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Anti-Equality Forces Get ‘the Posner Treatment’ at Seventh Circuit Hearing

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BY **ARI EZRA WALDMAN**

By now you have heard that the attorneys representing Indiana and Wisconsin got a shellacking from the famous Reagan-appointee, Judge Richard Posner. **Sean brought us 7 classic outtakes from Judge Posner's questioning**, but even those barely scratch the surface of what it must have been like. As someone who has had the privilege (and dread) of arguing before Judge Posner, as well as admiring him from afar, quoting his work, and disagreeing with some of his scholarship, I can say that this is just Posner being Posner. A brilliant scholar with strong views who's been around a long time, he does not suffer fools, whether those fools are seeking millions of dollars in damages or challenging the constitutionality of a ban on gays marrying. Do not think Judge Posner's obvious frustration with the anti-equality attorneys is evidence of a particular love of marriage equality, something he still calls "homosexual marriage," after all. This is how he would approach anyone who comes to him with a stupid argument.



And that is the greatest take away from the Seventh Circuit marriage equality hearings: the arguments against us are just stupid, and everyone appears to get that.

Let's start with Judge Posner, who seemed to relish the opportunity to inject some sanity into Wisconsin's and Indiana's arguments. He repeatedly said things like, "So you don't have an answer to that?" or "How can you brief it if you don't know anything about it," in response to Wisconsin's inability to support its arguments that heterosexuals would stop marrying if gays could, or "You don't seem to have any reasons" for banning gays from marrying, or, as Sean noted yesterday, "You don't have any sort of empirical or even conjectural basis for your law." Judge Posner followed that one with a little snark: "Funny." Mic drop.

CONTINUED, **AFTER THE JUMP...**

But Judge Posner was not doing anything other than what we have been saying for some time. He just did it with a little more flair. It is ridiculous to say that when gays are allowed to marry, fewer heterosexuals will marry. It is nonsense to say that banning gays from marrying actually encourages opposite-sex couples to have more sex after marriage, thus increasing the likelihood of having children within marriage. It is shocking that states would ostensibly want to keep children of gay couples in a state of legal and financial uncertainty, a point Judge Posner cited from the wonderful brief of the Family Equality Council.

We have made these arguments before. Attorneys have made these arguments in almost every marriage equality case since the decade-old state litigation in Massachusetts (and even older litigation in Vermont). Judge Posner was obviously aware of this nonsense and could not stand it any longer.

If Judge Posner was the hearing's headliner, his colleagues, Ann Claire Williams and David Hamilton, were not merely the background voices. They were stars on their own.

Judge Williams saw an opening during one of Judge Posner's carpetbombing campaigns to rescue Indiana's Thomas Fisher, saying, "I don't think counsel is going to be answering your questions." But then reminded Mr. Fisher that his arguments about children are far south of sensible: the gay couples he wants to discriminate against, she noted, are the ones who affirmatively want to have children. By basing its ban on the future possibility of promiscuous heterosexuals having an accidental child, Indiana was privileging a hypothetical future child whose parents didn't actually intend to have kids over a child whose parents dutifully planned to raise her in a loving home.



But it was the relatively unemotional Judge Hamilton, President Obama's first judicial appointee and the subject of a loud Republican Senate filibuster, who showed how far marriage equality has come in the federal judiciary. Almost as an afterthought, Judge Hamilton noted that, "It seems to me that we're in the realm of heightened scrutiny based on sex discrimination." Though it may have been a throwaway line to him, and it barely got any traction in the grand scheme of a Posner-dominated oral argument, it is a remarkable line. The sex discrimination argument — which holds that banning gays from marrying discriminates on the basis of sex because a man can marry a woman, but because he's a man, he cannot marry a man — has not received the kind of traction many marriage equality advocates had hoped when they first made those arguments 20-plus years ago. What's more, the notion of

heightened scrutiny as accepted as a fact in antigay discrimination cases is a monumental step forward from where we were when the Supreme Court decided *Windsor*.

Expect a 3-0 proequality decision from this bench in record time. Judge Posner, the senior judge on the panel, will likely write it and his opinion turnaround time is close to the top of all federal appellate judges.

The expected decision demands that we ask the question again: Do we even need the Supreme Court. Stay tuned for my next post on that.

