarried plaintiffs I think are certainly the furthest away from any, quote, unquote, concrete steps toward attaining adoption.

The testimony you heard about the -- the third set of plaintiffs, if you will, and their relation to the foster-care program and adopting through foster care, I think that the facts, even considering what's come out today, show that they're still very far away from taking any concrete steps towards obtaining adoption.

But the first two, again, like I said working backward -- and I'll refer to the first two sets of married plaintiffs as the ones that are seeking stepparent adoption. The concrete steps that are alleged in the complaint, we have

15-year-old advice from an attorney saying that they would not be able to -- to adopt. And I think that the other allegation in the complaint relates to can't get a home study, therefore, can't get an adoption and some other facts relating to Executive Director Berry that Mr. Goodwin will address.

But as far as the cases go and as far as concrete steps go for an injury, I don't think that this is the kind of standing analysis that's like you would have in an administrative process case where somebody's seeking a benefit through an administrative process and, you know, you can look at it and say -- well, like in some cases that you had before your Honor, like the *E.H. v. MDE* case where the plaintiffs were arguing futility. *There's an administrative process. It would be futile for us to go through it.* I don't think that that kind of standing analysis applies here.

I think what you're looking at is the stepparent adopters have not done anything to take any concrete steps toward obtaining an adoption, which, of course, as we know, is to actually file your adoption lawsuit in a Mississippi court.

THE COURT: Would a stigmatic-type injury based on a statute that targets a group, would that not create an injury as to standing?

MR. MATHENY: Well, I'll candidly admit this, your Honor. Throughout the marriage cases recently that I'm sure will come up at various points during the day on other issues,

some judges, including Judge Reeves, focused on things like stigmatic injury.

The reason why I think that that's off base here is that if you can claim that the injury is that the statute has injured you in a stigmatic way, I mean, that's -- that's kind of getting out there to the whole, you know, prudential-standing-type principles like generalized grievance, large groups of people or everybody.

I think you can make an argument that if you can -- if you can just say that the stigma is the injury, you have a problem with being able to pin that down. You also --

THE COURT: But, I mean, isn't it -- I mean *Lujan* talks about, you know, those types of, you know, maybe-some-day-type injuries. But, I mean, if you're talking about individuals who have been raising a child for 15 years and are precluded by a statute from adopting, doesn't that hit them a little closer to home than the types of cases you're talking about?

MR. MATHENY: Well, I -- I think so. And I think that that's why in -- you know, in our briefs and other submissions on the PI. The real issue here is the causation and redressability, particularly --

THE COURT: All right. I'll let you get to it.

MR. MATHENY: Because even if you assume that one of these concrete steps or stigmatic injury or whatnot creates a

requisite injury in fact for the stepparent adopters or anyone else, I think you run long into this *Okpalobi* case. And, you know, the -- Judge Jolly's lead opinion there dealt with the Eleventh Amendment.

And my reading of it is -- which we're going to address separately, but my reading of the Eleventh Amendment portion of that is really it was seven judges joining that opinion and then you had three other judges -- I think it was Judge King, Judge Higginbotham and Judge Benavides who joined and concurred in part and dissented in part.

But the point being is you have a ten-judge majority of the en banc court in the *Okpalobi* case pointing out that when a state officer is sued in a case challenging the constitutionality of a state statute, state officers that have no connection and there's no causation for don't belong as defendants in the suit. And I know that it's not the lead opinion, if you will, but I think the easiest way --

THE COURT: Maybe I'm wrong. I thought that the -- I thought the Eleventh Amendment argument did not get a majority of the court but that the standing portion of the case did.

MR. MATHENY: That's right. And I may have misspoke or said too much about it. But as I understand it, there were 14 votes. There were seven on the Eleventh Amendment and then there were ten when you put together the concurring that joined in Judge Jolly's opinion as to the standing. And so --

THE COURT: I'm sorry. I must have misunderstood you. But, yes, that's my understanding as well.

MR. MATHENY: We're on the same page there, your Honor.

THE COURT: Okay.

MR. MATHENY: But the point is I think and as it relates to the attorney general specifically in this case, is that there's -- there's no connection that the attorney general has with these -- specifically the stepparent adoptions and certainly the foster-care allegations too.

But, most importantly, for purposes of the motion to dismiss and the PI, there's not anything that the attorney general would have anything to do with their adoptions except, except, if they filed in state court and challenged the constitutionality of the law. Then the attorney general would have the duty to show up in court and argue the constitutionality of the statute.

If they sue state officials about the statute, like my brothers that are here with me today, the attorney general's required to defend state officers. And as I understand it -- and this -- this is where the Eleventh Amendment and the standing stuff kind of bleeds over into each other. But I understand that their argument is that because the attorney general has the duty to render nonbinding advisory opinions, that that somehow creates some kind of causal connection

between him and the 93-17-3(5) that's at issue.

And, number one, you know, on the Eleventh Amendment side of things is where I think the cases have addressed it. But I think you could look at it just simply like this. In *Okpalobi*, the Louisiana attorney general certainly had the authority and the duty to render advisory opinions. He had the duty to go in and --

THE COURT: Let me just interrupt for a second, because I think you've framed it pretty well. I think -- I mean, there's authority that says that merely being the attorney -- in fact -- well, there's authority that says that being the attorney general is not alone enough. And you were talking about the bleed-over into the Eleventh Amendment -- or about the bleed-over in the Eleventh Amendment. There's also authority that says that being responsible for defending, you know, the state is not the type of standing that the court has in mind.

But the opinions I think are where the plaintiffs probably place the greatest weight, and it's not -- you know, I've certainly read cases where attorney generals had the authority to issue nonbinding opinions and that was not enough to create standing.

In this case the attorney general did issue two opinions, one of which I think, frankly, is too -- too far afield to -- for me to put too much weight on. So I think the

one that's -- that has -- that you need to address is the one that was at the request of the chancellor with respect to I think it was -- it was a gay couple, but they weren't married at the time.

And the attorney general's opinion quoted 93-17-1 -- oh, shoot. I've lost the statute now. But they cited the statute and he said that, of course, you know, that gay couples are not allowed to do adopt. But then he went on to address the issue that was raised.

First, I was a little surprised to see a judge asking for an advisory opinion from the Attorney General's Office. And I wanted to ask about that, because I don't know that the statute even allows it. But is that the practice of the Attorney General's Office to issue opinions to judges?

MR. MATHENY: Your Honor, you're absolutely correct. The statute does not say that. There is a practice, as I understand it, for the Opinions Division to answer opinions. But, importantly, not -- opinions do not get issued with respect to anything that's in pending litigation. And that's -- that's true as to any opinions to anybody, but certainly with respect to judges. It's not like a judge has a case pending and then asks the attorney general, *Hey, what do you think about my case?*

THE COURT: And that bleeds right into the next question. I found -- well, there are lots of opinions that

y'all have issued to judges, but they're usually in an administrative context like *Can I access court funds for this purpose?* things that are not related to litigation. But the opinion that's been cited seems -- I don't know the -- I haven't seen the letter itself and I don't know the context of the question that the chancellor asked, but it sure seems like the question that would have been in the context of litigation. What was the context of that question?

MR. MATHENY: The context of the question -- and I will say this, because I had the same kind of curiosity that your Honor is expressing. And we're talking about the 2012 opinion that they cite that I think was signed by Ellen O'Neal in the AG's Office to Chancellor Burns I think is the title of the opinion.

I think, your Honor, it was purely a "what if" question. I certainly know that there -- it didn't -- the opinion request didn't say anything about there being pending litigation.

There's another thing about that opinion. And I think your Honor is picking up on it, but I want to be sure. I think the question was what if two individuals of the same sex seek to obtain an adoption.

And the result of the question was -- again, in 2012, was that 93-17-3(5) doesn't have anything to do with that; that the problem with their hypothetical adoption proceeding that

was the subject of the opinion was that you're talking about single -- a single person or married persons whose spouse joins a petition, which, you know, the opinion was that that was why they couldn't adopt. It had nothing to do with 93-17-3(5) I think is the --

THE COURT: But the opinion does quote that subsection, does it not?

MR. MATHENY: Sure. And I think the problem with the theory is -- I don't think the standard is, you know, has the attorney general cited a statutory provision in an advisory opinion somewhere and somehow that makes him connected to its enforcement or a causal connection for purposes of standing.

I think that's the problem is that, frankly, citing those two opinions or like you mentioned with the first one -- or I'm sorry, the second one, the 2013 opinion, it just cites the -- cites the statutory provision. Really doesn't have anything substantively to do with it. So I don't think that that's the standard.

Like I said before, I think that this stuff relates more to the Eleventh Amendment, but, certainly, the -- you know, the subject is the same.

THE COURT: Does it change the analysis, though, that the opinion in question was written to one of the chancellors for the -- that's a defendant in this case?

MR. MATHENY: Does it change the analysis?

THE COURT: In other words, this isn't a -- and I understand that the opinions are not binding in any event; but this isn't, for example, an opinion that was written for a chancellor down in Biloxi. This is a chancellor who actually has jurisdiction for one of our plaintiffs and has therefore been named as a defendant in this case.

MR. MATHENY: I would submit that that part is just coincidence, your Honor, in the sense that it just so happened that the plaintiffs in this case live in Oktibbeha County and there's four chancellors and he happened to be the one that requested that opinion.

But I would say this. I think that sequence and timing and the chronology is important here. In 2012 we're not talking about the *Windsor* case or the *Obergefell* case. And at that point in time, I mean, you're -- you know, the issue of gay persons having the fundamental right to marry and getting married, that hadn't come into existence.

There was a change when *Obergefell* came out that all of a sudden everybody is married. It essentially wiped out the relevance of 93-17-34 which was the previous impediment because of the marriage requirement. And then now the question after this opinion that we're talking about in 2012 and now comes into play about, well, how does -- now does the 93-17-3(5) apply given the facts that may be put before a chancellor in an adoption lawsuit.

THE COURT: But it's still -- I mean, it's still the attorney general's position that 93-17-3(5) is constitutional. In other words, if you got that same letter today, you're going to write the same letter you wrote back then, because you're taking the position here today that you think that the statute is constitutional.

MR. MATHENY: Well, yes, your Honor. And that's -- that's a subject in the response of the likelihood of success on the PI issue. We haven't moved on the constitutionality issue to dismiss. But I think importantly --

THE COURT: Well, I guess I need to ask. I mean, what is your position? Do you -- is it your position that the statute is constitutional or unconstitutional?

MR. MATHENY: Well, I cannot and do not concede that the statute's unconstitutional. I would say that for purposes of looking at this standing issue and it's also for purposes of looking at the Eleventh Amendment issue, the fact that the attorney general in *Okpalobi* believed that Louisiana Act 825 was constitutional and defended it, I mean -- and defended it at the trial court and defended it all the way up in the first panel opinion, that's not the test that, you know, does the attorney general think that it's constitutional or not or would he opine what -- you know, to state officers if it's constitutional or not.

The test is is there a causal connection between the

attorney general and enforcement of the statute. And we submit that there's not one here.

THE COURT: Okay. And just to move it along a little bit, I think I understand well your argument with respect to the attorney general and the redressability issue. So are you going to argue with respect to Mr. Berry also?

MR. MATHENY: Mr. Goodwin will be arguing with respect to Mr. Berry.

THE COURT: Okay. Is there anything else you want to add with respect to the attorney general?

MR. MATHENY: I would like to say this. In looking at the *Okpalobi* decision, I do think that Judge Higginbotham's formulation of what the test is -- and he says that it's really simple, but I think that his formulation of the test as you applied it here would be, you know, will enjoining the attorney general get the plaintiffs the adoption that they're asking for. I think the answer is clearly no.

And I think that that's *Okpalobi*'s import to this case. And so that's what I would -- that's all I would have to say about the standing issue with respect to the attorney general.

THE COURT: All right. Thank you.

MR. GOODWIN: Your Honor, may it please the court.

THE COURT: Yes, sir.

MR. GOODWIN: Given the court's comments and direction

earlier with regards to the issues and the defendants and what the court wants to discuss today, I'll be discussing the causal connection prong as well as the redressability for Director Berry. First and foremost is the role of DHS in adoptions and what is that.

The plaintiffs have alleged in this case that DHS is the initial arbiter for the adoption process, that they've been unilaterally denied the ability to get an adoption by DHS. That's simply not true. The initial step in an adoption is to file a suit in chancery court to adopt.

The only -- and I will break these up because DHS plays a different role depending on whether it's a private adoption, which is what we have with the movants, versus a foster-care adoption, which the Oktibbeha County plaintiffs are seeking.

In private adoptions, like with the movants, the only role DHS has is to perform a home study if ordered by the court. That's the only role they play. And because of that, there's no way they can -- they're not the gatekeeper for whether someone adopts or not. And, furthermore, in stepparent situations, the statute does not even require that a home study be done. It waives that requirement when you have a biological parent involved.

So it's a strong possibility that in this case, at least as to the movants, the Rankin and Forrest County

plaintiffs, that they would file their suit in chancery court seeking adoption, the judge would say the statute doesn't require it, and then would either grant or deny it. And DHS would never have anything to do with the adoption.

But let's assume for a moment that he said, *Well, it's not required, but I would like -- I would like to see one done*, and he orders DHS to do one. At that point DHS performs the home study.

They -- Mark Smith says in his declaration that he's submitted that that's what DHS does. They do home studies when ordered by the court; and if ordered by a court in connection with an adoption proceeding with one of these plaintiffs, they would perform a home study. So -- your Honor, you had a question?

THE COURT: Well, Ms. Kaplan asked Ms. Sweeten-Lunsford about that affidavit. And I guess I want to be precise about what exactly Mr. Smith is saying here.

Is he saying that they would -- assuming that the couples are otherwise qualified, of course, that they would not deny the application just because they're a same-sex couple and that that would allow them I guess to -- on the foster-care path towards adoption?

MR. GOODWIN: And would that allow them to then adopt? Is that what you're --

THE COURT: Right.

MR. GOODWIN: He is saying that DHS in its role would not refuse to do it and would not give an unfavorable home study, assuming everything else turns out okay, simply because they're same sex.

I don't believe DHS and I don't believe Mark Smith is taking the position that they could then go before a chancellor -- because even in a foster-care situation, once you decide, *Okay. I fostered this child and I want to adopt this child*, you still have to then go file a suit with the chancery court. The adoption is not handled internally by DHS.

And so DHS is not taking the position that -- as to what the court may or may not do with the adoption petition. DHS is simply saying, which is consistent with DHS's very limited role in all this, which is *We would not deny your foster petition or your foster application simply because you're a same-sex couple. In light of* Obergefell, *you're now married. Therefore, the fact that unmarried couples cohabitating are prohibited is not an issue for you anymore. Therefore, that's not a problem for us either.*

THE COURT: All right. Assuming that the facts that we heard today are correct, that DHS is sitting on applications and refusing to process them because the individuals are the same sex, how would you address that?

MR. GOODWIN: Your Honor, honestly, that's the first I've heard of that. That's a new allegation I've never heard

before today. I have basically no way to refute it.

If -- let's assume it's true. Let's assume that DHS is sitting on applications and refusing to process them -- I almost can't believe it, to be honest, your Honor; but if it's true, then it would put them in a position where there would be some kind of causal connection.

And just to be clear, these are foster-care applications, correct, that she was speaking about?

Obviously, if you cannot -- if your goal is to foster and then adopt and you cannot foster because DHS is simply refusing to process the application, then DHS is preventing you from eventually adopting. Again, this is the first I've heard of it. We have no way to refute that.

I do know that -- she may be the director of training and stationed in Tupelo, but I do know that the deputy commissioner and the commissioner -- the deputy commissioner has done a declaration that's before the court that says -- and he's the number-two guy in charge there -- they will not be denied because they're a same-sex couple.

THE COURT: Okay. So that raises a legal question for you. I may get this legal term wrong, but I think it's voluntary cessation. There's a line of cases that say that a governmental defendant cannot simply say after they get sued, *Okay. Well, we're going to stop doing that* and then moot the case.

MR. GOODWIN: That would be a convenient way to get rid of a case. I could see that and why that's not allowed.

THE COURT: Exactly. Now, it is allowed in some context, and you have to -- you have to show that -- I think the words are an absolute certainty that the defendant wouldn't reverse course as soon as the case is over. This wasn't -- I don't think this was in the briefs and you may not be prepared to explore that.

MR. GOODWIN: I would like to. I may not be able to do so in a very detailed fashion, but --

THE COURT: So why wouldn't that -- then apply that standard and that legal theory here if there's testimony that the plaintiffs were told sort of in the wake of *Obergefell* that they still could not adopt and then after the lawsuit's filed there's an affidavit from somebody who appears to be in a position of authority that says, *Well, we won't stop your application.*

MR. GOODWIN: There is zero evidence that's been presented before this court outside of the testimony we heard today, which hearsay testimony from -- from Shelia -- I can't think of her last name. But there's zero evidence before the court --

MS. KAPLAN: I don't think that's hearsay. I believe that qualifies as a party admission.

THE COURT: Well, there was no objection to the

testimony. So it's in.

MR. GOODWIN: Fair enough, your Honor. There's nothing in the DHS policies that says you cannot foster or that we won't do a home study because you're a same-sex couple. The criteria always was and is that you be married. Post of *Obergefell*, that's no longer an issue.

I have no doubt that many people were denied, same-sex couples, prior to that because their marriages, if they had a marriage certificate from somewhere else, it was not recognized.

All we have, again, to hang a causal connection on here is the testimony of one of the plaintiffs that someone that works for DHS in Tupelo tells her that DHS is stalling on these applications because they're same-sex couples, despite someone who is further up the hierarchy in the organization saying to the court, *We will not reject the applications because -- because you're a same-sex couple,* period.

I think if you were to allow such testimony to create that causal connection, you could do it in practically any case. *Well, so and so said that they're stalling. So and so says they're not going to do it*, when there's nothing in the policies that says they're going to do it -- that they're going to do that. Again, it's always been are you married or are you not.

DHS has no authority to grant or deny adoptions.

They're not in the adoption business. When it gets time to do adoptions, you have to go to a chancellor and file suit there. DHS does not take a position on it. And so, your Honor, I think that would be a dangerous precedent if that was enough to create a causal connection.

THE COURT: All right. Anything else?

MR. GOODWIN: Your Honor, just on the redressability issue briefly. An order enjoining DHS from -- what the plaintiffs say they want is they want an order enjoining DHS from enforcing the law -- enforcing the statute at issue; but at the same time DHS has no authority to grant or deny an adoption. And, again, it would not get the plaintiffs any closer to what they say they want. And for that reason --

THE COURT: But, again, let me ask you about the context of the foster-adoption process. If DHS is blocking them from even applying -- or, you know, from having their applications considered, then seems like DHS could offer redress.

MR. GOODWIN: If that's -- again, that's the first I've heard of it; but if that's the case and DHS could remove that -- could remove that block, but it still would not grant the plaintiffs an adoption. They still have no power, no authority to tell a chancellor deny it or grant it.

THE COURT: But isn't it sort of a -- one of the tenets of standing is that the relief that is gained does not

have to be complete relief?

MR. GOODWIN: That's correct.

THE COURT: All right. Anything else?

MR. GOODWIN: No, your Honor.

THE COURT: All right.

MS. KAPLAN: Good afternoon.

THE COURT: Start with the attorney general.

MS. KAPLAN: Oh, I apologize.

THE COURT: No, no. I'm sorry. Yes, Mr. Miracle.

MR. MIRACLE: Your Honor, as I appreciate the court's early comments focusing on these other issues, I am certainly prepared to stand on our brief unless the court has any particular questions as it relates to the chancellors.

THE COURT: I appreciate that. If something pops up, I'll let you know.

MS. KAPLAN: Sorry about that, your Honor.

THE COURT: No. What I meant was I'd like for you to start with the attorney general.

MS. KAPLAN: Yeah. So good afternoon, your Honor. May it please the court. It's nice to be back in Mississippi. Last time I was here on the marriage equality case, counsel on the other side joked that it would be a mighty cold day in the state of Mississippi before gay couples ever got to be married and noted that it was a very cold day that day, which it was. I'm very, very happy that it's significantly warmer today.

We are here today to challenge a statute, Mississippi Code Annotated 93-17-3(5), which we believe under *Windsor* and *Obergefell* is clearly unconstitutional. And in connection with some of the discussion that just happened, I want to note that the statute at issue does not talk about marriage. There's nothing about marriage in this section that we are challenging.

The section itself says that adoption by couples of the same gender, i.e., gay couples, is prohibited. There's no exception that says in there adoption by gay couples of the same gender is prohibited unless they are married. It says clearly that adoption by gay couples is prohibited.

Now, instead of dealing -- or spending much time about the law and the merits, defendants -- and this is what defendants do. I understand that. I often represent defendants -- have --

THE COURT: Well, it is the Constitution they're talking about.

MS. KAPLAN: It is the Constitution. And they've come up with a series of arguments about standing, procedural roadblocks. It's kind of like a shell game in that each defendant is pointing to the other defendant saying, *Not me. Not me. It's him, not me.*

I was thinking about it this morning. I have a nine-year-old son, your Honor. And sometimes my son, unfortunately, wakes before I do. And when I come into the

kitchen, I see a bowl with some melted chocolate ice cream and an ice cream scoop. And I say to my son, *Jacob, who's been eating* -- you know, *Who's been eating chocolate ice cream here this morning in the kitchen?* And my son's response to that is always, *Not me.*

What we're hearing from the defendants in this case is that no one in the state of Mississippi is responsible for enforcing the statute that's being challenged.

THE COURT: Well, I think actually what you're hearing is that the executive defendants -- that there's no standing as to them because they don't enforce the statute, that the judges apply the statutes, which is very different. And, frankly, they've got very solid authority from the Fifth Circuit saying that you can't sue judges in advance telling them how they're going to have to rule on a case.

MS. KAPLAN: I agree with that, your Honor.

THE COURT: I think the claim against the judges is a nonstarter, frankly. So it may seem like a shell game, but it's -- but I think -- I think it's entitled to its day in court. In other words, I don't think it's a frivolous argument that they're making. You've got to show standing before you can get to the merits. That's day one.

MS. KAPLAN: I agree that you have to show standing. And as your Honor has already pointed out and the Supreme Court has held, the presence of one party with standing assures that

the controversy is justiciable. And that's true with respect to plaintiffs or defendants.

In the *Chickasaw County* case, which is cited by the defendants, which is a challenge to the Mississippi civil commitment procedures, the Fifth Circuit rejected the plaintiffs' attempt to sue the chancery judges, what your Honor just noted. But the very next language in the opinion is critical, since the Fifth Circuit did not assume, as defendants seem to argue here, that there was no proper defendant in the state of Mississippi who could be sued.

Instead, the Fifth Circuit noted the following. "On remand, plaintiffs will have the opportunity to correct this error by substituting as defendants the Mississippi officials with executive responsibility for defending the challenged civil commitment procedures."

THE COURT: Right. That's the question. Have you named somebody with that authority?

MS. KAPLAN: And that's exactly the argument here. And then, indeed, in a similar case by the renown judge, justice, Judge Friendly, in which actually he permitted a suit against New York judges with respect to the challenge to the bar procedures in the state of New York, he said, "We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights

protected by the Civil Rights.... Rather it would seem anomalous that while federal courts could entertain a complaint similar to plaintiffs' if made with respect to other licensed professions" -- he's talking here about the bar -- "such as medicine or accountancy, they are powerless with respect to admission to the bar."

And in that case because there actually were no other defendants, Judge Friendly, the author of the other opinion cited by defendants, allowed the case to go forward against the state court judges.

Now, I'd like to suggest -- and I think your Honor is already thinking the same thing -- that there's a way to cut through all the arguments in this case about judicial immunity, about the *Pullman* abstention, about prudential standing, that there's a way to make this case relatively simple.

At a minimum here, the traceability requirements applicable on a motion to dismiss are clearly satisfied as to the executive director of MDHS and the attorney general. Let me started with MDHS.

MDHS's job is to promulgate rules and regulations regarding Mississippi adoption law, including with respect to whether social work agencies can conduct home studies. Here -- and here (indicating), your Honor -- I am happy to provide a copy to the court -- is their manual of rules and regulations in the state of Mississippi concerning adoptions, 900 pages

long.

Two things with respect to the arguments made by my friend. First of all, the assumption that he makes in his arguments is that all home studies that are done in the state of Mississippi are done after a chancery court proceeding is filed. That is not true. In a host of adoptions and, indeed, in his own affidavit at paragraph 12, he admits that it is not uncommon both, frankly, in private and public or foster-care adoptions for the parties to go ahead and get a home study in place conducted and then file for the adoption.

And, indeed, your Honor, if you think about it, that makes sense. If you have a baby -- if you want to adopt a newborn through a private adoption agency and you're waiting kind of to see if the baby's born, most parents in that situation get the home study done, get the papers together, have it all ready through the private adoption agency, and then when the baby's born, file for the adoption.

But MDHS is omitting a crucial part of its role. And it's in our complaint and it's in the testimony, which is MDHS serves a crucial function in terms -- it's in these regulations -- in terms of licensing in the state of Mississippi the private social work agencies who are qualified and capable of conducting such home studies.

And the unrebutted testimony in the complaint is that the plaintiffs in this case have been told that if they -- when

they tried to get a private home study through a social worker in Mississippi, they were told that they were -- that the agency was afraid to do that because if they did, they would either lose funding or have negative repercussions from MDHS.

Now, it's not difficult for MDHS to solve the problem here, your Honor. All they have to do is promulgate a regulation in this booklet (indicating) that makes it very clear today that a private social work agency in the state of Mississippi is permitted to conduct a home study for a gay married couple and that no negative repercussions will happen to them in connection with funding or anything else should they do so. That is more than sufficient.

Causal -- the causal relationship for standing is not like a 10b-5 case. It's not even like a tort case. All it has to be is an indirect relationship to the plaintiff's harm. And here not only is there not -- is there an indirect relationship, there's a direct relationship.

Moreover, with respect to the voluntary cessation arguments that your Honor was making, they could have solved that problem already. We submitted a stipulation in this case to the defendants that your Honor was copied on asking them to concede that -- that they were taking various positions in the state of Mississippi and that with respect to MDHS that there was --

THE COURT: Can you slow down just a bit.

MS. KAPLAN: I apologize, your Honor. We asked -- we sent them a stipulation asking them to agree that in light of *Obergefell*, there were no issues with gay couples adopting in the state of Mississippi. And, typically, in a case when you submit stipulations to the other side, if maybe they want to change your wording one way or the other, they come back with a new draft. That was not what MDHS did here.

They refused to sign the stipulation and refused to make clear precisely what our clients want, which is clarity -- statewide clarity in the state of Mississippi that gay couples can get home studies whether ordered by a court -- we presume that they would follow any order by a court. That's not the question -- or a home study by a private social work agency who can do that and not be afraid that there will be negative repercussions from MDHS because, of course, your Honor, there's a statute which on its face says that gay couples, married or unmarried, can't adopt children in the state of Mississippi, a statute that you heard the attorney general say he believes is still constitutional.

THE COURT: All right. Break your argument down. With respect to the application process, break it down per couple because it -- you know, I think the facts are a little different with respect to the stepparent claims versus the ones who haven't done anything yet versus the ones who are trying to be foster parents.

MS. KAPLAN: As always, things with kids, your Honor, adoption is complicated. So my understanding is with respect to stepparents today in the state of Mississippi, the couple still has to file the petition together. Okay. So it's not this argument that it's one person filing a petition is not correct if it's a married couple in the state of Mississippi.

There is an argument that a home study for stepparents is not required. But there's also an argument that if you wanted to be absolutely safe, if you are a new gay married couple in Mississippi and you want to get this done, you would go ahead and hire a private agency to do the home study so you can get the adoption done as quickly as possible.

And there is a legal question, which I think is at best incredibly unclear, whether under the statute that adoption would be prohibited whether it's an adoption by a single person, even though you're married and you're a stepparent, or an adoption by a couple, a gay couple, which is clearly prohibited by the statute. So that's the situation with respect to the two separate couples.

THE COURT: Say it again. I didn't follow that last part.

MS. KAPLAN: Right. So two issues with respect to the couples. One, in an excess of caution, it would not be -- it would be prudent for them -- many people would do this -- would have a home study done. This is a relatively new phenomenon in

the state of Mississippi.

In order to do that, they need someone in Mississippi to actually conduct the home study. And they've been told up to now that no agency in the state of Mississippi will do that because of the statute, a statute that the AG is still saying is constitutional and a statute that the MDHS has issued no guidance on to say -- in this huge manual they have, to say to these agencies, *Okay. Given Obergefell, it's now okay.*

Let me just cut to the relief that we're seeking here actually --

THE COURT: No. Actually, I want you to back up. You said that there was an ambiguity in the statute.

MS. KAPLAN: Yeah.

THE COURT: That's what I didn't follow.

MS. KAPLAN: Yeah. So the am -- the second piece of it is the ambiguity in the statute. The section says adoption --

THE COURT: All right.

MS. KAPLAN: -- by couples.

THE COURT: Ms. Kaplan, Gina can't keep up with you --

MS. KAPLAN: I'm sorry, Gina.

THE COURT: -- like that. You need to --

MS. KAPLAN: She's unfortunately had to deal with me previously, but I apologize again.

THE COURT: You're not on a clock. So if you want me

to follow you, you've got to slow down.

MS. KAPLAN: So the statute itself says that adoption by couples of the same gender is prohibited. And the question that exists is whether an adoption by a gay married stepparent is an adoption by a couple and, therefore, prohibited by the statute or an adoption by a gay person, individual. Okay? And that is an unsettled question under Mississippi law.

The one thing we do know is that gay couples would -- if you have a stepparent adoption, you have to both file the petition in the chancery court. Can't just be the nonlegal parent who files. Both parents have to file.

And it will be then a question -- again, the kind of clarity we want, we're trying to seek in this case -- whether or not judges in the state of Mississippi are prohibited from doing that adoption under the statute or whether it's an adoption by a single person. Okay?

THE COURT: Well, did you just step into a *Pullman* problem there?

MS. KAPLAN: No, because a *Pullman* problem only comes up if the -- first of all, *a Pullman* problem doesn't solve the foster parents who are plaintiffs in this case. And a *Pullman* problem -- courts only apply the *Pullman* if it's absolutely obvious that there's a state issue that can avoid this issue. And there's not absolutely obvious that there's a state issue that can avoid this.

And it's even worse because here if they go to the chancery court and they get some ruling, those records are all under seal. There's not going to be any public opinion one way or the other for any other couple in the state of Mississippi that will tell them what they can or should do. It has absolutely no precedential value.

The only way there's precedential value is if they lose and they appeal to the Mississippi Supreme Court.

THE COURT: You're saying under *Pullman* that if it's in the context of a sealed case, then *Pullman* doesn't apply?

MS. KAPLAN: I'm not saying it doesn't apply; but I'm saying in the context of *Pullman*, courts look to the question of whether there will be a resolution -- a good chance of a resolution of the issue, avoiding the federal constitutional question by virtue of the state court proceeding.

And here that's virtually impossible, at least until you get to the Mississippi Supreme Court. It won't have -- no other couple in the state will know what that chancellor did or did not do.

THE COURT: Well, do you -- okay. Do you have any authority that says that?

MS. KAPLAN: It's -- I don't have a *Pullman* case that's come up in connection with this sealed adoption proceeding, your Honor. But it's clearly relevant to the policies and procedures and case law under *Pullman*, including

the Fifth Circuit direction that *Pullman* is a doctrine that is to be applied sparingly in federal court cases when there's clearly federal court jurisdiction.

THE COURT: But are you saying that there is an interpretation of the Mississippi statute that would allow adoption?

MS. KAPLAN: No. I don't. I'm saying that they have been ambiguous. I believe that since a couple applies to adopt and the statute says that adoption by gay couples is prohibited, that unless the chancellor finds the statute unconstitutional, then they will deny the adoption. And they can't even get there in most circumstances because they will not be able to find a private agency that will conduct the home study.

THE COURT: All right.

MS. KAPLAN: With respect to the AG --

THE COURT: I'm sorry. I'm not sure you answered the question I had for you.

MS. KAPLAN: Sure.

THE COURT: I follow the argument -- and I haven't decided any of the issues. So don't -- nobody read anything into that. But I follow the argument with respect to MDHS blocking applications in the foster-care context, and I've heard testimony today in that context.

But I believe I need to look at the standing of each

individual plaintiff to determine whether they have standing. And, for example, Mr. Matheny I think pointed out that the two couples that have the motion that's in front of me today are not in the foster-care context. They're stepparents.

MS. KAPLAN: Correct.

THE COURT: So I need for you to -- assuming for the sake of argument that the executive director is blocking foster-care applications, foster-parent applications, that's not going to impact those that are trying to become stepparents.

MS. KAPLAN: Correct.

THE COURT: They are stepparents.

MS. KAPLAN: Correct. So there are two issues there. With respect to stepparents, the issues are, again, that given the -- given that when you want to adopt a child you usually take all precautions and do everything possible to assure that you have the most complete possible application to the court and that that typically includes -- or in this situation would include a home study just so that there's absolutely no question -- in fact, that's what these plaintiffs had done in the past, they tried to do in the past.

What we need from MDHS is promulgation of a regulation -- and this -- in Mississippi -- or guidance in Mississippi that no private social work agency that conducts home -- most home studies are not done by MDHS, your Honor.

They're done by private agencies -- and that no private agency is prohibited from conducting a home study in light of the Mississippi adoption ban and the *Obergefell* decision, and that any agency that does that will suffer no negative repercussions in terms of licensing or funding from MDHS, which is what the testimony in the complaint says. Excuse me. Not the testimony, the allegations. I apologize.

THE COURT: Right. Well, that's what I was about to ask you. Is that part of your prayer?

MS. KAPLAN: What our prayer is -- and I was going to go to that. What our prayer is is that this court issue a declaratory judgment as to the executive director of MDHS and as to the attorney general that the Mississippi adoption ban, which, again, doesn't speak to marriage -- it speaks to gay couples -- is unconstitutional; and then an injunction that the attorney general and the MDHS issue regulations or directives or, in the case of the attorney general, opinions consistent with that order.

In the case of MDHS, as I've suggested, I think that that would include -- I don't think the court has to tell them what to do, but I think at a minimum it would include a directive that makes it clear in the state of Mississippi today that any private social work agency can conduct a home study of a gay couple -- a married gay couple today and there will be no negative repercussions for that.

With respect to the attorney general, I think that would mean -- and, again, I don't think the court has to specify this. I think you can just say appropriate action consistent with that order. But I think with the attorney general, at a minimum, would be clarification of the prior attorney general opinion that you noted was issued to a chancellor in this case and, clearly, has been read by chancellors throughout the state, making it clear that today in light of *Obergefell* the Mississippi adoption ban does not apply and that gay couples can adopt in the state of Mississippi.

And, indeed, in the adoption -- excuse me -- in the divorce case that was decided yesterday by the Mississippi Supreme Court, the attorney general actually conceded that gay couples should be permitted to divorce in the state. I don't know why he's taking the position.

I don't know what the argument is, frankly, that adoption is somehow different under *Windsor* and *Obergefell*; but the attorney general was perfectly capable in that case of conceding that that was the truth. And what he can and should do here is clarify in connection with your judge's order the prior opinion he issued.

THE COURT: Let me give you a chance to address it because I think I'm going to hear in it a second. And when I read your amended complaint, I don't see it asking for that list of things you just threw out. You're asking me to declare

that the statute's unconstitutional and to enjoin anybody from applying it and for attorneys' fees.

MS. KAPLAN: Yeah. I think the -- if the defendants that remain in this case are -- which is what your Honor seems to be thinking, are the executive director of MDHS and the attorney general, then I think the appropriate order for your Honor to enter would be that the Mississippi adoption ban is unconstitutional in light of *Obergefell* and *Windsor*, and that both the executive director of MDHS and the attorney general should take appropriate action consistent with that opinion. To be honest, your Honor --

THE COURT: But what -- okay. I've been --

MS. KAPLAN: That's what they did in the marriage case.

THE COURT: I've been wanting to talk about the attorney general. So let's get to him for a second.

MS. KAPLAN: Right. I don't think you need to specify. I think they knew what to do in the marriage context, and I think they would know what to do in this context. I don't think it's going -- I don't think we're going to have any enforcement issues. I don't think --

THE COURT: I think that's very different. I mean, the attorney general is charged with the duty of representing the state. And so in the context of the -- I don't know the name of the case, but the case decided yesterday by the

Mississippi Supreme Court. The attorney general decided in that case not to contest the point. And we'll get into it later.

There are distinctions between the fundamental right to marry versus the benefit of adopting. So I'm not going to get into the attorney general's head, but there are differences in those cases. And, basically, you're -- when you say they know what to do, I mean, you're almost saying I should tell them they need to drop this case.

MS. KAPLAN: No, your Honor. I wasn't talking about that in connection with the divorce case. What I was talking about it, in connection with the CSE case. When we brought the marriage equality case before Judge Reeves and it was unstayed and then we got an order and then there was an enforcement order from the Fifth Circuit, the attorney general then took action.

There were some clerks in the state of Mississippi who were hesitating. And the attorney general took care of it and took appropriate action to make sure that that order was enforced --

THE COURT: But the problem I --

MS. KAPLAN: -- but he didn't have to tell them what to do.

THE COURT: The problem I have here is we're not dealing with court clerks. And I don't think that the attorney

general can enter an order that says the chancellors have to --

MS. KAPLAN: I agree. All he has to do is clarify -- revoke and clarify his private opinion -- his prior opinion, which all attorney generals -- which all chancellors in the state treat now as binding authority or certainly persuasive authority. And the Supreme Court has held that an opinion from an agency like that, being persuasive authority, is sufficient to confer standing.

THE COURT: Let me ask you this. If the only thing that happens in this case is that he withdraws that opinion, does that give you the relief you need?

MS. KAPLAN: Yeah. Well, no. We need the MDHS relief. But with those two things, yes. I don't think we're going to have any problems in the state of Mississippi, your Honor.

THE COURT: She lost you.

MS. KAPLAN: I apologize. Yes. I am confident --

THE COURT: Wait. Wait.

MS. KAPLAN: -- that chancellors --

THE COURT: Wait. Gina, where are you?

(REPORTER READ BACK)

MS. KAPLAN: I believe as to the attorney general, yes, your Honor. I do not believe that there will be any future issues in the state of Mississippi, just like we didn't see in Mississippi the kind of situation you've seen in Alabama

and Kentucky in the marriage context, if the attorney general withdraws that opinion. I think it will be very clear to chancellors throughout the state that the -- that it is now permissible for gay married couples to adopt in the state of Mississippi.

And with respect to MDHS, again, what we need is -- it's not a lot, but what we need is clarification -- first of all, we have this foster-care issue that came up today. But, again, if your order issues a declaratory judgment as to MDHS that the Mississippi adoption ban cannot be -- is unconstitutional, I think that will clarify that.

I think those -- those applications will start moving very quickly. And I think it will be clear -- maybe it's not even necessary to have a directive, but I think it will be clear to social work agencies in the state of Mississippi that it is okay for them now to do home studies for gay married couples.

I don't think we need anything more than that, but I do think we need that, because you heard today already from a live witness the situation she's encountering. We have an attorney general opinion that says the opposite of that, which in Mississippi, like in any other states, attorney general opinions stating the law are treated as very persua- -- they should be -- persuasive authority by the chancellors.

THE COURT: But the attorney general opinions in

Mississippi, don't they pretty typically say, *We're not passing judgment on whether or not they -- on the federal issues that may be implicated*? They just give an opinion on the state law issues. In fact, one of the opinions that you cited says just that.

MS. KAPLAN: Yeah, but you have that combined now with the position they're taking in this case, that the Mississippi adoption ban is still good law and still enforceable. So we're in a bit of a conundrum right now. And if you issue a declaratory judgment as to the AG that it's not constitutional, I don't think -- I think that problem will go away.

THE COURT: Let me ask you, in terms of the opinion --

MS. KAPLAN: Yep.

THE COURT: Oh, shoot. Is it *Bennett v. Spear*?

MS. KAPLAN: Yeah, I just -- I actually just have that in front of me, your Honor.

THE COURT: I mean, I took a look to see what I could find in terms of opinion writing by attorney generals and whether that creates standing. And there's not a lot out there. There are cases that say an unbinding attorney general opinion does not created standing.

Bennett v. Spear was dealing with an opinion not from an attorney general but from an agency, and it seemed to me -- and this is what I want you to address -- and it seemed to me that the court was taking a hard look at the extent to which

that opinion had a coercive effect.

MS. KAPLAN: So what the Supreme Court said in the *Bennett* case -- well, let me back up for a second. I think one of the reasons for the dearth of authority on this, your Honor, is the fact that -- and it goes back to what you were saying earlier about injury -- is that there is -- none of the cases they're citing on -- in this case are equal protection cases.

There is a very strong line of authority in the Supreme Court and in the Fifth Circuit that when you have an equal protection challenge, which is what this is, to a statute that on its face excludes a category of citizens from some benefit or protection under the law, then the kinds of issues that courts typically looked to in other situations, even due process cases, frankly, do not apply; and that that not only is the injury presumed, but the traceability standard, which the Supreme Court has already said in the context of this is very low, is indirect causation, nothing even close to tort causation, is satisfied. So in the *Bennett v. Spear* case --

THE COURT: Well, let me stick with where you were for just a second. What is your best authority in terms of the elements of standing in an equal protection context?

MS. KAPLAN: In terms of injury?

THE COURT: No, in terms of the elements, the --

MS. KAPLAN: The elements of standing are the same.

THE COURT: They're the same under equal protection or

due process.

MS. KAPLAN: Yes.

THE COURT: So explain to me the distinction you were making.

MS. KAPLAN: Yeah. So when --

THE COURT: You said the cases are distinguishable because they're not equal protection cases. But it's the same three prongs?

MS. KAPLAN: It's the same three prongs. But when courts look at equal protection cases, particularly cases like this challenging an exclusion of a group of people, they not only assume that injury exists, number one, and then when they look at both redressability and causation, which, again, is a weak standard, they typically find -- first of all, it's often not even raised, these challenges; but when they do come up, they typically find them to be satisfied.

THE COURT: But are you saying that they're -- I mean, you still have to -- you still have to be able to show that the injury was caused by the defendants' --

MS. KAPLAN: You have to find that there's a --

THE COURT: -- conduct.

MS. KAPLAN: No, not -- no, you don't, your Honor. You'd have to find that there's an indirect link between the plaintiffs' injury and the defendants' conduct. So an opinion by the attorney general is clearly enough under the *Bennett v.*

Spear case where there the question was how much water is going to be released in the future.

And the court found that an advisory opinion which serves an advisory function by the Wildlife and Fish -- the Wildlife and Fish Commission was enough to establish standing. They hadn't set any definite standards in connection with the plaintiffs, but that advisory opinion was enough.

THE COURT: But, I mean, in that case didn't they say that if the opinion had been ignored, it would have been ignored at the actor's risk and there were potential penalties associated with it and that there was a, quote, powerful coercive effect in action, close quote, on page 168 through 169?

MS. KAPLAN: My understanding -- and I -- I believe that what they held is no different than the opinion here.

THE COURT: But what is the -- I guess what I need to know is how are you linking an opinion that was written whenever it was written to the actual injury that is suffered here? The injury that's suffered here is that the Mississippi legislature passed a law that singled out your clients.

MS. KAPLAN: Yeah. And the state agency -- the director of the state agency that promulgates regulations --

THE COURT: I'm talking about the attorney general right now.

MS. KAPLAN: -- and the attorney general has issued an

opinion applicable to one of the chancery judges where our plaintiffs would have to file. Not only that, that's obviously, similarly to *Bennett v. Spear*, going to have the same kind of advisory function on chancellors throughout the state that says that that law is good law.

THE COURT: So you're saying that that advisory opinion carries the same force as the opinion in *Bennett v. Spear.*

MS. KAPLAN: I believe it does, your Honor. In this context I believe it does. We're not aware of any chancellors in the state of Mississippi who have in any way deviated from that opinion. And we're hearing -- you've heard testimony today that already gay couples are having difficulties applying even to foster.

And let me get back to what the standard is. In *Comer v. Murphy Oil*, the Fifth Circuit said that for issues of causation, the Article III traceability requirement need not be as close as the proximate causation needed to succeed on a tort claim. Rather, an indirect causal relationship will suffice. There is clearly, your Honor --

THE COURT: But, I mean, in fairness, *Comer* is not good law.

MS. KAPLAN: What?

THE COURT: It was vacated.

MS. KAPLAN: It was vacated, but when the -- well, but

the --

THE COURT: Let me ask you. I mean, the Fifth Circuit is clear that if it's vacated, it's as if it didn't happen. So, I mean, do you have other authority that -- by the way, I don't disagree with what *Comer* says based on the facts of *Comer*. *Comer*, the defendant was basically making the argument there's -- there's no causation -- *I didn't cause the injury. Therefore, there's no standing.* And the Fifth Circuit made the pretty obvious --

MS. KAPLAN: Right.

THE COURT: -- comment that, well, you don't have to necessarily win your case before you can prove standing.

MS. KAPLAN: Well, not only that, your Honor, what they said in *Comer*, which the Supreme Court has said and which is clearly the case, is it's not -- they would like you to think that it's the same kind of causation that you see either in a 10b-5 case, securities fraud case, or even a tort case. That's not what's required.

There has to be some relationship between the conduct of the defense -- clearly, there has to be some kind of relationship between the conduct of the defendant and the plaintiffs' injury, but it doesn't have to be the sole, the only, the most direct source of that -- of that injury. That's clear -- clearly true.

It's not -- it would be very good for them if it was

the same standard as 10b-5 or tort, but it's not. And that's why the court for standing, particularly on a motion to dismiss, treat this causation standard in a much more relaxed standard than the defendants would have your Honor believe.

THE COURT: All right. I'm going to take a break here in a few minutes. I want to hear from Mr. Matheny. Is there anything else that you want to add?

MS. KAPLAN: Yeah. Let me -- if I may have a second just to look through this, your Honor.

(COUNSEL EXAMINED DOCUMENTS)

MS. KAPLAN: On this issue that we've been discussing, your Honor, about what the standard is, the standard that the court has said in *Bennett* and others is that in -- and they emphasize this in *Bennett* -- was that the injury had to be fairly traceable. Fairly traceable. Again, very different than a sole or direct or even a proximate cause of the plaintiffs' injury.

THE COURT: What's the best case in terms of providing a definition of what "fairly traceable" means?

MS. KAPLAN: I think -- well, you know, there's -- let me -- I think the best case on fairly traceable, frankly, is in *Bennett* and the cases citing *Bennett*.

THE COURT: Before you sit down, though, you need to address *Okpalobi*.

MS. KAPLAN: Yeah. I was just going to get there. I

want to address two cases, *Okpalobi* first. So in *Okpalobi*, your Honor, which was a challenge -- a due process challenge to a statute that had been promulgated in Louisiana that gave women injured in an abortion a private right of action against the abortion doctor, at least two contingencies had to occur before that private tort statute came into play.

One, obviously, the woman had to be injured during an abortion; and, two -- and this is more important, frankly, she had to decide to exercise her private tort remedy to sue the doctor personally under the statute. Indeed, the Fifth Circuit in *Okpalobi* emphasized that what was being created by that statute, which was Act 825, was a private right of action against her abortion provider.

And under those circumstances, the Fifth Circuit understandably concluded that the governor -- and that makes sense. It would make sense to anyone -- that the governor and the attorney general have no power to tell a private woman or anyone, frankly, when they should exercise a private tort remedy against anyone in connection with the statute. So their connection between what this woman would or would not do under this private tort remedy and their action obviously was incredibly distant, if it existed at all.

Here -- and the Fifth Circuit explained it in these words. It said if Act 825, a private tort statute, is on the public interest side of the continuum, then almost anything can

be said to affect the public interest. And I agree with that, your Honor. It's about a private individual's decision to sue.

The Mississippi adoption ban, however, could not be more different. It has nothing to do with a private right of action. And on its face it bars all state officials, including all the people in the MDHS, from allowing gay couples to adopt.

And, your Honor, I have to point out, that's why you keep hearing this distinction between foster care and adoption. The statute on its face does not bar gay couples from fostering children. So that's why you keep hearing MDHS saying they can foster children, because there's no statutory bar. But there is, in fact, a statutory bar to them adopting children.

And that -- for that reason and because that statutory bar has long existed, it has prevented gay couples in this state up until now and continuing today from taking the steps necessary to either get home studies or to get -- to actually go through the foster-care system.

THE COURT: You say that it affects all elected officials. I mean, in what way does the governor have anything to do with deciding whether or not a gay couple can adopt?

MS. KAPLAN: Executive director of MDHS reports to the governor. The governor sets the policy as a matter or executive policy.

THE COURT: You know there are plenty of cases that say that's not enough.

MS. KAPLAN: The connection -- the governor here and the executive director of MDHS both are responsible for the policy in the state as to whether a Mississippi gay couple should be permitted to adopt in the state of Mississippi. But as your Honor said, I'm focusing here on the attorney general and on the executive director of MDHS.

THE COURT: And for the attorney general, just to put a point on it, you're relying on the fact that he issued an opinion before *Obergefell* that addressed a different issue, but he -- but he referenced this statute.

MS. KAPLAN: He issued an opinion prior to *Obergefell* referencing the statute and he's taken the position publicly post *Obergefell* that the statute is still valid. He's done two things.

THE COURT: But anybody can state a position. He has no authority to grant or deny an adoption and he has no authority to decide whether or not somebody gets a home survey.

MS. KAPLAN: MDHS has that in connection with its licensing regimen over --

THE COURT: What I'm looking for --

MS. KAPLAN: -- private adoption -- private agencies.

THE COURT: Hang on. I'm looking for something specific with respect to the attorney general that has any impact on this particular statute.

MS. KAPLAN: By issuing the opinion, your Honor, that

he issued and then by saying effectively that post *Obergefell*, that that opinion is still a good opinion -- and that's effectively what he has done in this case by defending the constitutionality of the Mississippi adoption ban -- then he -- what the attorney general has done and said both stigmatically probably just as importantly and specifically is he's not only told chancellors that they should continue to follow his opinion, number one, but stigmatically he has told gay couples throughout the state of Mississippi that their marriages and their families are not as good as the marriages of straight couples and straight families, a holding that is directly contrary to the Supreme Court's decision in *Windsor* and *Obergefell*.

He's the chief law officer of the state and he's issued an opinion on this and he's now said that that opinion is still correct and still binding.

THE COURT: I mean, well -- and this probably bleeds over into the Eleventh Amendment, but *Ex parte Young* says just because the attorney general may be called upon to defend the state --

MS. KAPLAN: We're not -- we're not seeking to invoke jurisdiction because he defends the state.

THE COURT: Well, you just said because he's taken a position here today, that that somehow causes injury.

MS. KAPLAN: But you have to read that position in

connection with his prior opinion. That position in this case read in connection with his prior opinion is a statement -- it has to be -- a statement that that prior opinion is still valid and is still the law in his view of the state of Mississippi.

And not only is that creating stigmatic injury day after day after day to my clients and their kids, but it's telling the chancellors of the state of Mississippi that they should abide by that prior opinion. And that's why we need a declaration as to the attorney general that the Mississippi adoption ban is unconstitutional.

You know, I -- as I said, I don't think we need anything more than that, but I think we need a declaration as to the attorney general, given those positions that the Mississippi adoption ban is unconstitutional.

And then I've spoken, of course, about same thing with respect to MDHS. And I believe that both the attorney general and the MDHS as responsible public officials will take whatever acts are necessary to enforce that declaration, which I am quite confident will include acts statewide pretty quickly that allow gay married couples in the state of Mississippi to adopt.

If you do it the other way, your Honor, what you're going to have is chaos. You're going to have a bunch of couples -- or what they would like to happen is a bunch of couples filing petitions with chancellors that will be under seal, that will not be reported. No one is going to know in

any county whether or not they can actually adopt their kids.

Ultimately, maybe that decision will get to the Mississippi Supreme Court. And, ultimately, if the Mississippi Supreme Court -- there's a .89 chance -- .89 percent chance that it will get to the Supreme Court.

And what the -- the logical consequence of what the defendants are arguing is that gay couples' in Mississippi only chance of asserting this constitutional rights with respect to adoption under *Windsor* and *Obergefell*, assuming they don't win in the Mississippi Supreme Court, is the .89 percent chance that the Supreme Court will then take cert from the case.

That is not what a long line of cases in this country, including Justice Friendly's opinion, including the other opinions that we cited in our brief, including, frankly, the *Pullman* abstention doctrine and all the other abstention doctrines, say when it comes to the obligation of a federal court to decide issues of federal constitutional law when properly presented to them. And there can just be no question as to MDHS, no question, that there's jurisdiction --

THE COURT: You mean Berry.

MS. KAPLAN: Excuse me?

THE COURT: MDHS is an arm of the state.

MS. KAPLAN: I'm sorry, your Honor?

THE COURT: MDHS is an arm of the state.

MS. KAPLAN: I meant the executive director. I

misspoke. I apologize.

THE COURT: Anything else?

MS. KAPLAN: Let me just look quickly.

(COUNSEL EXAMINED DOCUMENTS)

MS. KAPLAN: I'm not hearing -- I'm not hearing defendants still arguing that we have any causation problem anymore. I think it's clear that you don't have to actually file for an adoption petition in an equal protection case such as this in order to have injury.

And, indeed, it's quite interesting. If you look at the *Gratz-Bollinger* case -- and it comes up often in the context of affirmative action, interestingly enough -- the courts have held over and over again that plaintiffs challenging affirmative action regimen do not have to actually apply or do the kinds of actions that they say that these plaintiffs would have to do.

In fact, in *Gratz* the kid said that he would intend to transfer to University of Michigan of Ann Arbor; he had not applied to transfer. And the Supreme Court said that that was more than sufficient for injury.

THE COURT: Is it -- I don't know how you pronounce -- I'm terrible about pronouncing case names.

MS. KAPLAN: Sure.

THE COURT: But it is "Loo-han" or --

MS. KAPLAN: "Loo-han."

THE COURT: -- or "Loo-john"?

MS. KAPLAN: You know, I don't know, your Honor. I'm saying like I know, but I don't know. I apologize.

THE COURT: That seems to me to be the case that I look to to determine whether or not there's enough. I mean, there the plaintiffs have a someday aspiration to potentially be in a position where they could be affected. And I think the language that the court used is they've taken no concrete steps towards doing that. Is that -- am I quoting that correctly?

MS. KAPLAN: No. I think that the -- the test in *Lujan* was whether people who are environmentalists, who care about the environment, have standing to challenge environmental regulations. It, frankly, is a prudential -- it's almost a prudential standing case, whether they're within the zone of interest to challenge an environmental regulation.

Here, again, in the equal protection context that almost never comes up. I mean, the people who are in the zone of interest affected by the Mississippi adoption ban are my clients. There's no question about that. And the attenuation --

THE COURT: Well --

MS. KAPLAN: -- between whether --

THE COURT: Okay. So --

MS. KAPLAN: I'm sorry, your Honor.

THE COURT: *Duarte v. City of Lewisville, Texas,* last

year, is an equal protection case, is it not?

MS. KAPLAN: I believe so, your Honor.

THE COURT: And in that case is where they quoted *Lujan's* concrete plans language. The issue in that case, if I recall, is a -- somebody on a sex offender list wanted to move.

MS. KAPLAN: Right.

THE COURT: And the defendant said, *Well, you know, you didn't try to buy a house* or whatever. But they had taken concrete steps towards trying to buy a house, and the Fifth Circuit said that was enough. They had talked to a realtor. They had gotten a --

MS. KAPLAN: Right.

THE COURT: -- they applied for a loan, those type of things.

MS. KAPLAN: Similar to what our --

THE COURT: But isn't that an equal protection case, and didn't they say you need to have concrete steps?

MS. KAPLAN: Well, that is an equal protection case that said you had to have concrete steps. But if you look at the *Gratz* and the *Bollinger* case -- at the *Gratz* case and the other -- the affirmative action case we cite, the court is very clear in those cases they didn't have to take concrete steps, that an intention to apply and the connection with a facially -- a statute that facially classifies groups in one way or the other was sufficient.

And the court couldn't be any clearer about that in the *Gratz v. Bollinger*. I think it's the *Jefferson County* case, which is another affirmative action case which says the exact same thing.

Moreover, as your Honor has pointed out, these clients have actually taken the concrete steps that they can within the regimen that currently exists in the state of Mississippi to adopt.

THE COURT: What about the couple that they're engaged? They said they'd like to adopt at some point in the future.

MS. KAPLAN: I'm not pressing the claims with respect to that couple, your Honor.

THE COURT: All right. Thank you.

MS. KAPLAN: Let me talk for a second about the other -- there are two main cases that the defendants rely upon, and then I will finish, your Honor, which is -- yeah. The other case I was talking about, the equal protection case where intent was enough, was the *North Florida Chapter of Associated General Contractors v. Jacksonville* case, and then another kind of minority set-aside situation.

In there the court said, "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier

need not allege that he would have obtained the benefit but for the barrier in order to establish standing."

The other -- other than *Okpalobi* -- I can't pronounce it, your Honor. I apologize -- the *Okpalobi* case -- I apologize if I just ruined the name of the -- the doctor's name in that case -- the other case that the defendants rely on heavily, the Fifth Circuit case is *Bauer*, the *Bauer* case. And that case is also factually and credibly different and distinguishable from the case here.

Bauer involved a due process challenge to Section 825 (sic) of the Texas Probate Code which provided for the appointment of a temporary guardian ad litem when a person is incapacitated. This woman, Bauer, who apparently was the beneficiary of a $500 million trust and allegedly was an alcoholic who suffered from hallucinations, had previously been the subject of temporary guardianship proceedings filed, it looks like in the most part, by her son.

In denying standing in *Bauer*, the court relied on the familiar, almost black letter principle that since there was no reason to think -- necessarily to know that this woman would ever suffer from hallucinations or require another guardianship proceeding in the future, there was no standing.

It's kind of the standard test of standing that the court then found there to be an exception in *Roe v. Wade* when they were talking about abortion, being capable -- repetitive

and capable of a few, this was the exception they were talking about. This is the standard. Again, the facts between this situation --

THE COURT: I think you're shortchanging that case more than just a bit. I mean, that case turned on whether or not the judge's actions were in an adjudicatory setting. And it quoted, Ordinarily, no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of that statute. That's what that case turned on.

MS. KAPLAN: What the court said in that case is that there was -- because there was no pending adversary guardianship proceeding against that particular guardian --

THE COURT: That's factually correct; but the case, as I read it, and the cases it cites, they distinguish between when a judge is acting in an administrative -- in fact, this is the tact you took in your brief. When they act in an administrative capacity, then, yeah, there may be a case or controversy. But when a judge is acting as a judge, he's not -- he or she is not an adversary to a party.

And that's -- and are you -- well, let me ask you this. Can you cite a case where a judge was -- where standing was found as to a judge who did not have a case in front of him or her and the party was challenging the constitutionality of a statute?

MS. KAPLAN: The Judge Friendly case that we cited about --

THE COURT: The Judge Friendly case, did that not deal with an administrative responsibility of the judges as opposed to an adjudicative responsibility?

MS. KAPLAN: Yeah, but what the -- but both Judge Friendly in that case and what other courts have relied on in these cases, if the only party for -- against whom you can bring the constitutional claim is the judge -- in fact, Judge Breyer in the court of appeal case talked about -- he assumed that judges would comply with the declaratory judgment as to constitutionality as to the other defendants.

If there's a declaratory judgment here as to other defendants, we don't need the chancellors. If, however, there is no defendant who can be sued about the constitutionality of the Mississippi adoption ban, then in those circumstances, in the exception set forth in those cases, then the chancellors who are not acting in any particular adjudicatory case, but if they are truly -- I don't think they are for the reasons we talked about -- but if they are truly the only Mississippi state official to enforce the Mississippi adoption ban, then in the opinion of Judge Friendly in that case and the opinion of Judge Breyer, frankly, in the *Puerto Rico* case, then it is appropriate to sue them only for declaratory relief, not for an injunction and not for damages, which we are not doing. I'm

waiving any injunctive claim.

THE COURT: But I have to deal with *Bauer*. Is there any binding authority that supports what you just said?

MS. KAPLAN: Yes, it's the *Puerto Rico* case I cited.

THE COURT: That's First Circuit, is it not?

MS. KAPLAN: Oh, binding you mean in the Fifth Circuit. I believe that *Bauer* stands for that proposition, your Honor, as well. I don't think that *Bauer* takes the position that if there was -- if there was a constitutionally -- if this woman actually was committed and wanted to challenge -- she was currently committed under a temporary guardianship, which she was not at the time, and wanted to challenge the procedures by which she was committed and there was no one else to sue, everyone else was taking the position, which I'm sure wasn't true in the city of Texas, that the only person to sue was the chancellors or whatever the equivalent things. I don't think *Bauer* stands for the proposition that they could not be sued.

There are not -- the general proposition in this case -- in this country is that federal constitutional rights can be vindicated. We don't want to sue judges and we didn't seek to sue judges here. We think we can get the relief we want from the executive director of MDHS and the AG.

THE COURT: Okay.

MS. KAPLAN: But if in the rare circumstance --

THE COURT: I'm going to have to cut you off. You've been -- I think you've had plenty of time. I ask you to wrap it up at this point.

MS. KAPLAN: Okay. I don't think --

(CONFERRED WITH COUNSEL)

MS. KAPLAN: I don't think I have anything else, your Honor.

THE COURT: I think you've said --

MS. KAPLAN: Oh, one more thing. I'm sorry. I can't help -- my son would say I can't help myself. I would refer your Honor to the *Spokeo* oral argument that happened in the Supreme Court on Monday. That was a -- is a case about whether Congress -- I mean, it shows how far removed they are from the situation here -- can create a statutory cause of action to give a plaintiff a cause of action for a misreporting under an accredited agency even if the plaintiff hadn't been harmed. And I don't know how the Supreme Court is going to decide, but you can read the colloquy of the justices. And they thought whether or not that presented standing was a real live issue.

THE COURT: Okay.

MS. KAPLAN: So trust that to the situation of these people who just want to adopt their own kids, your Honor.

THE COURT: All right. I was about to say I think you've said enough to where Mr. Miracle is wanting to respond, because you've gotten into his clients pretty hard. I'm going

to take a 15-minute break. We're going to come back. I almost never set time limits, but I think I'm going to have to now because we've got -- we still have two big issues to address --

MS. KAPLAN: Okay.

THE COURT: -- that we haven't touched. So court will be in recess until 3:30.

(RECESS)

THE COURT: All right. Mr. Miracle, do you want to say anything?

MR. MIRACLE: Very briefly. Just for the record, your Honor. I certainly think *Bauer* could not be more clear that the requirement of a justiciable controversy is not satisfied when a judge acts in his adjudicatory capacity. My appreciation for *Bauer* was -- the linchpin was was it adjudicatory or nonadjudicatory. Everything then flowed from that. There's nothing here that the judges would do or would not do that would not be adjudicatory.

And I think the only other point I would stress is that there's nothing in *Bauer* to suggest, based on that holding, if -- if they're acting in an adjudicatory capacity, if flowing from that there's no justiciable controversy, then there can be no Article III standing.

Then the notion that, however, you set that aside and wait to see if they happen to be the last defendant standing, then on the back end there's no other state actor but the

judges, that then you can somehow leave them in the case, I mean, that just is completely inconsistent with the notion -- if there's no Article III standing to start with, if they're acting only in an adjudicatory capacity, which they would be, and if there's no Article III standing, then the argument I think was made was, well, but it would be okay if they were the only state actor left standing.

That would fly in the face of it and that would swallow Article III standing altogether. And I think that *Bauer* does answer the question as to the judges, your Honor. And I don't have anything further.

THE COURT: All right. Thank you. All right, Mr. Matheny, would you like to make a rebuttal?

MR. MATHENY: Thank you, your Honor. I want to hone in on this. There was a lot there and I think a lot that can, as we've been saying, bleeds over into other issues that we're going to get to. But on behalf of my client I want to hone in on this AG opinion issue.

And I think what's important, because there has been a -- there was a lot of talk about it. What that opinion says is that two unmarried single persons cannot adopt jointly pursuant to 93-17-3(5). That's true if it's a male and a female, a female and a female or a male and a male. That's the law under 93-17-3(4).

That's the law in lots of states. That's not just

Mississippi law. That's the law -- I think that's the law in over half the states at least, if not more.

So I'm not sure how withdrawing or retracting or modifying that opinion that stated that proposition in an advisory nature to a hypothetical, how that's going to redress anybody's injury. And it certainly doesn't prove causation.

The only thing that I can say about the attorney general opinion further than that is just last Thursday, not yesterday, but, the week before, in *Basil v. Browning*, the Mississippi Supreme Court had an election contest case. One of the litigants, the appellees were relying on AG opinions.

And Chief Justice Waller I think it was wrote the opinion. He went out of his way to restate what the Mississippi Supreme Court and the Court of Appeals, Judge Southwick in his treatise, has stated over and over again, that attorney general opinions are not binding. And they're certainly not binding on courts.

And in the election contest case they decided -- they went through and just flat out said the attorney general's opinions are either incorrect or distinguishable. And we know that can't be the law that it could be binding, because then why would we need courts. We would just ask the attorney general if we could dictate what goes on there. But that's the specific point of rebuttal.

I do -- out of everything that was said, I do think

that this is important. This is not a shell game. What it is is, it is recognition that there are some statutes that don't enforce themselves. There are some statutes that are on the books that judges adjudicate cases under and that judges interpret and apply and if they find to be unconstitutional, they can overrule; but the notion that statutes don't enforce themselves, therefore, it has to be some executive branch official that you can trace to the enforcement statutes is just not correct.

Some examples would be statute of limitations, the *Smith v. Beebe* case quoted in my brief is a brief case, but it recognizes that, albeit under Eleventh Amendment principles. You've got other state statutes like damage caps. Now, damage caps might get -- constitutionality of damage caps might get before this court if there is a dispute, say, where the court has diversity jurisdiction, like *Sears v. Learmonth*, where this court has to make a determination within the course of that case as to the statute's constitutionality. But you don't see damage caps cases where somebody goes out and says, *All these constitutional arguments about damage caps, I'm just going to go sue the AG* or *I'm going to go sue the AG and the governor and get a ruling from a federal court.* You file your action, you file your lawsuit in state court and you argue the constitutionality there, if there's not some other reason like diversity that it gets to federal court.

It's the same with Tort Claims Act. It's the same with other domestic matters, the *Mendez* and the *Gras v. Stevens* opinion that's a Judge Friendly case that was cited I think within *Okpalobi*. I'm not sure if that one made it into our brief, but it's certainly cited in there. I think that's those are the cases directly on point here. You've got *Okpalobi*, you've got *Mendez* you've got *Gras* and, of course, the other ones in the brief.

I wasn't sure if you wanted me to move on to the Eleventh Amendment arguments, or I think Mr. Goodwin has some rebuttal as to the DHS points that were made.

THE COURT: Okay. Let's make those quickly.

MR. MATHENY: Okay.

MR. GOODWIN: Your Honor, brief rebuttal. Counsel opposite said in her remarks that we had left out an important thing which was that home studies can be done voluntarily. That is true. The statute allows for a prospective adoptive couple to go and get a home study before they file their petition. That -- that process has nothing to do with DHS. You go to a private adoption agency or private social worker, request it and they do it. And then you present it to the court after you've filed your petition to adopt. But DHS only does home studies if ordered by the court.

And then their argument for how DHS is involved in the voluntary scenario is that they approach social workers who

said, *Sorry. We would love to, but we can't do the home study because DHS would, basically, retaliate against us and try to strip us of our license.* So we're going to find a causal connection here based on hearsay from a third party about what they feel DHS might do if they were to help the plaintiffs. That's a very tenuous thing upon which to base a causal connection, your Honor.

THE COURT: Well, under Rule 12(b)(1), I have to accept the -- unless they're disputed -- and it hasn't been disputed with any evidence -- I've got to accept that averment of the complaint as true, that it actually happened.

MR. GOODWIN: And it's impossible for us to refute. We don't know who the social worker was, who the -- you know, there are no facts, time frame, anything, social agency. So they've alleged this unidentified person, time, place and that they have a fear of what might happen. And that's all they have.

That's all I have, your Honor.

THE COURT: All right. Thank you.

MS. KAPLAN: Very briefly, your Honor.

THE COURT: No. We're going -- you will have the last word on your motion. They get the last word on their motion. And I'm now adopting the Fifth Circuit rules of hearings because we've plowed late into the day.

Mr. Matheny, you've got -- I'm going to give both

sides 20 minutes on Eleventh Amendment. Your time has started.

MR. MATHENY: Your Honor, I don't think it will take that long. I think there's enough --

THE COURT: Do you want to reserve any for rebuttal?

MR. MATHENY: Let me reserve three minutes.

THE COURT: Okay.

MR. MATHENY: If that will please the court. I think there's enough bleed-over between the issues on Article III and the Eleventh Amendment that it's really -- it's neither complicated nor does it take a very long time to explain, but, essentially, it's this.

The only way that the AG or any of the other executive branch defendants, for that matter, or the judicial -- the judicial branch defendants can be on the hook here is if *Ex parte Young* applies and if they can proceed under the *Ex parte Young* fiction.

Young clearly establishes a state's AG cannot be sued in federal court to test the constitutionality of a state statute based on the AG's duty to represent the state in litigation. I think that the *Fitts* case that's quoted there in *Young* clearly establishes that. And I think that, you know, if that wasn't the law, then it would just be the AG and the governor, you could just plug them in, and all of a sudden you don't have the Eleventh Amendment anymore because it would mean nothing.

So you have to have two things. You have to have a sufficient connection between the state official, here the AG, and the enforcement of the act that's being challenged, 93-17-3(5).

Now, we keep talking about what to call it. I'm calling it *Okpalobi*, and I'm sticking with that. But you've got *Okpalobi*. You've got all the cases that Judge Jolly was discussing in *Okpalobi*, *Young*, *Fitts*, the *Smith* case, and you've got this debate about how close a connection or what do you call it when you see all these terms, close connection, special duty, special charge, some connection and others in the cases about what degree essentially does a state officer have to have with the enforcement.

THE COURT: So let me just cut to the chase and ask you about that. Like all of us, I've read that case a few times. First of all, we're now talking about the plurality opinion. It states the test as you just described it and does it more than once. And it says that the exception only applies when the named defendant state officials have some connection with the enforcement of the act and threaten or are about to commence proceedings to enforce unconstitutional acts. And it says that more than once.

Later in the opinion, at 405, it says this, that "The necessary fiction of *Young* requires that the defendant state official be acting, threaten to act or at least have the

ability to act." And then it says, "It is this unconstitutional conduct, or at least the ability to engage in unconstitutional conduct, that makes him no longer a representative of the sovereign."

And so my question is, this language about the ability to act or at least the ability to engage in unconstitutional conduct, how does that interplay with the test announced earlier in that opinion?

MR. MATHENY: Well --

THE COURT: In other words, the first part of it says you have to have the ability to enforce it and you have to basically be in a position where you're about to do it. And here it says you have to at least have the ability to engage in unconstitutional conduct, which seems lesser.

MR. MATHENY: It does -- I mean, I would say all the different formulations seem to suggest an array or a range and a disagreement about it. Ability, if it -- if it's just the ability -- well, let me say it this way.

I think that Judge Jolly's formulation of requiring a close connection that's been quoted by later panels as noted in our brief, I think that that's the proper test. But even if it's not, even if it's just some connection or it's the ability to do it, I don't think that that can be met here.

What we're talking about is no connection. The attorney general's duties to defend state officials in

litigation, argue the constitutionality of statutes in court and render nonbinding opinions -- and that's what they key on is what he has the ability to do, that he might do, that would satisfy the connection prong of the *Young* case.

But he can't order judges what to do. He can't order a judge to decide an adoption case this way or that way. He can't direct anybody to do anything. His opinions are purely advisory.

So I don't think -- even if you say that it's just barely the ability, if that's just the test, I don't think that even the ability is met either for the attorney general to do anything other than his duties of -- if they challenge the constitutionality, you have to show up and argue the constitutionality of the statute or defend the state in court. But I don't think even if the test is ability, I don't think it's satisfied here.

THE COURT: All right. Anything else?

MR. MATHENY: I would say this. There's two other -- two other points. I was mentioning earlier the important cases cited in our brief. And because of the bleed-over, certainly, *Mendez*, *Gras v. Stevens,* the *McBurney v. Cuccinelli* case in the Fourth Circuit that I cited in my brief is important on this idea that the AG had some control through his nonbinding opinion.

THE COURT: The *Cuccinelli* case, they -- I may be

thinking of the wrong one, but didn't they say, *We're intentionally not going to address what would happen if the AG had actually issued an opinion*?

MR. MATHENY: That's correct. They said they're not going to address the issue of if he actually was going to issue an opinion or participate in the agency's decision-making process there. But as far as I know, the attorney general does not participate in a decision-making process of chancellors other than in his role as a litigant. And also the thing that I said earlier about the -- I don't think that this AG opinion from 2012 that we're talking about is on point.

There is this one other thing -- so those three cases, *Mendez, Gras, McBurney*. The *1st Westco* case out of the Third Circuit talks about opinions, and that was the one where the AG gives somebody else an opinion who goes and does something and that that wasn't sufficient. So you've got those cases.

Then there's this other idea that I think is important, because it -- in addition to the fact that you've got connection, you've got threat to enforce that's required under the Eleventh Amendment that's a little different from the standing analysis. You've got this thing -- and I think that maybe this speaks to the idea about the causation of standing versus what *Young* and what connection stands for, and that's in the *Children's Healthcare, The Legal Duty v. Deters* case I

think. It's the Sixth Circuit case cited in the brief.

And it talks about Supreme Court precedents like *Papasan* and other, you know, monumental Eleventh Amendment holdings. *Young* relief is appropriate to directly end a violation of federal law as opposed to relief intended to indirectly encourage compliance with federal law through deterrence.

I think that everything that's in the briefs, everything you've heard here today is enjoin the AG or issue this declaration against him because it's going to have some kind of indirect effect on other people. And like the Sixth Circuit that wasn't persuaded in *Deters*, I think that your Honor should not be persuaded by this idea that some indirect action against the attorney general and indirect conduct is appropriate when you're looking at this thing from a straight Eleventh Amendment immunity point.

MR. MATHENY: I'll reserve the remainder of my comments if there's no further questions.

THE COURT: Okay. Mr. Matheny, I kind of forgot that -- I'm sorry. Mr. Goodwin, I forgot that you and Mr. Matheny are kind of two sides of the same coin here.

MR. GOODWIN: Yes, your Honor.

THE COURT: So I'm going to give both sides 25 minutes. Y'all have used ten.

MR. GOODWIN: Your Honor, I'll just be just a moment.

I won't take long. I think the last point that Mr. Matheny made is a very important one, that a *Young* -- the *Young* fiction is used to directly end violations of a constitutional right. And in the DHS context you've got two -- two sets of plaintiffs who say that they can't get a home study -- a voluntary home study because of what someone's afraid Defendant Berry and DHS might do. That is as indirect as it gets. As for --

THE COURT: But you're going to have to address the testimony today that even after *Obergefell* that DHS was intentionally holding back applications for foster parents.

MR. GOODWIN: Yes, your Honor. Yes, your Honor. As to that defendant -- or as to those -- that couple, yes, that -- that's something that's -- that's testimony today that's in the record. There's not much we can do about that.

But as to the other -- the stepparent plaintiffs, there's just -- there's no way for this court to enjoin -- enjoin Director Berry and directly end a violation, a constitutional violation or an ongoing constitutional violation, against those -- those two sets of plaintiffs.

And, your Honor, that's all I have. Unless the court has some questions, I'll reserve any time I might have for rebuttal.

THE COURT: Okay. Thank you.

MS. KAPLAN: Your Honor, on DHS, take the director of DHS first. Here's the testimony and the evidence, the

allegations that we have in the record.

First, with respect to private adoptions we have now a concession by my friend that they didn't really brief that question; but it is true, in fact, that many, many couples seeking to adopt get home studies voluntarily and that those agencies who do those home studies are licensed by MDHS. There's no dispute about that. You cannot do a home study in the state of Mississippi unless you meet the licensing requirements and are officially licensed by MDHS.

Moreover, we have testimony that is, again, unrefuted that those private agencies who are available and have been approached to do that in the past have said that they cannot do it because of the existence of the statute, which, again, does not speak to marriage, your Honor, it speaks to gay couples, and that if they were to do that, they are concerned that given the statutory ban, which both defendants are saying is still in force -- I mean, it's kind of -- it's a little bit topsy-turvy, your Honor, because, on the one hand, MDHS is saying that the statutory ban is still in force; on the other hand, they're saying -- I'm not sure exactly what they're saying other than if they're ordered to do a home study, they would do it. But they're not saying that *We think the statutory ban no longer exists. Therefore, gay couples in the state of Mississippi can adop*t.

And so, understandably so, private adoption agencies

that have to be licensed by MHS, unless there is a statement to the contrary by MDHS about the statutory ban, have been and will continue to be unwilling to allow gay couples to get home studies in the state of Mississippi. And you also have a concession from counsel for MDHS that that is a key step in adopting.

These questions about -- of course, it's the chancellors that ultimately approve the adoption; but that would be direct proximate causation. And, again, your Honor, that is not the kind of causation that is required either for the Eleventh Amendment or for standing under the Constitution.

You further, as your Honor has pointed out with respect to MDHS, with respect to foster care have unrebutted evidence that despite statements from MDHS, again, which don't really make sense because they say -- they're not saying the statutory ban doesn't exist; what they're saying now, though, let gay couples apply, even though, again, the ban is not about married couples. It's about gay couples.

You have testimony from someone very -- about someone very high up in MDHS for fear of losing her job that it was her understanding that those applications had essentially been put on ice. With respect to the executive director of MDHS, that is more than sufficient not only to establish standing but to meet the *Ex parte Young* exception. Again, we're not seeking damages, only we're seeking a declaration and a prospective

order that appropriate implement -- appropriate actions be taken consistent with that declaration.

Now, with respect to the AG, again, I'm a little bit curious, because I'm looking at the attorney general opinion, which I heard Mr. Matheny say had nothing to do with 93-17-5, but it says under analysis, that Mississippi Code Section 93-17-3 provides in part -- relevant part as follows -- it cites (4), which is about married couples, and then it cites (5), "Adoption by couples of the same gender is prohibited."

And then it goes on to say -- I'm reading verbatim -- "Clearly, this statute prohibits adoption by same-sex couples." So I don't really under the statement that --

THE COURT: I've read it. I know the order that that -- and you sort of changed the order of that.

MS. KAPLAN: I read directly from what it says, Mississippi -- unless my printout is wrong, your Honor. Mississippi Code 97-3-1(5) --

THE COURT: I know. I --

MS. KAPLAN: -- cites (4), cites (5), and then says, "Clearly, the statute prohibits adoption by same-sex couples."

THE COURT: But then the analysis kicks in and they answer the question that was asked, which was not that question. I mean, I know what it says.

MS. KAPLAN: Okay.

THE COURT: So my question to you is with respect to

the attorney general, *Okpalobi* wasn't the last case -- even though it's a plurality, wasn't the last case the state -- the test, the test being that the official has some connection with enforcement of the act --

MS. KAPLAN: Right.

THE COURT: -- and threatened and are -- threatened, quote, and are about to commence proceedings to enforce the unconstitutional act. So in what way is the attorney general now threatening and about to enforce or commence proceedings?

MS. KAPLAN: Yeah, your Honor, if that's the standard for the exception for *Ex parte Young* under the Fifth Circuit, I would -- obviously, the attorney general here has not threatened to commence proceedings against any of the gay couples in the state of Mississippi.

As your Honor pointed out, there is language in the opinion that says -- suggests that the standard is not that stringent. And there are many, many other cases reported in the federal courts throughout the country that do not suggest in any way that the standard is that stringent.

THE COURT: Hang on a second. I mean, the Fifth Circuit -- and that case is not the last time the Fifth Circuit used that language. It used it again in -- let's see.

(COURT EXAMINED DOCUMENTS)

THE COURT: -- *Morris v. Livingston* last year. Said, "the duty to enforce the statute in question and a demonstrated

willingness to exercise that duty."

MS. KAPLAN: So what the attorney general has done here is issue an opinion directed to the chancellors saying that the Mississippi adoption ban prohibits adoption by gay couples and then, subsequent to the *Obergefell* decision which certainly I think calls that into question, has reaffirmed that opinion by taking a position in this case that the Mississippi adoption ban is not in any way affected by *Obergefell* and is, in fact, still constitutional.

THE COURT: But is there any -- maybe I'm beating a dead horse here. But is there any way that the attorney general is currently threatening to exercise any authority in a way that enforces the statute?

MS. KAPLAN: I believe that is enforcing the statute, your Honor.

THE COURT: By defending this case?

MS. KAPLAN: I -- no. I believe by -- at the -- the existence of the prior opinion and the current statements by the attorney general that that prior opinion is still in effect, he is enforcing an -- clearly, in our view, an unconstitutional law. And the opinion by him -- none of the other cases --

THE COURT: How do you -- then I guess I need to ask this. How do you define "enforcing"?

MS. KAPLAN: Well, that -- what he is saying is he is

re -- he is basically making it clear that his prior opinion --

THE COURT: I asked you a kind of specific question here.

MS. KAPLAN: Yeah.

THE COURT: What do the cases say in terms of defining enforcement?

MS. KAPLAN: Well, if the --

THE COURT: Didn't *KP I* or *KP II* address that?

MS. KAPLAN: The cases that they cite on attorney general opinion, unlike these case -- this case do not have an attorney general opinion directly on point issued directly to the issue. They talk about whether the attorney general having the ability to issue opinions is sufficient. And they say just the fact that you can issue advisory opinions on the law is not sufficient.

The other case that they cited, the *Westco* case, the attorney general opinion in that case has absolutely no effect whatsoever. So it's not directly relevant either.

THE COURT: My question to you is how the courts are defining the term "enforcement."

MS. KAPLAN: Your Honor --

THE COURT: And isn't it --

MS. KAPLAN: Okay.

THE COURT: I mean, *KP* -- and I can't remember if it was the first one or the second one -- define it as compulsion

or constraint. Isn't that right?

MS. KAPLAN: Yeah.

THE COURT: Okay. So in -- what is -- I think -- I mean, I understand your position is that he issued this opinion and it's still sitting there and that's enforcement of the statute.

MS. KAPLAN: Yeah. He issued an opinion that's still sitting on his -- has taken -- essentially taken the position that that opinion is still a binding -- is still a persuasive opinion that should be followed by the chancellors.

THE COURT: Would you agree that he has no authority to tell the chancellors what to do?

MS. KAPLAN: I would agree with that.

THE COURT: All right. Anything else on this?

MS. KAPLAN: No.

THE COURT: All right. All right, Mr. Matheny.

MR. MATHENY: Your Honor, I would just briefly and quickly say I think you covered all the points with your questions there.

I think what I'm hearing is that this all boils down to that if the attorney general defends his clients in a lawsuit filed against them or defends himself, then that's enforcement. And that's certainly not the definition of it under the formulation under *KP* or *Okpalobi* or *Young* or *Fitts* or any of the others. And that's all I'd have to say about that,

your Honor.

THE COURT: All right. Thank you. Mr. Goodwin, y'all still have a little bit of time left.

MR. GOODWIN: Just briefly, your Honor. Counsel opposite has said a few times that she doesn't understand the position that DHS can say, *Come and apply to foster, because we won't deny your application because you're a same-sex couple*, and the position that the adoption ban is in force and it's constitutional.

That's the whole crux of DHS's argument here is what we do, what DHS does, what Director Berry does, has nothing to do ultimately with whether the adoption -- whether the chancellor grants the adoption. We say you can be a foster parent, because that's what DHS does. They oversee the foster system. They take the applications. They approve fostering. They do home studies if ordered by the court.

But then past that point, it's up to the chancellor to decide whether or not to -- how they read the statute and whether or not the adoption is granted or not. And so to say under their policies, which are if you're married -- and these couples are now married after *Obergefell* -- you can be a foster parent. And so I just wand to make that point, your Honor.

And then as to the testimony we've heard about what some employees may be doing in the Tupelo office or -- I'm not sure exactly where, but I understood it to be the Tupelo office

maybe, that they're burying or, as she put it, they're putting them on ice, these applications to foster, there's been no allegation here, no testimony, no evidence, that any application filed by any of these plaintiffs has been buried or put on ice. And I just wanted to point that out, your Honor.

THE COURT: All right. Thank you. All right, Ms. Kaplan, your motion.

MR. MATHENY: Your Honor --

THE COURT: Yes.

MR. MATHENY: I'm sorry. Just kind of a point of order. On the *Pullman* issue that was part of the motion to dismiss, I can certainly and think it certainly is relevant to the plaintiff -- or the movants' motion and raise those issues there, but I just wanted to make sure we didn't miss the chance to discuss that issue. But I'm happy to bring it up within the context of our response to the PI.

THE COURT: Any objection?

MS. KAPLAN: No, your Honor.

THE COURT: Okay.

MS. KAPLAN: On the PI, your Honor, we have three witnesses. We have two sets of plaintiffs and an expert on child-rearing. Would you like us -- I assume you'd like us to start with the witnesses?

THE COURT: Yes.

MS. KAPLAN: Okay.

MR. KAYE: Good afternoon, your Honor. Our first witness is Donna Phillips, who's a plaintiff in this case.

DONNA PHILLIPS,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAYE:

Q. Good afternoon, Ms. Phillips.

A. Hi.

Q. Would you please state your name for the record.

A. Donna Phillips.

Q. And, Ms. Phillips, why are you here today?

A. My spouse and I, Jan Smith, we seek for a second parent adoption for the child that we've had together who's now eight years old.

Q. Okay. Ms. Phillips, could you tell the court about yourself.

A. Yes. I am -- Jan and I have been together for 20 years, and I currently work for the Mississippi National Guard as an auditor.

Q. Okay. And you're married?

A. Yes, we are married.

Q. Okay. Now, how long have you been with the National Guard?

A. Total for approximately 17 years.

Q. And have you been in the Air National Guard the whole time?

A. No. The majority of my career, until 2009, was spent with

the Army National Guard.
Q. Okay. Could you tell us about -- a bit about your time in the Army. Where did you serve?
A. When I was in the Army National Guard, I served in various positions. But I was mobilized for Enduring Freedom in 2003 and then again in response to Hurricane Katrina when that happened.
Q. Now, you mentioned that you left the Army Guard in 2009. How old was your daughter at that time?
A. She was just about two.
Q. And did your decision to leave the Guard have anything to do with your daughter?
A. Yes. Hannah had some significant allergy problems, sinus issues and seemed to be sick a lot during that time. So I received a letter to deploy to overseas. And I was concerned that Jan would have problems making sure that she had adequate health care and legal care since she didn't have any parental rights.
Q. Now, Ms. Phillips, are you a legal parent to your daughter?
A. I am. I'm the birth mother.
Q. So you carried and gave birth to your daughter, Hannah.
A. Yes. That's correct.
Q. But your wife, Jan Smith, is not.
A. She is not.
Q. Okay. When you left the army in 2009, did that have an

impact on your family?
A. Absolutely. We went from a two-family income to down to one. And then because the position I was in required me to be in the military to maintain my full-time job with the Mississippi National Guard, I subsequently lost my full-time job as well, which meant that I couldn't carry insurance for Hannah.
Q. What did you do then?
A. Well, Jan, of course, couldn't carry her insurance under hers because she had no parental rights. So we paid for out-of-pocket continuation of our insurance until I could get another job to cover her.
Q. Okay. Aside from leaving the army in 2009, have there been other consequences for your family of Jan not having parental rights of Hannah?
A. There's just a constant worry that were -- if anything were to happen to me, that Jan would not have those legal rights to take care of her. In addition, when we register for school or if we sign her up for any activity, I worry that whoever's in charge of that activity won't let Jan make decisions for Hannah because she's not a legal parent.
Q. Okay. Could you tell us about Hannah a bit?
A. Yes. She's a very active, very social eight-year-old. She's very involved in Girl Scouts, learning how to play the electric guitar, and she loves to do art.

Q. How long have you been with Hannah's other mother, Jan?
A. 20 years.
Q. When did you marry?
A. In 2013, shortly after the ruling -- *Windsor* ruling.
Q. Okay. And can you tell us about when Hannah was born? Was Jan there?
A. Yes. She was very involved. We had a very extensive birth plan in place so that there would be no questions when we went to the hospital that she would be able to make decisions for myself -- for me or for Hannah.
Q. Okay. When Hannah was born, was Jan's name on the birth certificate?
A. No. We left the father portion blank.
Q. So your name is on the birth certificate --
A. Correct.
Q. -- but Jan's is not. After Hannah was born, did you take steps to adopt for Jan?
A. Yes. We looked at -- we sought the advice of a local attorney to help us, and he gave us the information that the statute was in place that says two people of the same sex could not adopt.
Q. Okay. After that did you take any additional steps?
A. Yeah. After that we started to look into other states that were -- that had some type of way for adoption for a second parent that did not require residency. And we found that

Florida had that possibility. So we obtained a lawyer in Florida and started those proceedings.

Q. What happened then?

A. They told us that we had to have a home study from the state which we resided in.

Q. Okay. And what happened then?

A. We contacted several private social workers to conduct a home study. Most of them referenced the fact that the statute was in place, that they couldn't. And some expressed concerns that they might lose their funding because of the law at the time.

Q. And which statute was that?

A. The one that says that two people of the same sex cannot adopt, same gender cannot adopt.

Q. Okay. And since then, have you taken any additional steps towards adoption?

A. Yes. As a matter of fact, recently, after *Obergefell*, we contacted a local attorney here and asked her to -- you know, what would be the possibility of proceeding with adoption, and she -- she asked what county. We said Rankin.

So because it would be expensive to go through the process, she addressed the judge just to -- I guess to ask the question of what if. And the response that we'd gotten from her is he said, *Not no, but hell no.*

Q. And that was on an informal basis.

A. That is correct.
Q. What do you want from this lawsuit, Ms. Phillips?
A. We just want to be treated like any other family. We want Jan's name on the birth certificate and for her to have all the same rights that I do.
Q. Thank you.
A. Thank you.
MR. KAYE: Your witness.
MR. GOODWIN: One moment, your Honor.
(PAUSE)

CROSS-EXAMINATION

BY MR. GOODWIN:
Q. Ms. Phillips, I'm Tommy Goodwin. I represent the governor and DHS and Director Berry in this case. You had said that you -- one of your concerns was insurance for Hannah. Correct?
A. Correct.
Q. You said you had some difficulties, but you did find insurance. Is that right?
A. Correct.
Q. You said you were also afraid that depending on the situation at school and who might be at the school in charge of the school, that you may have some issues.
A. Correct.
Q. Have you actually had any issues? You said you were afraid, and I --

A. Yes, sir.

(PAUSE)

A. I'm afraid my parents might challenge custody.

Q. Have they challenged custody?

A. They have not, but they would.

Q. But they have not?

A. They have not.

Q. And have you filed a petition to adopt in Rankin County?

A. No. We went -- had an informal inquiry by a local attorney; and we were told, *Not no, but hell no.*

Q. And if you were to -- if you were to receive an order from a chancellor where you live granting the adoption, would that give you what you want in terms of it would change the birth certificate and correct the issues you've identified?

A. Correct. If Jan's name were on the birth certificate, we would -- we would have the same rights as everyone else.

MR. GOODWIN: One moment, your Honor.

(COUNSEL CONFERRED)

MR. GOODWIN: No more questions, your Honor.

THE COURT: All right. Any redirect?

MR. KAYE: Very briefly, your Honor.

REDIRECT EXAMINATION

BY MR. KAYE:

Q. Ms. Phillips, you said you were concerned about your parents challenging custody. Can you explain the circumstances

in which that -- you're concerned that that might arise?
A. That was the issue in 2009 which caused me to get out of the military. And we haven't spoken since they found out about this case.
Q. And you're concerned that if something were to happen to you, they might challenge custody.
A. Absolutely.
MR. KAYE: No further questions.
THE COURT: All right. Thank you. You can step down. Who's next?
MR. KAYE: The next witness, your Honor, is Dr. Susan Hrostowski, another plaintiff.

SUSAN HROSTOWSKI,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAYE:
Q. Dr. Hrostowski, would you state your name for the record.
A. Susan Hrostowski.
Q. And, Dr. Hrostowski, would you explain your background a little bit, your education?
A. Sure. I'm an Episcopal priest and I am associate professor of social work at the University of Southern Mississippi. I have a master's of divinity from Virginia Theological Seminary. I have a master's of social work from the University of Southern Mississippi and a Ph.D. in social work from Tulane

University.
Q. Okay. Are you married?
A. I am.
Q. Who's your spouse?
A. Kathy Garner.
Q. Is she here today?
A. Yes, she is.
Q. Do you have any kids?
A. I do.
Q. Tell me about them.
A. Hudson Garner is my son. He is 15 years old. He attends Sacred Heart Catholic School where he's a straight A student, plays on the football team and the basketball team and the powerlifting team and sometimes track team. He goes to Camp Bratton Green in the summers, and he also works as a counselor for children with developmental disabilities in the summer.
Q. And, Dr. Hrostowski, why are you here today?
A. I'm here because I want to be Hudson's legal mother.
Q. Okay. And why aren't you Hudson's legal mother?
A. Because the law says no two people of the same gender can adopt a child.
Q. Okay. Is your spouse Hudson's legal mother?
A. Yes.
Q. Okay. Now, would you tell me about when Hudson was born?
A. Yes. Well, let me first say that it took Kathy a long time

to convince me to have a child because I was worried about bullying and oppression and all that for a child of two mamas. But, you know, she convinced me that we are so blessed and that we have so much to offer and this was the next logical and next normal step for a family to grow.

And so we went through the process of finding a donor and we chose characteristics that were like me. So I was there when he was conceived, there every day of the pregnancy making peanut butter sandwiches. I was there during labor and saw his head before anybody else did, helped Kathy push. So I got to hold him first. I got to hold him before Kathy did.

THE COURT: Let me stop you for just a second. You've said the minor's name in open court and it's on the record.

MR. KAYE: Yes.

THE COURT: And it has not been identified in the pleadings to date. It's been identified by initials.

MR. KAYE: That's correct. I believe my clients are okay with this.

THE WITNESS: We decided to do that. We discussed it with our son, and he said this was important and he wanted to do that.

THE COURT: Okay.

MR. KAYE: Thank you, your Honor.

BY MR. KAYE:

Q. Is your name on Hudson's birth certificate?

A. No, it's not.
Q. After Hudson was born, did you take steps to become his legal parent?
A. We tried. You know, this law came into effect at the end of Kathy's pregnancy and was signed when he was six weeks old. So we called our attorney and said, *Is there any way around this?* And she said the only way around it would be if Kathy terminated her parental rights and then I asked to adopt him and that that was very risky because then a judge might say no because I'm a lesbian.
Q. And even if you had succeeded, Kathy wouldn't have legal rights.
A. Right. He'd still only have one legal parent.
Q. Since then have you taken any other steps towards --
A. Yes. Several years later I called my friend Michael McPhail who is a youth court judge and again said, *Is there any -- do we have any recourse?* And he said, *No. You just need to love that child and don't worry about it.*
Q. Okay. And has your inability to become Hudson's legal parent had an impact on your family?
A. Well, not on our family per se. Our family dynamics are pretty darn good. But, you know, there's always that -- number one, there's always that worry that -- again, that -- if I should die, Hudson would not get my Social Security.
Hudson, as you can tell, is an extremely bright young man

and I think he'll not only get an undergraduate degree but go on for advanced degrees. And if I were his legal parent, he could come to USM for half price. Now, we're saving up, but I don't know if we have enough for all that he's going to want to do.

So there are those considerations, as well as we worry -- because he's an athlete and often gets injured, you know, we do worry about if he had a football injury in the middle of Loyd Star, Mississippi, if Kathy weren't there, would I be able to get him the treatment that he needed?

Q. What do you hope to achieve from this lawsuit?

A. I hope to have the same rights as other families and that -- that I can become Hudson's legal mother.

Q. Thank you very much.

A. Sure.

CROSS-EXAMINATION

BY MR. GOODWIN:

Q. Dr. Hrostowski, just a couple of questions.

A. Certainly.

Q. Have you been able to find insurance for your child?

A. Yes.

Q. And when you met with the -- or you spoke with your friend the youth court judge, approximately when was that?

A. That was about five years ago.

Q. Five years ago. Have you -- have you ever considered the

possibility that your adoption would be approved because it would be just you adopting and not you and the biological mother?

A. No. I find that confusing, to tell you the truth. And, again, what our legal counsel told us was that in order to do that, Kathy would have to terminate her parental rights, which we found onerous.

Q. Are you aware that Kathy could simply join in the petition to adopt in which you would be seeking to adopt? She would be joining the petition as the biological parent. She would not have to terminate rights. Are you aware of that?

A. No, but I will say that after -- after the Supreme Court ruled this summer, we did ask a friend of ours who's an attorney could we now try to adopt; and he said, *Well, in Forrest County, you'd have a one-in-four chance depending on which chancery judge you got.*

Q. You've spoken about some things that you hoped would not come to pass, like not being able to pass along your Social Security benefits, tuition, you know, tuition break at Southern Miss.

Can you identify anything for me that as we stand here today that you've experienced that -- that you would not have been able -- or that you would be able to do or benefit that your child would be able to benefit from if you were legal?

A. Well, one of the things is that I tend to be the one that

takes Hudson to the doctor. He's had a concussion. He's had a broken finger. He's had, you know, a laundry list of issues.

When I take him, the first time I take him to any particular physician, they say, *Are you his mother?* And I say, *Yes.* In my heart and soul, I am his mother. But I know that if they pushed it, you know, if they said, *Give me some proof,* I would have no proof and they wouldn't render services.

Q. But to date you've not said, *No, I'm not,* and you've not been denied medical services. Is that right?

A. Not November 6th, 2015.

MR. GOODWIN: Thank you, your Honor. That's all I have.

THE COURT: All right. Any redirect?

MR. KAYE: No, your Honor.

THE COURT: All right. Thank you. You can step down.

MR. KAYE: Your Honor, our final witness is Brian Powell. He's an expert on sociology.

BRIAN POWELL,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAYE:

Q. Professor Powell, would you state your name for the record.

A. Sure. Brian Powell.

Q. And, Professor Powell, what is your profession?

A. I'm the James Rudy professor of sociology and the

department chair at the department of sociology at Indiana University.

Q. And how long have you been a professor at Indiana University?

A. Since 1986.

Q. Okay. Would you describe your educational background?

A. I earned my BA in sociology at Hobart and William Smith College in 1976 -- '72. In 1976 -- no. Sorry. That was high school. I graduated from Hobart and William Smith College in 1976 with a major in sociology. I earned my MA in sociology at Emory University in 1980. I earned my Ph.D. at -- in sociology at Emory University in 1984.

Q. Okay. And within sociology, do you have an area of expertise?

A. Yes. My areas are primarily in family sociology and sociology of education.

Q. Okay. And what do you mean by family sociology?

A. Family sociology is a very broad concept, very broad topic. But, generally, it deals with the impact of society, in particular, the social policies and laws on families and family interaction.

Q. Okay. And are there specific kinds of families that are the focus of your research?

A. In my research I cover a wide range of family structures. I look at large families, small families, older families,

younger families, single-parent families, single-father families, single-mother families, biracial families, and for the purpose of today, relevant for today, same-sex families.

Q. And have you published articles on the topic of same-sex families?

A. Yes, I have.

Q. What have those articles been about?

A. The articles and a book covers two areas. The first one is America's views regarding same-sex families with children and without children, and the other one -- the other topic focuses on what are the implications of coming from a same-sex family for children's outcomes.

Q. And have you published scholarly articles on other topics in the field of sociology?

A. Yes.

Q. About how many?

A. About five dozen.

Q. Have you served on any editorial board positions on any scholarly journals?

A. Yes. I've been the deputy editor for *American Sociological Review,* which is the flagship journal of the American Sociological Association. I also have been deputy editor for two other journals sponsored by that same association, *Sociology of Education* and the *Journal of Health and Social Behavior.* I've served on the editorial board for -- the

editorial board for *Social Psychology Quarterly.*

Q. Have you been a peer reviewer?

A. Yes.

Q. For what type of publication?

A. In the past 20 or so years I've probably -- I review one to two articles a week. So that probably multiplies up to around 1500.

Q. Okay. And those articles include articles on family sociology or same-sex parenting?

A. Yes.

Q. Are you a member of any professional associations?

A. Yes. I'm a member of the American Sociological Association, the Council on Contemporary Families, the National Council on Family Relations, North-Central Sociological Association and Family -- the Family -- Work Family Network.

Q. And have you served as an expert witness before?

A. No -- I mean yes.

Q. How many times?

A. Once.

Q. And did you testify in that case?

A. No, I have not, obviously.

Q. Okay. Did you submit any written testimony?

A. Yes. That's correct.

Q. Were your expert qualifications in that case challenged?

A. No.

Q. Okay. What was that case about?
A. It dealt with the ban on same-sex marriage in the state of Indiana.
MR. KAYE: Your Honor, I offer Professor Powell as an expert in the field of sociology.
THE COURT: Any objection?
MR. GOODWIN: No objection, your Honor.
THE COURT: He'll be accepted as an expert in the tendered field.
MR. KAYE: Thank you.
BY MR. KAYE:
Q. Professor Powell, what have we asked you to do in this case?
A. I was asked to assess the claim that dual-gender parenting is preferable to same-sex parenting.
Q. Okay. And in assessing that question, what are the sources of information on which you relied?
A. I relied on three things. First of all, I relied on my own research. I also relied on my assessments of the research that's been conducted in the area and also assessments that have been made by professional associations, in particular, the American Psychological Association and the American Sociological Association.
Q. And for research done by others, about how many articles have been written that you reviewed for this matter?

A. Dozens.
Q. And over what time frame have they been published?
A. About 20 years.
Q. Now, based on your own research, on your experience as a sociologist, on the literature that you've reviewed and the opinions of the professional associations you mentioned, do you have a view on the reasonability of the view that opposite-sex or dual-gender parenting is preferable to parenting by same-sex couples?
A. Yes, I do. My assessment is gender of parenting does not determine good parenting. Good parenting determines good parenting. And my conclusion is that same-sex-parent children who come from same-sex households fare as well as children who fare from -- who come from mother-father households.
Q. What does mainstream social science research show with respect to children of married same-sex parents?
A. The research on this topic is pretty overwhelming. The research conclusion is basically what I just said, that children who come from same-sex households fare as well as children who come from mother-father households.
Q. Okay. And is that view widely accepted by the social scientific community?
A. Yes. The degree of consensus on this topic is very high. It's remarkably high. And I was trying to think of another topic that there's higher level of consensus among

sociologists. I can't come up with one.
Q. When you say the children raised by same-sex parents fare just as well as children raised by opposite-sex parents, what metrics are you looking at in making that judgment?
A. There are multiple metrics out there. Educational outcomes, for example, how one does in school and how far one goes in school. Social development. Psychological well-being. For example, how happy the person is or how depressed the person is. Interactions or act -- behavioral factors such as interactions with others, which people act out, and other factors such as substance use.
Q. Okay. In addition to studies looking at outcomes of children, are there studies that have looked at parents --
A. That's correct.
Q. -- and comparing same-sex parents and opposite-sex couples as parents?
A. That's correct.
Q. What do those studies show?
A. The findings indicate, the research is, again, very clear that good parenting is not linked explicitly to gender and that same-sex parents are as capable as father-mother households in terms of parenting.
Q. What about the argument that it's important for children to have a male and a female role model in the home?
A. That argument is -- the idea that -- that fathers are a

certain type of parent and mothers are a different type of role model is a myth. When you think about parenthood, there is a wide range of parenthood -- parenting out there. And there's a wide range of fathers out there and there's a wide range of mothers out there.

There are some fathers who are authoritative and there are some fathers who are not. There are mothers who are authoritative and some who are not. And mothers who are nurturing, some who are not. Fathers who are, who are not.

The idea that gender -- that parenting is very gendered and that it's -- certain things are exclusive to women and the others are exclusive to men just is not true.

Q. And what about gender identity? Is there any evidence linking whether a child grows up in a home with same-sex parents or opposite-sex parents to gender identity?

A. There's no evidence of that.

Q. You've mentioned that the consensus view regarding same-sex parenting is overwhelming. Are there any studies that conflict with that view?

A. There are a few exceptions.

Q. And do those few exceptions, in your opinion, undercut the consensus view?

A. Not at all.

Q. Why not?

A. Setting aside that they're very, very few studies that

reach that conclusion, the quality -- the methodological quality of those articles are very suspect.

Q. And is there a leading study of those few you're talking about?

A. The most visible article out there on this topic is an article by Professor Mark Regnerus who's a professor of sociology at the University of Texas.

Q. And what did Professor Regnerus conclude?

A. Professor Regnerus looked at 40 outcomes and concluded that children who were raised by lesbian mothers or gay fathers fared worse than do children who were from, quote, intact -- intact mother-father households.

Q. And do you agree with his conclusions?

A. No, I do not.

Q. Why not?

A. There are several fundamental flaws with the study, but the primary flaw as I see it is Professor Regnerus did not study what he claimed he was studying. What I mean by that is he said he is studying children who are raised by lesbian mothers or raised by gay fathers. But if you look at the data, that's not what you have.

The survey included something known as calendar data. In calendar data, what happens is the respondent -- the respondent checks who he or she lived with for each year through childhood. And so you can get a really good picture of who did

the child actually live with. The child by -- the person answering these surveys, by the way, are adults, young adults, who are thinking back to their childhood.

And what we found -- and what I mean by "we" is Professor Simon Cheng who's a professor of sociology at the University of Connecticut and I found is that there were a large number of people according to the calendar data who Regnerus said was raised by a lesbian mother or gay father who never lived with that parent or lived for a very short period of time, one year, two years, three years, four years.

In fact, of the 236 cases that he has -- he had of children who said were raised by a lesbian mother or a gay father, of the 236 only two of them said that they lived throughout childhood with two same-sex parents.

Q. Were there other methodological issues you take with Professor Regnerus' study?

A. Yeah. There were several other -- there were several prim -- there were several other serious concerns. Let me mention one.

Another problem, as far as I'm concerned, is he doesn't take into account the question of family instability. What I mean by that is his comparison, what he -- what we know is family instability can be challenging. It can be -- just change can be challenging for many of us. And it can be particularly challenging for children.

And what he -- in his analysis what he did was, we know that there's going to be family instability and we know there's going to be family instability in both heterosexual families and in same-sex families.

Well, what he did in this study was he compared same-sex families to heterosexual families in which the parents stayed together throughout the childhood and even beyond the child's childhood. So you're really comparing a group that has no family instability. He basically took out the heterosexual families that had instability. He compares it to same-sex families which would have instability.

Q. Were there other methodological instabilities that you found?

A. The third problem is a problem that -- that, actually, we teach in our graduate classes in sociology in our very first semester. And it's a lesson that you need to clean your data.

Now, what I mean by that is when you have -- give surveys, we know that some people may not take the survey as seriously as we would like or may misinterpret questions or may satisfice, that is go very very quickly throughout the survey without paying much attention.

And one thing you do, which is a cardinal rule of research, is you check this. And you especially check it if you're dealing with a small number of cases, as he was dealing with. And what we found in this case, in his study, was that

Professor Regnerus did not -- if he did clean his data, he did not do a very good job doing it.

For example, we found -- give you two examples. We know the survey takes about 25 minutes to do on average, and there was one person who answered the questionnaire in less than 10 minutes -- or 10 minutes, which suggests to us that the person was just zooming through the questionnaire and not answering it.

The other type of problem is people giving answers to other questions that are so suspect that you have to be suspicion of the other responses as well. One example was a 25-year-old man who said that his father had a same-sex relationship with another man, but the respondent also said he was seven foot eight inches tall, had eight -- weighed 88 pounds, had eight children and was married to eight women.

Q. Pretty unlikely.

A. Yeah.

Q. Okay. Now, you mentioned earlier that you had done this analysis with Professor Cheng from the University of Connecticut. Was that analysis done for this case?

A. No.

Q. Why did you do that analysis?

A. My research focuses on family structure, and so this is a topic of great importance. But another aspect of my research is looking at questions of measurements and methodology. And

this is something I've been doing on several different topics.
Q. And did you publish your findings?
A. Yes. We published the article in *Social Science Research,* which was the very journal that Professor Regnerus published his article.
Q. Now, beyond identifying criticisms of how Professor Regnerus analyzed the data, did you and Professor Cheng go any further?
A. I'm sorry. Could you say that again?
Q. Did you and Professor Cheng do anything else with Professor Regnerus' data other than simply identify issues with it?
A. The methodological problems alone should invalidate the study, but we did go one step further. We reanalyzed the data, adjusting -- taking into account these different type of errors. And once we did that, we found that the -- that the outcomes that he talked about, these differences between children from same-sex households and from heterosexual households, disappeared.
Q. So, in other words, the data that Professor Regnerus relied upon actually supports the consensus view.
A. If the -- if one cleans the data and adjusts the data appropriately, the findings from his data yield -- basically yield the same patterns, yes.
MR. KAYE: No further questions at this time.
THE COURT: All right. Cross.

CROSS-EXAMINATION

BY MR. GOODWIN:

Q. Dr. Powell, you've said in your affidavit and I believe on the stand that there are a few studies that disagree with your opinion. Is that right?

A. Uh-huh (indicating yes).

Q. And you talked mostly about the -- and I may mispronounce it -- Regnerus?

A. Yes.

Q. -- Mark Regnerus' study?

A. Uh-huh (indicating yes).

Q. Is he with the University of Texas at Austin? Is that correct?

A. That's correct.

Q. And you said he's a professor of sociology there?

A. That's correct.

Q. Do you consider the University of Texas at Austin to be a prestigious academic institution?

A. Yes, I do.

Q. And where did he publish this -- where did he publish his study? What publication?

A. He published the article in the *Social Science Research.*

Q. Which you pointed out is the same publication that published your article criticizing his studies.

A. That is correct.

Q. And do you consider that publication to be reputable?
A. What, my article?
Q. No, sir. I'm sorry.
A. Sorry.
Q. Do you consider the *Social Science Research*, that publication, to be reputable?
A. It is -- the journal is a good journal. And any journal, of course, could have -- make mistakes.
Q. Has the Regnerus study been withdrawn?
A. No, it has not.
Q. And when I say that, has it been withdrawn by the journal itself?
A. No, it has not.
Q. Has it been withdrawn by the University of Texas?
A. It has not been withdrawn by the University of Texas, but the department of sociology has basic -- extended -- sent an announcement basically saying that it does not endorse the position that was presented in that research.
Q. Actually, back in 2012 didn't the University of Texas conduct a study, an independent investigation because of criticisms from people like yourself and found no evidence of academic fraud related to the study?
A. There's a distinction to be made between academic fraud and academic mistakes.
Q. Is Mr. Regnerus' study the first study to be criticized?

A. No.
Q. Isn't that part of the peer-review system that the scientific community has?
A. The peer-review system is a very important system, and the peer-review system is something that -- you know, that should work. In this case there at least -- there are concerns that others have expressed and have published about that the review process may have been contaminated.
Q. And you don't know if that's the case.
A. Well, what we do know -- what we do know is that some of the people who reviewed his paper were consultants on the project.
Q. But, again, a university that you consider to be prestigious, University of Texas, has not withdrawn it. And the publication, which you say is a reputable publication, has not withdrawn it. Correct?
A. That's correct.
MR. GOODWIN: One moment, your Honor.
(COUNSEL CONFERRED)
MR. GOODWIN: That's all I have, your Honor.
THE COURT: Any redirect?
MR. KAYE: Just a few questions.

REDIRECT EXAMINATION

BY MR. KAYE:
Q. Has the American Sociological Association taken a view of

Professor Regnerus' paper?

A. Yes. The American Sociological Association did a review of the research that's been conducted on the topic on the question of same-sex marriage. I referred to that earlier. And in that review it assessed the quality of research, assessed the research that's been conducted on the topic and has assessed the quality of the research.

The -- a good portion of the report focuses on the Regnerus study and concludes that the study had very, very serious flaws. I should add that the -- the review that was conducted by the American Sociological Association preceded my article. So the review does not take into account the comments of my research.

Q. Okay. And you mentioned earlier that Professor Regnerus' department at the University of Texas has taken a position on this. Could you tell the court a little bit more about that?

A. Yes. When the article came out, there -- when the article -- when the article came out, it did get a -- receive a great deal of media attention. And the -- and there was a concern about aspects of the research, the review process, the quality of the data, the quality of the analysis.

And, you know, several professors, leading professors within that department, including chairs of that department, current and former chairs of that department, issued a statement basically saying that if the -- the research that was

conducted by Professor Regnerus did not reflect the position of the department.

Q. Okay. Now, they didn't find any academic fraud. Is that correct?

A. Fraud is -- the question of fraud as opposed to making a mistake is a very difficult thing. In academia we are loathed to use the term "fraud."

Q. What would an example of fraud be in academia?

A. Well, fraud would be, for example, completely making up your data.

Q. Okay. And just because an article wasn't based on fraud doesn't necessarily mean that it's reliable.

A. That's correct.

Q. Okay.

A. One could be honest and make a very serious mistake.

Q. Okay. Now, you said that you reviewed dozens of studies in preparation for -- in reaching your opinion?

A. Excuse me?

Q. How many studies did you testify that you -- that you had reviewed in reaching your opinion today?

A. How many articles did I --

Q. Yeah, articles, studies.

A. Dozens.

Q. Dozens. Okay. So one or two or three articles wouldn't necessarily undermine that, would it?

A. No. When the -- when there are so many articles going in one direction and articles using very, very different approaches, very, very different orientations and you have a couple that go in the other direction, you know, if you -- you know, the evidence still remains a pretty strong consensus.

Q. Thank you very much.

MR. KAYE: I have no further questions.

THE COURT: All right. Thank you, Doctor. You can step down.

MS. KAPLAN: Your Honor, may I have a five-minute bathroom break?

THE COURT: Yes. Court's in recess.

(RECESS)

THE COURT: Ms. Kaplan, how do you want to split your time?

MS. KAPLAN: What's my limit, your Honor?

THE COURT: 20 minutes.

MS. KAPLAN: I would say I can probably -- I think I can do the initial part in five. Maybe not even need it.

THE COURT: All right. Go ahead.

MS. KAPLAN: Your Honor, let me clarify something that came up earlier, and I apologize for not clarifying this before. I think your Honor raised the issue of the attorneys' fees in the case and that was something you were thinking about, because I had talked about --

THE COURT: I'm actually not thinking about it at all. I had looked at the amended complaint and I was -- I was noticing the absence of some of the relief that you were asking for, and I just noticed that paragraph 3 -- I'm not focused on that at all at the moment.

MS. KAPLAN: Well, I just want to state for the record that, as we did in the marriage case, the Paul, Weiss firm is not -- will not seek attorneys' fees in this case. We're not -- can't promise that if there are problems with respect to enforcement; but for this phase of the proceedings, we will not be seeking fees from the state. So when I say we're looking for declaratory judgment and prospective injunctive relief, I truly mean that.

THE COURT: Okay.

MS. KAPLAN: Let me go to the -- I don't think I need to say too much about this, your Honor. I think a lot of this was in our papers, and I'm cognizant of the fact that both my speaking speed and the lateness of the day has worn out your court reporter, and for that I apologize.

With the fam- -- the standard, of course, for a preliminary injunction is familiar. So substantial likelihood of success of the merits, substantial threat of irreparable harm, a balance of the harms, and the public interest. On the substantial likelihood of success on the merits, I think our both legal case and factual case through the testimony of

Professor Powell is extremely compelling.

THE COURT: Let me ask you quickly, because the thing that -- about *Obergefell* that's I guess hard to apply from a lower court standpoint -- and I want to choose my words very carefully here -- but the equal protection aspect of that opinion didn't apply any of the tests that I'm used to applying. And it didn't explain, you know, whether or not gays are a protected class. It didn't explain whether it was rational basis review or strict scrutiny or someplace in between. It just didn't -- it didn't explain any of that.

You offered a witness talking about rational basis. I'm going to ask the defendants the same thing, and they're going to like the question less than you're going to like it. But it seems to me that they just -- that Kennedy just said, *I don't really have to tell you what tests I'm applying. This is unfair,* period. And he seems to say that applies to benefits as well as fundamental rights.

And my -- from what I've read, adoption is not a fundamental right. But he seems to lump everything together without explaining why under the equal protection side and just says, *It's unfair, therefore.* Have other courts tried to determine what the test is post *Obergefell* in the equal protection context?

MS. KAPLAN: I would say a few things to that, your Honor. One, Justice -- first of all, the *Obergefell* case is

both a due process case and an equal protection case. He says in a page or two that the equal protection elements -- essentially, due process and equal protection fuse themselves in this context. And he grounds his decision on equal protection grounds as much as due process grounds or certainly on equal protection grounds.

And he does not discuss specifically -- and you're absolutely right about this whether -- what standard of scrutiny applies in the equal protection context. Other than in the *Windsor* case, which does a very similar analysis and uses very similar language, the word "dignity" is a prominent word of Justice Kennedy's in both decisions.

He says that he is applying what he calls a more careful consideration I think was the word. I think in argument Justice Kagan called it a more rigid review than what one would ordinarily do in the lowest form of what I would call *Lee Optical* equal protection rational basis.

THE COURT: You said Kagan?

MS. KAPLAN: Kagan said that in oral argument, and Kennedy in his opinion says more careful consideration.

In addition, in the *Obergefell* decision, Justice Kennedy, although not in the text of a formal heightened scrutiny analysis, not using the footnote of *Carolene Products*, but he actually does talk about all of the four factors, frankly, that the courts apply under *Carolene* --

under the famous footnote.

So he does say both in *Windsor* and *Obergefell* that gay people have been a historically discriminated-against group. He does say in both *Windsor* and *Obergefell* -- again, it's not organized this way, but you can find it throughout the decision -- that there is nothing about being gay that has anything to do with one's ability to contribute to society. You heard it here from the professor in terms of being a parent, although you don't have to have that kind of a connection for heightened scrutiny analysis.

He says that being gay, again, both in *Obergefell* and *Windsor* and various places, is not a choice and that people should not have to choose to have their dignity as gay people respected. And he certainly nowhere suggests that gay people have so much political power that the Supreme Court doesn't need to step in and that gay people can get what they want through the political process.

So what is that -- the question -- I guess I can respond to your Honor with the same question. Where does that leave us?

I think most commentators out there and most of the courts who have -- certainly, post *Windsor*, Judge Rinehardt said this post *Windsor* in the Ninth Circuit. There has been less litigation post *Obergefell* given the timing. But most academic commentators and judges agree that Justice Kennedy is

doing something higher than *Lee Optical* rational basis. I think the best expression of it is to use the more careful consideration language he used in *Windsor*. He clearly is doing that in both.

One of the great pieces of evidence of why he's doing that is he doesn't spend very much time talking at all really about the justifications -- the supposed rash of justifications offered by either the State of Michigan in *Obergefell* or by the Bipartisan Legal Advisory Group in *Windsor* for why the statute survives rational basis.

So the best I can say is it's something more than the lowest. He has not said exactly what it is. Clearly, it's something that applies to gay people and it's somewhere between *Lee Optical* and probably a classical heightened scrutiny analysis.

THE COURT: Okay. Did you say that there has been some -- I know there's commentary, but is there a case that's tried to figure it out?

MS. KAPLAN: Well, Rinehardt did the best. So Rinehardt in the Ninth Circuit in a decision about -- in the *SmithKlein* case about jury service, ironically, went into an extended analysis concluding that what Justice -- because he had had to decide whether the Ninth Circuit could re-litigate the issue, could reconsider the question of whether gay people had heightened scrutiny. And he concluded that the Supreme

Court did do so in *Windsor* in a very extensive kind of Judge Rinehardt-type analysis, and made that conclusion.

I believe there are a couple of lower courts that have done it as well. I don't have the citations on the tip of my hand, but I can get them to you.

THE COURT: That's fine.

MS. KAPLAN: So in terms of -- in terms of the likelihood of success on the merits, not only do you have the overwhelming scientific testimony consensus that there is no rational difference between gay parents and straight parents with respect to child outcomes -- and I think we can all agree that even if the Mississippi legislature believed that when they -- and I'm sure some legislators did when they passed that in 2001 -- that even under a rational basis, it has to be rational. There has to be some support for it. And by today, by 2015, I think it's overwhelming that there is no support for it. American Psychological Association, the American Sociological Association, teams of experts.

But even more than that, your Honor, you have the opinions of the Supreme Court themselves. And fundamental to Justice Kennedy's analysis is not only the dignity of gay adults, but fundamental to his analysis in both *Windsor* and *Obergefell* is the dignity of their family and their children. And he could not be more specific about this. He says it over and over again.

He talks about DOMA as humiliating tens of thousands of children now being raised by same-sex couples because it makes it difficult for them to understand the integrity and closeness of their family. And in *Obergefell* he actually talks about the exact situation that we heard our plaintiff couples testify to, which is the problem that if an emergency were to arise, schools and hospitals may treat these children as if they had only one parent.

It's hard to imagine a statement by the Supreme Court of the United States more directly on point than the issues presented by this case than that. And while, of course, marriage and adoption are different, the underlying analysis and rationale for the marriage decision in *Obergefell* and *Windsor* is exactly the same, exactly the same reasons in this case.

Now, the other side really only has one case. For this reason, your Honor, every single case addressing the question of adoption by gay parents since *Lofton* has come down our way. It's even happening in countries. It happened in Columbia and Mexico. I think Columbia two days ago.

The *Lofton* decision from 2001 -- or from 2004 -- excuse me -- was pre *Windsor*, pre *Obergefell*, has been disavowed by the very Florida state courts that applied the statute. And I would point out -- I just can't help but point out that Judge Rosemary Barkett's dissent in *Lofton* had it

exactly right. If you need any other reason for understanding the rationale of the statute which is true in Mississippi, all you have to do is look to the fact that drug abusers, convicted felons, deadbeat dads, child abusers are not categorically exempted from adopting kids the way that gay couples are.

On the irreparable injury, your Honor, again, there's not much I can say that would add to what you've heard. You heard it straight out of the plaintiffs' mouths. It was -- you know, I feel guilty, frankly. I can't help myself. I feel a little guilty about Donna having to give that testimony about her parents, but it is a very live concern.

She -- if she were to die, she would have no control over who would have custody of her daughter. And I think anyone who's a parent -- I certainly am myself -- can imagine what that would be like to have to live with day to day.

With respect to the balance of harms, I don't -- not hearing any harm from the other side. I think no one -- no one is taking the position that it would be bad for these children to have two adoptive parents. I'm not hearing --

THE COURT: Let me ask you about that real quick, and you've got about ten minutes of your time left.

MS. KAPLAN: Okay.

THE COURT: It's always tricky to me in these motions for preliminary injunction as opposed to permanent injunction -- and sometimes in cases the parties agree to just

do it all at one time -- because let's hypothetically say that I agree with you and I enter an order that declares the statute unconstitutional and I get it wrong. In between the preliminary injunction, permanent injunction or an appeal, what happens then?

MS. KAPLAN: The question is whether those adoptions would be -- the question is whether those adoptions would be null and void?

THE COURT: Right.

MS. KAPLAN: Well, that situation has come up in the marriage. It came up in the marriage context a lot. It's directly analogous. And the Supreme Court itself in its wisdom, if I can use that term, denied cert in both the Fourth Circuit, the Seventh Circuit and Tenth Circuit knowing that that meant that gay couples were going to get married in their circuits and that they faced the risk when the Supreme Court raised the issue of the continued legitimacy of those marriages. And that did not -- the Supreme Court was willing to do that.

I think the same thing applies here. I think if you put the test to any of these plaintiffs, they wouldn't hesitate to give you an answer, which is they're more than willing to take that risk to assure security for their children.

I would also think -- I would also say that the risk I think that the Fifth Circuit in light of Justice Smith's

enforcement decision in *Obergefell*, that they would reverse a decision of this court saying that the adoption ban is unconstitutional in light of Obergefell is extremely low.

THE COURT REPORTER: I lost you.

(REPORTER READ BACK)

MS. KAPLAN: Saying that the Mississippi adoption ban is unconstitutional is extremely low if you look to Judge Smith's enforcement opinion post *Obergefell*.

The only other thing I want to say, your Honor, is about the *Pullman* abstention doctrine. And very quickly -- first of all, we all know it's the exception, not the rule. Generally speaking, federal courts should abstain only when there's a difficult and unsettled question of state law must be resolved before a substantial federal question could be decided.

Here you actually heard testimony on this. You heard Donna say that the judge in Rankin County told her friend not only no, but hell no, post *Obergefell*. And you heard our other plaintiff say that in the county she lives down in Hattiesburg, she was told that she only had a one-in-four chance of a chancellor -- only one of the four chancellors had any chance down there of granting an adoption under the current circumstances.

Moreover, to the extent -- and I expect that that's what he'll say, that Mr. Matheny will say that the -- the

Pullman issue has to do with the stepparent question, whether a stepparent is applying as a single person or as a couple and whether if applying -- even if they are applying as a single person, whether the Mississippi adoption ban that says gay couples can adopt applies, would only solve -- even if they're right about it -- and I don't think they are -- would only apply to two of the four couples. If you take out the as yet unmarried couple, you still have a couple. And the whole point of *Pullman* is being efficient.

So you would still have two courts, a state and federal court, having to decide these issues. That kind of obviates the whole purpose of the *Pullman* abstention doctrine. The federal court is still going to have to decide the issue. So I'm not aware of any cases that split plaintiffs that way under *Pullman.* And under the rationale of *Pullman,* it doesn't really make much sense.

I don't think, your Honor, unless you have any questions, that I have anything further.

THE COURT: Okay.

MR. MATHENY: Your Honor, if it please the court, I can kind of go in reverse order there. First let me say -- I think this is certainly clear in our papers and should be implicit, but I'll say for the record that the attorney general -- and I believe the other defendants will as well -- fully incorporate all of the grounds for dismissal into our

response and objection to the PI.

But on the *Pullman* point, I think our -- our brief sets this out and I think it was admitted here today that there is an ambiguity in the statutes about how it works in connection with stepparent adoption. The only movants who've actually moved for a preliminary injunction are those that are seeking stepparent adoptions.

And I think what I heard was that the inefficiency or the reason why it wouldn't be fair to make the movants actually go and seek the adoptions that they're actually seeking in state court before this court makes a ruling upon whether or not the statute's constitutional or not that may or may not apply to them is because they might be told no and they might have to go up to the Supreme Court and it would just be chaos.

And I guess the point is that you've kind of got the inverse problem. I mean, if you grant two couples a preliminary injunction that tells them that the -- or authorizes them to proceed with an injunction or a declaration that the statute is unconstitutional, what do other chancellors in other counties in other stepparent adoptions when they file -- you know, are they going to be bound by your order? I mean, the point being is there's a potential for chaos either way.

I think that the way to minimize the chaos -- and I think this is the purpose of *Pullman* -- is that no matter what

happens, unlike marriage licenses, et cetera, ministerial acts, unlike those, we know that everybody who wants to get an adoption is going to end up in chancery court at some point.

And what we're saying is that these -- these plaintiffs and anybody else should be required to go to state court first. And it's not because -- it's not because that there's some sort of requirement that they should do that, but it's because the *Pullman* doctrine is deference to the Mississippi state court system to resolve an issue that's ambiguous that could -- and you don't have to be able to resolve the whole case, but it could resolve the issues that are before the court on this preliminary injunction. And that's why it's appropriate to have them go file where they would have to file their lawsuit anyway.

As far as the merits go, I know that -- the court asked the question earlier and I had responded to it and said, you know, that the attorney general on the PI motion cannot and does not concede that 93-17-3(5) is unconstitutional, you know, if it is actually applicable to these movants.

You know, your question to counsel opposite about what *Obergefell* means and the lack of guidance, careful consideration, what happened to our old rational basis review test, I don't know the answer to those questions.

THE COURT: So let me ask it this way then. In that opinion Kennedy -- I'm going to read three quotes to you. He

says first that the marriage laws are unequal because same-sex couples are denied all benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. So it's an "and." He's using the conjunctive there.

They're denied benefits, and adoption is one of the benefits that he mentions by name. And it also factually is one of the benefits that one of the plaintiffs in that case -- the reason they wanted to get married was so they could adopt. So he says they're denied the benefits and the fundamental right, which, of course, is the right to marry. And so he says it's unequal because of both those things.

And then in response to an argument that this should organically rise, you know, in the states as opposed to the Supreme Court stepping in, he says, "Were the court to stay its hand to allow slower case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage."

In other words, it seems like he's rejecting the argument that we should go slowly on benefits. And he drew sharp criticism from Justice Roberts on that saying you can't just in one fell swoop say everything is unconstitutional without explaining exactly which laws you're talking about.

And the chief justice says, well, if you talked about the benefits-related statutes separately, there would be a

different analysis. But then he concludes, "Of course, those more selective claims will not arise now that the court has taken the drastic step of requiring every state to license and recognize marriages between same-sex couples."

So it seems like both the majority -- the majority is saying, *We're not going to sit on our hands. We're just going to take care of everything right now today.* And Roberts calls them on it and he says, *This should have come up on a case-by-case basis, but now it's not.*

From my perspective, it's -- then one approach that could be taken is to say if the Supreme Court is not going to care about applying standards, then why should I if they're saying benefits are lumped into this opinion?

MR. MATHENY: That's -- that's one view. And, obviously, the Roberts' portion of all of that would -- states the attorney general's position on it.

THE COURT: But what Roberts says is -- Roberts is highly critical -- obviously, highly critical of the opinion. But doesn't he sort of conclude that after today we're not going to have litigation regarding benefits that are related to marriage with respect to gay couples? Page 2606 is what I'm referring to.

MR. MATHENY: Well, and that's the problem that I have, your Honor, is that if it is all one fell swoop, if that's what *Obergefell* means and it sweeps everything up like

that, then, you know, I don't have a leg to stand on on the substantial likelihood of the merits without my defenses.

But if it doesn't, if it hasn't done that and we still are in the realm of rational basis review and looking for suspect classes and fundamental rights and -- the only federal court that's ever looked at this -- and that's because there were some unique facts there that are different than ours that made the Florida DHS amenable to a federal lawsuit. You know, it can be criticized, objected to and the overwhelming scientific sociological evidence can be opposed to it, but under the old regime, I think rational basis review applied --

THE COURT: You're talking about *Lofton*?

MR. MATHENY: Right.

THE COURT: But it's hard to put much weight into *Lofton* at this point. I mean, it was decided before -- even before *Windsor*, was it not?

MR. MATHENY: I agree.

THE COURT: And it's no longer the law even in Florida.

MR. MATHENY: That's right, your Honor, but it's -- it's the only affirmative authority that I have.

THE COURT: Okay. I mean, you're basically -- you're basically riding on the Eleventh Amendment and on Article III standing.

MR. MATHENY: Well, I would say this, your Honor.

With respect to the equitable preliminary injunction factors, we've addressed those in their brief. And just like you indicated, those -- those rely heavily on our defenses as well. It's right there on paper. It's obvious.

THE COURT: I'm not -- incidentally, I'm not -- I'm not diminishing the impact of your defenses. They're constitutional defenses and they deserve to be taken seriously. But it just seems to me like the posture we're in is that on the merits, you're really pressing the defenses more than a construction of *Obergefell* that would support the constitutionality of this statute.

MR. MATHENY: That's certainly fair to say, your Honor.

THE COURT: Okay.

MR. MATHENY: And that's my point. I don't want to waste the court's time trying talk around it. I'll say it this way bluntly. If they're 100 percent correct and I'm 100 percent correct, I win, because there are affirmative defenses, there are jurisdictional defenses and there are constitutional, you know, barriers to them getting the relief they are seeking here in this court against my client.

Their case has emotional appeal and it has personal impacts. We knew that when we saw the briefs and the affidavits and when you see the case. And they put on that case today, although I thought we were here for oral argument.

It's living and breathing. I can't deny it. I can't deny that it's an eloquent presentation presented by outstanding lawyers that are well beyond my capabilities.

But I can say that the broader societal interests in Article III and the Eleventh Amendment and the other principles regarding federal and state relations are not roadblocks. That's the foundation of the state and federal judicial system. It has to work together.

And the point of the attorney general's defense and my position here is that we're right on our defenses and the PI should be denied and our motion to dismiss should be granted, because the principles that ensure the proper balance in the dual and state/federal court system and promote a strong and cooperative federal relationship, you know, it's the rare case that it comes, but in this one it trumps -- it trumps the plaintiffs' claims.

THE COURT: All right. Thank you.

MR. GOODWIN: Your Honor, given that the briefing has been joint briefing between the governor and DHS and Director Berry and the AG and our arguments overlap completely for the preliminary injunction, I'll simply say that I agree wholeheartedly with everything Mr. Matheny said and stand on our briefing on that issue.

THE COURT: All right. Thank you. All right, Mr. Miracle.

MR. MIRACLE: Your Honor, with respect to the requested relief of the plaintiffs today, based on the 1996 Federal Court Improvement Act and I believe they've conceded in their briefing that injunctive relief against the judges, it will not lie. And I think they conceded earlier -- with respect to the Eleventh Amendment as to the chancery court districts, I think they've conceded that point as well.

So for purposes of injunctive relief against the judicial defendants, I think -- I think that they have no likelihood of success on the merits as to the judicial defendants for the reasons we set out in our brief and I think for the reasons they conceded based on the '96 Federal Court Improvement Act.

And I too would rely upon our other defenses that we incorporated in our response to the opposition to the motion for preliminary injunction as well as our motion to dismiss. Thank you.

THE COURT: All right. Thank you. You've got ten minutes left.

MS. KAPLAN: I can do this in less. I know I said that last time, but this time I really can.

THE COURT: I've heard that before, by the way.

MS. KAPLAN: I know. I'm losing credibility quick, your Honor. I apologize. I just want to make two points.

The first I want to try to put my -- we've been here

now for a long time, and I want to try to put my finger on the issue that is not only giving rise to plaintiffs' claim in this federal court, explains why we're in this federal court and explains why this court should issue a declaratory judgment at least as to the executive director of MDHS, which we believe will solve the problems that these plaintiffs face. And here's the problem.

On the one hand, if I'm hearing it correctly, you're hearing from the executive defendants that -- it's not entirely clear, but they -- I guess they seem to be taking the position that stepparents -- gay parents can adopt as stepparents and are not barred by the Mississippi adoption ban that says gay couples can't adopt. That seems to be what Mr. Matheny was saying.

You're hearing from the attorney for MDHS that MDHS doesn't want to do anything, you know, go and God bless, to stop gay foster parents from going through the foster parent process and MDHS will do nothing to stop that. So on the one hand, they say they want -- presumably, they want these plaintiffs who want to adopt their own kids to be able to adopt under the stepparent provision. They want gay parents who have foster kids to adopt, yet -- and they admit, your Honor -- you just heard Mr. Matheny admit that they have really no defense on the merits. Yet, when -- in this case when asked to sign a stipulation that would give the plaintiffs that relief, that

would at least make their position clear as to that relief, they have refused to do so.

And it's precisely that confusion, that mess between the state officers and the state chancellors and the MDHS private agencies and the MDHS social workers that puts the plaintiffs in this position of doing what plaintiffs have done for a very long time in this country, which is going to federal court to get enforcement under the federal Constitution.

It's not a surprise that what the plaintiffs heard when they tried to do this and when they asked -- when they went to their home lawyers and said, *Can we do this?* they heard, *No. Not only no, hell no,* or *one out of four.*

So I don't understand why the defendants take the positions they're taking and why they won't at least negotiate with us on a stipulation that would solve these problems. They're speaking out of both sides of their mouth, your Honor. And that's why we need the relief from this court.

The only other final point I would make is that -- you'll be shocked to learn that I agree with your analysis of the interplay between the Kennedy majority opinion in *Obergefell* and the dissent by Chief Justice Roberts. I can tell you that I'm not aware of any post *Obergefell* case raising these issues of -- any kind of marital-type issue, adoption, child, et cetera, divorce, that goes the other way. And I don't think that any counsel for defendants have raised any --

or cited any case that goes the other way. I'm aware of none. Thank you.

THE COURT: All right. Thank you. This should be no surprise to the attorneys, but I'm going to take this under advisement and prepare an order. Is there anything else before the court before we adjourn for the night? Ms. Kaplan?

MS. KAPLAN: Not for plaintiffs, your Honor.

THE COURT: Mr. Matheny?

MR. MATHENY: No, your Honor.

THE COURT: All right. Thank you. We're adjourned.

(HEARING CONCLUDED)

CERTIFICATE OF REPORTER

I, MARY VIRGINIA "Gina" MORRIS, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 13th day of November, 2015.

s/ Gina Morris
U.S. DISTRICT COURT REPORTER