

Exhibit B

1 mother and its father. It's good for the mother, who is less
2 likely to have -- to raise the child by herself, and it's good
3 for the father because it establishes and it fixes his rights
4 in and obligations to his child.

5 But perhaps most importantly, your Honor, from the
6 state's perspective, channeling naturally procreative
7 relationships into enduring committed marital unions decreases
8 the likelihood that the state itself will have to help provide
9 for the child's upbringing and that society will suffer the
10 social ills that are often associated with children who are not
11 raised in intact families.

12 President Obama recently noted this reality when he
13 said this:

14 "We know the statistics; that children who
15 grow up without a father are five times more
16 likely to live in poverty and commit crime,
17 nine times more likely to drop out of
18 schools, and 20 times more likely to end up
19 in prison."

20 **THE COURT:** How does permitting same-sex couples to
21 marry in any way diminish the procreative aspect or function of
22 marriage or denigrate the institution of marriage for
23 heterosexuals?

24 **MR. COOPER:** Your Honor, because it will change the
25 institution. As you -- as you noted in a question, or at least

1 him.

2 Q. How long have you been in this relationship?

3 A. March will be nine years.

4 Q. When you said you wanted nothing more than to marry him,
5 why?

6 A. The word "marriage" has a special meaning. It's why we're
7 here today. If it wasn't so important, we wouldn't be here
8 today.

9 I want to be able to share the joy and the happiness
10 that my parents felt, my brother felt, my friends, my
11 co-workers, my neighbors, of having the opportunity to be
12 married.

13 It's the logical next step for us.

14 Q. Do you believe that if you are married, that that would
15 change the relationship that you have, at all?

16 A. Absolutely. I think -- I think one's capacity to love can
17 absolutely grow. I think one's capacity to be committed to
18 another individual can absolutely expand. And I'm confident
19 that that would happen with us.

20 Q. Do you believe that if you were able to be married, that
21 would affect your relationships with your family and your
22 community?

23 A. Absolutely.

24 Q. How so?

25 A. It's that I would be able to partake in family gatherings,

1 it's different, probably, if you were living as a heterosexual
2 person, but for me might have always been their mom and in
3 their entire lives I have been out, so...

4 Q. Have you and Sandy entered into a registered domestic
5 partnership in California?

6 A. Yes.

7 Q. Tell us when you did that?

8 A. That was in August of 2004.

9 Q. Was that easy to do? Does California make it simple?

10 A. Yeah. It was a -- I think it was a form.

11 Q. That you submit to the state?

12 A. That we -- we completed it. I think we had to have it
13 notarized and then we mailed it in.

14 Q. What does domestic partnership mean to you compared to
15 marriage?

16 A. Well, we are registered domestic partners based on just
17 legal advice that we received for creating an estate plan. So
18 we saw a lawyer who works with couples on those things and we
19 completed a number of forms; a durable power of attorney, last
20 will and testament, and she recommended we also do the domestic
21 partnership agreement at the same time. So there were just a
22 number of those kinds of documents that we completed.

23 Q. You regard it as something of a property transaction or
24 estate planning transaction?

25 A. It was -- well, that's when -- we did ours during that

1 beautiful as our marriage.

2 **Q.** The Supreme Court subsequently in May of 2008 said you had
3 a constitutional right to get married. How did you feel about
4 that?

5 **A.** I felt great, that the Court thought we had -- felt we had
6 a constitutional right to get married. That was exciting.

7 It was also cloaked, though, in this dissension that
8 felt very familiar.

9 **Q.** What do you mean "dissension"?

10 **A.** Well, the dissension that was sort of the political
11 brewing of some activist groups that disagreed with gay
12 marriage, wanting to put something together to invalidate that
13 court decision.

14 **Q.** You mean, you were aware of that at the time?

15 **A.** I was aware reading in the paper about -- about that.

16 **Q.** Well, did you consider, well, the California Supreme Court
17 has said that we can get married. We want to get married. We
18 tried it once before. Now we are told we have a constitutional
19 right to do it. Let's do it?

20 **A.** We thought about it and discussed it. And I really felt
21 very strongly that at my age I don't want to be humiliated any
22 more. It's not okay.

23 We did get married. In fact, we got married twice
24 and we could get married a third time and it could get taken
25 away, and then we get married a fourth time. And, for me, it

1 felt like it made a circus out of our lives and I don't want to
2 be party to that.

3 I told Kris I want to marry you in the worst way, but
4 I want it to be permanent and I don't want any possibility of
5 it being taken away from us. So let's wait until we know for
6 sure that we can be permanently married.

7 We didn't want to do it for any -- for any other
8 reason. And we did have friends that had gotten married and we
9 were proud for them and thrilled for them and, also, worried
10 for them, that they would have the same experience that we had
11 had.

12 **Q.** Tell me all the ways that -- let me withdraw that for a
13 moment and ask you about domestic partnership.

14 You and Kris entered into a domestic partnership.
15 Explain to the Court in your words why you did that and what
16 that relationship means to you compared to what you are seeking
17 here today?

18 **A.** Okay. First of all, for me, there is -- domestic
19 partnership doesn't indicate anything about a relationship. So
20 it's hard for me to put it in those terms.

21 It feels like it's a legal agreement between two
22 parties that spell out responsibilities and duties, like
23 fiduciary duties that you have towards each other, and those
24 duties are -- mirrored some of those similar types of duties
25 that are, of course, found in marriage.

1 Q. Well, let's look at what you said in your deposition in
2 the Iowa case. And that's tab 2 of your witness binder. And I
3 would like to direct your attention to page 55, lines 12
4 through 14.

5 A. Page 55 is under tab 2; is that right?

6 Q. Yes.

7 A. I see. Oh, I need my reading glasses for this. Which
8 page?

9 Q. 55. It's in the upper right-hand corner.

10 A. Uh-huh.

11 Q. And in line 12 you were asked:

12 "Are you familiar with the institution of
13 marriage in the most populated countries on
14 the planet, China and India?"

15 And you answered:

16 "No, not really. I mean, no."

17 The consequences of same-sex marriage is an
18 impossible question to answer. Yes or no?

19 A. You're asking me to say yes or no?

20 Q. I am.

21 A. Right. I believe no one predicts the future that
22 accurately.

23 Q. And you're not an expert on marriage practices in ancient
24 Greece, correct?

25 A. I am not an expert on that. I am somewhat familiar with

1 Q. Okay. And do you agree with the statement you made there,
2 which is, "One could point to earlier watersheds, but perhaps
3 none quite so explicit as this particular turning point"? Do
4 you agree with that statement?

5 A. As I said there, perhaps -- and that was how I responded
6 to you -- that one could argue about this. But it's arguably a
7 highly-distinctive turning point.

8 Q. As a historian, you do not assume that progress is the
9 rule of history, correct?

10 A. That's correct.

11 Q. Marriage is a very complex institution, correct?

12 A. Indeed.

13 Q. There is a long, ongoing series of arguments among
14 historians, competing theories about how we find the causes of
15 any major phenomenon, correct?

16 A. Yes.

17 Q. Some historians prefer to weight ideas, correct?

18 A. True.

19 Q. Others prefer to weight economic factors, correct?

20 A. Yes.

21 Q. Some weigh pure contingency of how things occur, correct?

22 A. Give it more weight, yes.

23 Q. But to you, the most reasonable historical explanation
24 gives some weight to all of these factors, so that none of them
25 operates solely on its own, correct?

1 people be in love to get married, correct?

2 **A.** Not at all.

3 **Q.** Marriage, in your opinion, is a status which implies one's
4 having grown up, is that correct?

5 **A.** I think that is part of the social meaning, that it is
6 seen as a mark of adulthood, settling down.

7 **Q.** Another social meaning of marriage has been that it is the
8 way to found a household, a living unit that is an economic
9 partnership and that involves a commitment to one's partner,
10 correct?

11 **A.** Yes.

12 **Q.** Marriage also has a whole set of romantic meanings for
13 people, correct?

14 **A.** Yes.

15 **Q.** And this is broadcast to us all the time in our public
16 culture, correct?

17 **A.** Yes.

18 **Q.** So the public culture has an impact on the social meaning
19 of marriage, correct?

20 **A.** Yes, it does.

21 **Q.** The social meaning of marriage unquestionably has real
22 world consequences, correct?

23 **A.** Social meaning exists in the real world, yes.

24 **Q.** And just so the record is clear, the social meaning of
25 marriage unquestionably has real world consequences? "Yes" or

1 "no."

2 **A.** Yes.

3 **Q.** That it is far easier to say that the social meaning of
4 marriage has consequences than to measure the consequences,
5 correct?

6 **A.** I'm going to say, yes.

7 **Q.** For the generality of people, the social meanings of
8 marriage are highly influential in their own personal views of
9 the institution, correct?

10 **A.** Yes.

11 **Q.** One way the social meaning of marriage changes is through
12 actual social practices, correct?

13 **A.** Yes.

14 **Q.** Another way the social meaning of marriage changes is
15 through economic transformations, correct?

16 **A.** Economic transformations have a great impact on the social
17 meaning of marriage, yes.

18 **Q.** Another way the social meaning of marriage changes is
19 through ideas and ideology, correct?

20 **A.** These things are all bound up together, yes.

21 **Q.** So that's a yes?

22 **A.** Yes.

23 **Q.** There are also technological reasons why the social
24 meaning of marriage changes, correct?

25 **A.** Yes, specifically with -- with respect to the technology

1 of birth control and other reproductive technologies.

2 **Q.** And the law very definitely has an impact on the social
3 meaning of marriage, correct?

4 **A.** Yes.

5 **Q.** How a given person thinks about gay marriage, their own or
6 others, it's usually quite affected by quite small scale
7 factors; how they were brought up, who their friends are, what
8 their religion is, what they have observed and their own
9 personal experience, correct?

10 **A.** Yes.

11 **Q.** Now, let me ask you some questions about the state of
12 marriage today.

13 In your opinion, morality has been uncoupled from
14 marriage, correct?

15 **A.** If -- if you are quoting my work there, that was a
16 statement made in a context in which I made the point that
17 whereas in the past adultery and fornication were crimes that
18 were punished by the state; that the state enforced those
19 morally disapproved actions that -- in support of marriage, and
20 in support of making marriage the only licensed legitimate
21 place where sex could take place.

22 And I think what I was describing in making that
23 claim about morality being uncoupled was that we have a much
24 broader and more flexible set of social mores about sex,
25 marriage and morality in the past couple of generations.

1 **MR. THOMPSON:** Your Honor, we would ask the Court to
2 take judicial notice of DIX81.

3 **THE COURT:** Very well.

4 **BY MR. THOMPSON:**

5 **Q.** And, Professor, I would like to direct your attention to
6 page 7 of this book. And on the right-hand column, third
7 sentence from the bottom, Mr. Rauch -- and Mr. Rauch is an
8 advocate for same-sex marriage, correct?

9 **A.** Yes.

10 **Q.** And he's openly gay; is that correct?

11 **A.** Yes.

12 **Q.** Okay. And he says:

13 "Some gay marriage opponents may be bigoted
14 or homophobic, or otherwise out to get gay
15 people. But most of them are motivated by a
16 sincere desire to do what's best for their
17 marriages, their children, their society."

18 Isn't it true that there are some people among the
19 7 million Californians who voted for Prop 8 who fall into
20 precisely this category?

21 **A.** You know, it's difficult for me to know the variety of
22 reasons in which people -- which people opposed marriage.

23 It's easier for me to comment on the sort of
24 arguments that were made against marriage equality by the
25 Prop 8 advocates, than to assess the various reasons that

1 people might have opposed this.

2 **Q.** So you just don't know why people opposed Prop 8 -- I
3 mean, supported Prop 8?

4 **A.** Well, I assume that there were a range of reasons that
5 people supported Prop 8. But that the -- an underlying premise
6 of them was that gay relationships were unequal.

7 **Q.** But were some of the people within that range -- and I
8 understand it's a range and that there are all sorts of
9 reasons -- but would some of the people in California, some of
10 the 7 million who voted for Proposition 8, fall into the
11 category that Mr. Rauch indicates here?

12 **A.** Yes. But we have to ask why people believe that opposing
13 marriage equality is best for their marriages, their children,
14 and society.

15 **MR. THOMPSON:** Okay. Your Honor, I would like
16 permission to play a very short video, which is DIX 2553.

17 **THE COURT:** DIX, again?

18 **MR. THOMPSON:** 2553, Your Honor.

19 **THE COURT:** Thank you, sir.

20 **MS. STEWART:** Your Honor, before we play it, might we
21 have a description of it so I know whether to object or not?

22 **MR. THOMPSON:** Yes. This is a video of Carrie --
23 it's a very short video, which has the excerpt of
24 Carrie Prejean's statements, and then Mayor Gavin Newsom's
25 reaction as to her motivation for having the religious

1 research on heterosexual couples, which I believe is relevant.
2 It's based on research on same-sex couples showing similarity.

3 So it's really based both on that evidence, that
4 empirical research, and theories and explanations about why
5 those patterns exist.

6 So it's based on those. And then it's also informed
7 by this one piece of information that you referred to.

8 **Q.** And that is the only empirical study or survey in this
9 case that has been done on whether there are physical or
10 psychological benefits from same-sex marriage, correct?

11 **A.** As far as I know, that's correct.

12 **Q.** And, similarly, as far as you're aware, there have not
13 been any studies, empirical studies, done on domestic --
14 comparing whether there are physical and psychological benefits
15 from domestic partnerships, as compared to same-sex marriage;
16 isn't that right?

17 **A.** Studies comparing individuals in -- in same-sex domestic
18 partnerships and in same-sex marriages.

19 **Q.** To see if there would be a difference between the two. We
20 don't know that either, do we?

21 **A.** I think we have many reasons to estimate what we would
22 find. But, no, there have not been studies of that.

23 **Q.** And you would agree, as a researcher with 35 years of
24 experience, that it would be important for us to study same-sex
25 marriage and whether there are, in fact, the physical and

1 it's not enough for a married partner to treat you well and be
2 kind and thoughtful, but you have to also be able to develop a
3 relationship in which you find your soulmate and which -- so
4 the suggestion has been that shifting American values about
5 individualism may have been one of many factors that
6 contribute.

7 And the reason I talked about these factors was
8 because none of these factors is linked or is due to the gay
9 civil rights moment. That was really the point I was -- one of
10 the points I was trying to make, was that the increase in the
11 divorce rate was independent of the push for marriage equality
12 for same-sex couples.

13 **Q.** Now, looking at -- turning to page 13 of your expert
14 report where you have a chart that, I think, lists or sets
15 forth the divorce statistics in Massachusetts that you were --
16 that you spoke of on direct, you have four years worth of data
17 listed, is that right?

18 **A.** The four years before same-sex marriage and then the four
19 years starting with --

20 **Q.** And the four years after?

21 **A.** Yeah.

22 **Q.** And you would agree that this is not a tremendously large
23 amount of data from which to draw conclusions; isn't that
24 right?

25 **A.** It's a total of eight years of data. You know, I don't

1 know what large or small would mean in this capacity.

2 It's only four years since marriage began because
3 that's -- those are the most recent government statistics
4 available.

5 **Q.** And as we look at them in Massachusetts, we see that in
6 2004 -- of all of the years listed, in 2004 there was the
7 highest marriage rate, correct?

8 **A.** Correct.

9 **Q.** 6.5 percent?

10 **A.** Correct.

11 **Q.** And it went down in 2005 to 6.2 percent?

12 **A.** Yes.

13 **Q.** And it went down to 5.9 percent in 2006. Stayed at 5.9
14 percent for 2007, and we don't know 2008 and 2009 based on the
15 evidence that you have put in; isn't that right?

16 **A.** What I would -- your reading of these numbers is quite
17 correct. What I would comment about is that if you look at
18 these kinds of data -- not just in Massachusetts, but in other
19 states -- what you see is that there are always year-to-year
20 minor fluctuations.

21 And so that's why when I looked at these data, my
22 interpretation of them is really an interpretation of no
23 change, because the fact that the rate goes up two percent --
24 .2 percent one year or down, you know, a small fraction of a
25 percent the next, I think is kind of haphazard variation in the

1 data, and I don't take those as necessarily serious indicators
2 of anything.

3 To me, these -- what stands out to me is aside from
4 what looks like the impact of gay people getting married the
5 first year, increasing that number, the numbers just kind of
6 look the same to me.

7 **Q.** Have you undertaken a comprehensive analysis of the
8 marriage and divorce rates in the neighboring states to
9 Massachusetts?

10 **A.** No, I have not.

11 **Q.** How about nationally? You have not done a comprehensive
12 analysis of what the divorce rates during this time frame were
13 nationally either, have you?

14 **A.** No. The only point I was trying to make here was that
15 Massachusetts is a state that permits civil same-sex marriage,
16 and that it would be informative to look at in that state what
17 the patterns were leading up to -- prior to same-sex marriage
18 and following. I don't make any claims beyond that about what
19 these data show.

20 **Q.** And looking just for a moment at the divorce rate starting
21 in 2004, the year that same-sex marriage was allowed in
22 Massachusetts, the data, as you present it, 2.2 percent in
23 2004, 2.2 percent in 2005, 2.3 in 2006 and 2.3 in 2007. So
24 going up slightly in 2006 and 2007, correct?

25 **A.** And still winding up lower than they had been in the four

1 years preceding the introduction of same-sex marriage.

2 So, I mean, I -- we can try to make something out of
3 a difference between .3 -- you know, 2.3 and 2.4. But I think
4 given the fact that these numbers bounce around a little bit in
5 all states across years, that I was certainly not claiming that
6 the divorce rate went down as a result of same-sex marriage.

7 But if we want to look at minor variations in
8 divorce, the average divorce rate is lower after same-sex
9 marriage than before, but I interpret it as really the same.

10 **Q.** And, again, I don't know if it shows a pattern or not
11 either. We have four years and you would agree you have got
12 four years, including the year when same-sex marriage was
13 allowed in Massachusetts, and we have that year through 2007
14 and that's the data that we have?

15 **A.** Correct.

16 **Q.** And you would agree that it would be helpful to have
17 several more additional years worth of data to be able to draw
18 conclusions one way or the other, wouldn't you?

19 **A.** I'm sure we will have those data soon.

20 **Q.** I'm sure we will.

21 And just to finish up, Dr. Peplau, as to whether
22 same-sex marriage will have any effect on public attitudes
23 towards individualism or commitments over time, you can only
24 speculate about that issue because you have not actually done
25 any study of it, isn't that right?

1 A. Well, the issue is, do I think that -- I'm sorry. It may
2 be late in the day. Could you repeat the question?

3 Q. Sure. Whether same-sex marriage will have any effect on
4 public attitudes towards individualism or commitment over time
5 is something you can only speculate about because you have not
6 studied it and know of no studies, isn't that right?

7 A. So the question is, do I think that permitting same-sex
8 marriage might over time lead Americans to become more or less
9 individualistic, or do I think it might lead them to value
10 commitment more or less over time? Is that the question?

11 Q. Well, really, have you studied that issue so -- where you
12 can offer an expert opinion on it?

13 A. My general opinion, my overarching opinion that same-sex
14 marriage will not cause harm, is based on my consideration of a
15 lot of research on marriage, on same-sex couples, our
16 understanding of theories and so on.

17 And all of the evidence and the theories I know and
18 can think of are on the side of saying no harm.

19 And then on the side of what theory might there be
20 about why there would be harm or what data might there be to
21 suggest harm, there is nothing. So it's kind of like this
22 (indicating).

23 And so I have great confidence in that conclusion,
24 but it is the case that that -- that that opinion of mine is
25 not based on my having done an empirical study over time of

1 same-sex marriage will or won't influence the public's
2 attitudes about individualism or commitment.

3 **MS. MOSS:** Thank you. One moment.

4 **THE COURT:** Very well. Any redirect, Mr. Dusseault?

5 **MR. DUSSEAULT:** Yes, your Honor. Very briefly.

6 **REDIRECT EXAMINATION**

7 **BY MR. DUSSEAULT:**

8 **Q.** Dr. Peplau, Ms. Moss asked you some questions at the
9 beginning of cross-examination about enforceable trust and
10 whether there was enforceable trust in a domestic partnership;
11 do you recall that?

12 **A.** Yes, I do.

13 **Q.** Do you have a view as to whether there is a greater degree
14 of enforceable trust in a marriage than a domestic partnership?

15 **A.** I think it would be greater in marriage.

16 **Q.** Ms. Moss also asked you about barriers to exit and whether
17 there were barriers to exit in domestic partnership; do you
18 recall that?

19 **A.** Yes, I do.

20 **Q.** Do you have an opinion as to whether there are greater
21 barriers to exit from marriage than from domestic partnerships?

22 **A.** I believe there are greater barriers in marriage.

23 **Q.** Ms. Moss asked you about a piece of work from 1985 that's
24 at Tab 4 of your binder, Exhibit 1233, talking about
25 exclusivity. Do you recall that?

PROCEEDINGS

P R O C E E D I N G S

JANUARY 14, 2010

8:42 A.M.

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Let's see. First order of business, I have communicated to judge -- Chief Judge Kozinski, in light of the Supreme Court's decision yesterday, that I'm requesting that this case be withdrawn from the Ninth Circuit pilot project. And he indicated that he would approve that request. And so that should take care of the broadcasting matter.

And we have motions that have been filed on behalf of Mr. Garlow and Mr. McPherson. And the clerk informs me counsel for those parties are here present.

MR. MCCARTHY: Correct, Your Honor.

THE COURT: All right. Fine.

MR. MCCARTHY: Vincent McCarthy, Your Honor. I was admitted pro hac vice into this court very recently.

THE COURT: Yes. I believe I signed that yesterday, or the day before.

MR. MCCARTHY: I understand.

THE COURT: Well, welcome.

MR. MCCARTHY: Thank you.

THE COURT: You've got quite a lineup of lawyers here.

1 **MR. COOPER:** As the Court knows, I'm sure, we have
2 put in a letter to the Court asking that the recording of the
3 proceedings be halted.

4 I do believe that in the light of the stay, that the
5 court's local rule would prohibit continued tape recording of
6 the proceedings.

7 **THE COURT:** I don't believe so. I read your letter.
8 It does not quote the local rule.

9 The local rule permits remote -- perhaps if we get
10 the local rule --

11 **MR. BOUTROUS:** Your Honor, I have a copy.

12 **THE COURT:** Oh, there we go.

13 (Whereupon, document was tendered
14 to the Court.)

15 **THE COURT:** The local rule permits the recording for
16 purposes the -- of taking the recording for purposes of use in
17 chambers and that is customarily done when we have these remote
18 courtrooms or the overflow courtrooms. And I think it would be
19 quite helpful to me in preparing the findings of fact to have
20 that recording.

21 So that's the purpose for which the recording is
22 going to be made going forward. But it's not going to be for
23 purposes of public broadcasting or televising.

24 And you will notice the local rules states that:

25 "The taking of photographs, public

1 that -- minority stress doesn't affect of single person in the
2 same way. It is a potential.

3 Q. Thank you for that clarification.

4 Are you aware that same-sex marriage has been legal
5 since 2004 in Massachusetts?

6 A. Yes.

7 Q. Do LGB individuals suffer from a lower prevalence of
8 mental health disorders in Massachusetts than in California?

9 A. Well, the first answer is I don't really know, but that's
10 now how I -- I wouldn't expect it exactly in that way that you
11 are suggesting; that that would be the test of that, because
12 Massachusetts is not, you know, an isolate in the United States
13 and, you know, it would be more complicated for me to assess.

14 So that alone would not change everything. So it's
15 just one aspect of it. And, certainly, I would think that
16 people in Massachusetts who are gay would feel more supported
17 and welcome, so to speak. So in that sense, it would reduce
18 the stress that they have somewhat.

19 Q. But your answer is you don't know, correct?

20 A. Well, I don't -- I don't have the data on that.

21 Q. You don't have data?

22 A. Right.

23 Q. Okay. Thank you.

24 Do LGB individuals suffer from a lower prevalence of
25 mood, anxiety and substance use problems that do not meet the

1 criteria for formal psychiatric disorders in Massachusetts and
2 in California?

3 **A.** Again, the study wasn't done in the way that you are
4 describing it, although a study was done looking at states
5 where there's greater rights for gay and lesbian people, and it
6 did show those things that you are alluding to.

7 So it wasn't exactly done in the way that you are
8 saying. It wasn't Massachusetts versus California. But in
9 general in the United States states that offer more
10 protections, gay and lesbian populations there fare better than
11 in states that do not offer such protections.

12 So to the extent that you can use that as a
13 suggestion that it does have this effect that you are alluding
14 to, but I don't know of a study that compared California to
15 Massachusetts on any of those outcomes.

16 **Q.** Okay. And I was planning to ask you about the other
17 outcomes, but the answer would be the same?

18 **A.** Right. I don't know of a study that tested it either way.

19 **Q.** Thank you.

20 Are you aware that same-sex marriage has been legal
21 since 2001 in the Netherlands?

22 **A.** I am going to believe you on that. I'm aware that it's
23 legal.

24 **Q.** I will represent to you that it was.

25 **A.** Okay.

1 Q. Do LGB individuals suffer from a lower prevalence of
2 mental disorders in the Netherlands than in California?

3 A. I -- I actually don't know the answer to that, although
4 there are studies that -- I don't know the answer to that.

5 Q. Would your answer be the same if I asked about the other
6 outcomes you identified?

7 A. Right. I don't -- I don't know the comparison. Honestly,
8 I don't know that I can tell you the rates of all the disorders
9 specifically to California, so I couldn't compare them.

10 Most of the studies that I relied on were national
11 studies that were not separated by state.

12 Q. Okay. Thank you.

13 Now, you are aware that California allows same-sex
14 couples to register as domestic partners, correct?

15 A. Yes, I've learned that.

16 Q. And you believe that, quote, domestic partnership has
17 almost no meaning, and, to some extent, it's incomprehensible
18 to people as a social institution, correct?

19 A. Yes.

20 Q. And I apologize, I said "quote." That's -- that was from
21 your deposition?

22 A. Correct.

23 Q. And for opposing counsel's benefit, I'll identify that as
24 the transcript at page 80, 9 to 11.

25 A. I believe I talked about it today, as well.

1 Have you done any research to determine whether,
2 since it adopted AB205 -- and that's this bill we were just
3 talking about -- LGB individuals in California suffer from
4 worse mental health outcomes than LGB individuals in any
5 jurisdiction that recognizes same-sex relationships as
6 marriages?

7 **A.** No.

8 **Q.** Okay. Now, at your deposition -- I would like you to turn
9 to -- you made a statement, and I want to confirm that it was,
10 in fact, a statement that you made. And it's -- turn to tab 7,
11 if you would. That's a transcript of your deposition. And
12 look at page 149. And the pages are a little confusing.
13 There's four on each page.

14 **A.** That's okay.

15 **Q.** And it's actually page 38 in the continuous pagination at
16 the bottom, if that's helpful.

17 **A.** I got it.

18 **MR. DUSSEAUT:** Your Honor, I'd object if it's not
19 being offered to impeach anything.

20 **THE COURT:** Why are you offering it?

21 **MR. NIELSON:** I was going to ask him whether he
22 agreed with it. Perhaps I should ask him whether he agreed
23 with it, first. And then if he doesn't --

24 **THE COURT:** Why don't you ask him the statement --

25 **MR. NIELSON:** Yes, exactly.

1 a grandmother, and that we needed to look more broadly at the
2 environment in which children were raised.

3 And I absolutely still believe that that's the case.
4 And I think that's entirely consistent, with what I've been
5 saying.

6 **Q.** The increase in father's absence is particularly troubling
7 because it is consistently associated with poor school
8 achievement, diminished involvement in the labor force, early
9 child bearing, and heightened levels of risk-taking behavior,
10 correct?

11 **A.** Again, this is something that we talked about earlier.
12 That is correct. There are those associations.

13 The interesting question is: Why do those
14 associations come about and how can we understand those
15 associations?

16 **Q.** And boys growing up without fathers seem especially prone
17 to exhibit problems in the areas of sex role and gender
18 identity development, school performance, psychosocial
19 adjustment, and self-control, correct?

20 **A.** And I think some of those findings have held up, and some
21 of those conclusions have not been substantiated by a lot of
22 the recent research.

23 **Q.** Well, let's look at -- just to make sure we're getting on
24 the right page on the time frame, if you look at tab 15 in your
25 binder, this is an article from 2000.

1 heterosexual.

2 But none of the studies that are reviewed here are
3 themselves studies that focus on adjustment of children. I
4 think that's the case. Yes.

5 **Q.** You are not aware of any study that looks at the specific
6 benefits flowing to children whose parents are together under
7 domestic partnership law in California, correct?

8 **A.** I'm not aware of any study of that, no.

9 **Q.** And we don't have any studies that look at the behavioral
10 outcomes for children with married same-sex parents, correct?

11 **A.** That's correct.

12 **Q.** And on aggregate, the children being raised by gays and
13 lesbians are comparable in their outcomes to those being raised
14 by heterosexual parents, correct?

15 **A.** Sorry. Could you repeat that?

16 **Q.** On aggregate, the children being raised by gays and
17 lesbians are comparable in their outcomes to those being raised
18 by heterosexual parents, correct?

19 **A.** That's correct.

20 **Q.** And that's true even though none of those gay and lesbian
21 couples were married, correct?

22 **A.** That's correct.

23 **Q.** Thank you.

24 **MR. THOMPSON:** No further questions, your Honor.

25 **THE COURT:** Very well. Mr. McGill, redirect?

1 **A.** I was asked some questions. I don't know that I read it
2 thoroughly. It was presented to me, and then I was asked
3 questions.

4 **Q.** Okay. Now, I represent to you that Mr. Blankenhorn, who
5 is the author of this article, argues that redefining marriage
6 to include same-sex couples would undermine the purposes of
7 ensuring that, insofar as possible, children would be raised by
8 the man and woman whose sexual union brought them into the
9 world.

10 Do you recall that being the subject of this article?

11 **A.** Generally, yes.

12 **Q.** Okay. And would you agree that it's possible that people
13 voted for Proposition 8 based on the reasons that are
14 articulated in this particular article?

15 **A.** I believe that some people could say that. Once again, I
16 believe that their feelings would be grounded in prejudice and,
17 obviously, misinformation.

18 **Q.** Because you disagree with the premise that's put forward
19 in this particular article?

20 **A.** Well, it's not the premise. It's what we see in reality.
21 Many children are not raised by biological parents. They are
22 raised by one parent or another, or they are foster children.

23 So, I mean, this is supposing that everybody had had
24 a marriage, where both partners were there throughout the
25 upbringing of their children, all through the children's life.

1 Q. Well, this article puts forth the idea that, all things
2 being equal, that the best-case-scenario for kids is to be
3 raised with their biological mother and father.

4 You disagree with that premise?

5 A. You know, I think all things equal. But I also was a cop
6 for 26 years, and I know there are a lot of children who did
7 not benefit from child abuse, from child neglect, by biological
8 parents. So I don't know that we can say "all things being
9 equal."

10 Q. Okay. So you disagree with the premise that's being put
11 forth by Mr. Blankenhorn?

12 A. I do.

13 THE COURT: Is DIX1475 in?

14 MR. RAUM: This is --

15 THE COURT: Is it in evidence?

16 MR. RAUM: Yes, it is, Your Honor. It was admitted
17 into evidence on Thursday, in connection with Dr. Cott.

18 THE COURT: Very well.

19 MR. RAUM: Professor Cott, I should say.

20 BY MR. RAUM:

21 Q. Would you also agree that some people who voted in favor
22 of Proposition 8 did so simply to preserve the historical
23 tradition of marriage in this country?

24 A. I would believe that some people possibly voted that way.
25 I don't really know.

1 But, once again, if they did, I would think that
2 would be grounded in prejudice.

3 Q. And some people may have voted for Proposition 8 because
4 they feel that marriage is tied to procreation. Would you
5 agree with that?

6 A. I would agree that some people could say that. I don't
7 really know their reasoning behind that.

8 Q. And you agree that there are many reasons why people voted
9 for and against Proposition 8?

10 A. I do.

11 Q. And among these many reasons are reasons that are grounded
12 in good faith beliefs in marriage between a man and a woman?

13 A. I believe that good faith beliefs don't negate the fact
14 that they are grounded in prejudice, which means that one group
15 of people are being treated entirely differently simply because
16 of their sexual orientation.

17 Whether you have a grounded belief or not, I don't
18 think negates that.

19 Q. And I understand that's your position. But, nonetheless,
20 you believe that certain people, in good faith, could disagree
21 with that position that you've just articulated?

22 A. I believe that some people could. But I can't interpret
23 what they do.

24 Q. In fact, you shared that sentiment at one time; did you
25 not?

1 California, as further examples of
2 undemocratic judicial activism foisted on an
3 unwilling public."

4 Now, I don't suppose you agree with that comment, do
5 you?

6 **A.** No. As I discuss in the book, I think that the pace of
7 change has been quite measured.

8 **Q.** And, finally:

9 "Some in the gay community argue that change
10 is happening too fast to avoid political
11 backlash and that creating alternatives to
12 marriage, both for same-sex couples and for
13 other family forums, might be a better way
14 go."

15 Now, you obviously don't agree with that, right?

16 **A.** No, I don't agree with that either.

17 **Q.** But you believe that that view is a reasonable one to
18 hold?

19 **A.** It's one that people offer and that we talk about. And my
20 goal in the book was to take each of these questions that I
21 posed in this introduction and to, you know, look at them from
22 the perspective of data and reason.

23 **Q.** But you think, don't you, Professor Badgett, that social
24 change with respect to same-sex marriage in this country is
25 taking place at a sensible pace at this time with more liberal

1 states taking the lead and providing examples that other states
2 might some day follow, isn't that correct?

3 **A.** That's the conclusion that I draw from my look at the data
4 on which states have made these changes, yes.

5 **MR. COOPER:** Your Honor, one moment, please.

6 **THE COURT:** Certainly.

7 (Discussion held off the record
8 amongst defense counsel.)

9 **MR. COOPER:** I have no further questions, your Honor.
10 Thank you, Dr. Badgett.

11 **THE COURT:** Very well. Mr. Boise, redirect?

12 **MR. BOIES:** Thank you, your Honor.

13 **REDIRECT EXAMINATION**

14 **BY MR. BOIES:**

15 **Q.** Good afternoon, Professor Badgett.

16 You were asked earlier whether there were some
17 difficulties in the categorization of gays and lesbians; do you
18 recall that?

19 **A.** Yes.

20 **Q.** Are there difficulties in categorization of people based
21 on race and religion as well?

22 **A.** Umm, like with sexual orientation, I wouldn't think of
23 them as "difficulties." I think that there are challenges and
24 that's why we see some changes from time to time in terms of
25 how we measure those characteristics on surveys.

1 question yesterday, a single election result is -- or a single
2 piece of legislation should not be considered to be the basis
3 for a conclusion. It's a piece of evidence.

4 Q. All right. And one of the obstacles that gays and
5 lesbians face in California to realizing same-sex marriage
6 rights is religiously-inspired opposition, correct?

7 A. I would think that that's a national issue. That the
8 religions -- quoting the document that you submitted into
9 evidence, that gay and lesbian advocacy organizations think
10 they have a religion problem.

11 Q. Right. And there are some individuals who voted for
12 Proposition 8 because of Old Testament Biblical prohibitions
13 against same sex sexual contact, correct?

14 A. I think that that's a fair assumption.

15 Q. And there are some numbers of individuals who might have
16 voted for Proposition 8 because they believe their churches
17 were going to be compelled to bless same-sex marriages,
18 correct?

19 A. I believe that they had been led to believe that. So I
20 think that there is some evidence that that could be true, yes.

21 Q. And it's possible, in your opinion, that some people voted
22 in favor of Proposition 8 because of the negative reaction to
23 the perception of activist judges, correct?

24 A. I would think that that's possible, but less likely.

25 So, scholars of American public opinion regularly

1 bemoan the low levels of information that many voters have.

2 It is certainly an argument that has been used by one
3 side of the political spectrum to decry what they see as a form
4 of judicial activism and to make the judiciary a scapegoat for
5 their views.

6 I'm not sure the degree to which that penetrates into
7 the general public. I think many Americans don't fully
8 understand the judicial process or even the judicial
9 appointment process.

10 I am sure that it is the case that somewhere in
11 California someone probably voted on the basis of not liking
12 those darn judges. But I can't really speak to what percentage
13 that might be.

14 **Q.** All right. Now in your rebuttal report that you put in in
15 this case, you talked about the role of religion and how it may
16 or may not inform views on same-sex marriage, correct?

17 **A.** I did. I was responding to the expert report that had
18 been put in by --

19 **Q.** And we have decades of research on abortion opinion,
20 social welfare, death penalty, to suggest that people's
21 religious convictions shape their views of public policy,
22 correct?

23 **A.** I think that's a fair conclusion.

24 **Q.** Various measures of religion are a fairly robust predictor
25 of lots of forms of political behavior, correct?

1 27 is just the page at the bottom.

2 **BY MR. NIELSON:**

3 **Q.** All right. Now, have you had a chance to look at those
4 lines?

5 **A.** Yes.

6 **Q.** Did you give that testimony at your deposition?

7 **A.** Yes.

8 **MR. NIELSON:** Okay. And I'd like to read that, Your
9 Honor. He said:

10 "Now, that said, if you are trying to predict
11 for any specific individual whether their
12 identity will predict their sexual behavior
13 in the future, especially, that can be
14 problematic."

15 **BY MR. NIELSON:**

16 **Q.** All right. Thank you.

17 And we certainly know that people report that they
18 have experienced a change in their sexual orientation at
19 various points in their life, correct?

20 **A.** I'm sorry. Could you say the question one more time.

21 **Q.** Sorry. We certainly know that people report that they
22 have experienced a change in their sexual orientation at
23 various points in their life, correct?

24 **A.** Some people do report that, yes.

25 **Q.** Okay. Thank you.

1 As I have said before, we don't really understand the
2 origins of sexual orientation in men or in women. There are
3 many different competing theories, some biologically based,
4 others based more on culture and individual experience.

5 So I would say that what she is suggesting is that
6 the available evidence doesn't support the idea of there being
7 a strong biological factor that explains the development of
8 sexual orientation in women.

9 **Q.** Do you agree with that?

10 **A.** Yes. I would agree that that is the case.

11 And I would also say that I don't -- I believe that
12 it's the case that we simply don't understand the origins of
13 sexual orientation in either men or women.

14 **Q.** Okay. Please turn to page 87 of the same document.

15 (Witness complied.)

16 **Q.** And under "An Alternative Perspective," that heading, do
17 you see that towards the bottom of the page on page 87?

18 **A.** Yes.

19 **Q.** She writes:

20 "A comprehensive analysis of women's sexual
21 orientation should begin with empirically
22 grounded generalizations about women's
23 experiences. The cumulative record of
24 research on women's sexual orientation
25 supports three broad conclusions.

1 A. For tangible benefits, I would not be able to name them.

2 Q. Okay. Thank you.

3 And you talked a little bit about hate crimes. Are
4 hate crimes illegal in California?

5 A. I think crime is illegal in California.

6 (Laughter.)

7 Q. Correct. And are crimes -- and are crimes committed on
8 the basis of sexual orientation illegal in California?

9 A. Yes, they are illegal in California. And, in fact, they
10 still continue to occur.

11 Q. And do you believe there is a link between denying -- or
12 between defining marriage as a union of a man and a woman in
13 hate crimes?

14 A. Well, I think that it's -- as I said earlier, when we look
15 at structural stigma related to sexual orientation, it provides
16 a context in which all sorts of things happen, all sorts of
17 behaviors toward people in the stigmatized group.

18 And so I would say that a direct relationship between
19 those two is not empirically established, to my knowledge, but
20 that structural stigma, as basically creating the atmosphere in
21 which individual enactments of stigma occur, that there is
22 potentially a relationship there, yes.

23 MR. NIELSON: And, your Honor, I believe I'm
24 concluded, but I just want to quickly consult, if I may, for
25 just a moment?

1 institution or the possible participants in the institution
2 become over time less loyal to it, less -- they understand it
3 less. They -- they -- some of them -- they increasingly -- the
4 institution loses esteem in the society. It loses respect. It
5 loses its sense of being held in high regard. And the
6 institution becomes less and less able to carry out its
7 contributions to the society.

8 This concept of deinstitutionalization is, I think,
9 a -- a critical one for people who are studying the status and
10 future of any institution.

11 But, in particular, it has been of great value to
12 scholars looking at -- at recent trends in marriage, because in
13 the United States, particularly in recent decades, the last
14 three, four, five decades, there has been a marked process of
15 deinstitutionalization of marriage, with very numerous and
16 serious consequences for children and for society as a whole.

17 So it's an absolutely pivotal concept, if we want to
18 understand where the institution is going and what
19 opportunities we may have to -- to come to its aid.

20 **Q.** I think you did, just now, testify that the institution of
21 marriage is -- has been weakened, I think, to paraphrase your
22 testimony, by deinstitutionalization already.

23 What are some of the manifestations of that process?

24 **A.** Well, if you look, for example, at rates of out-of-wedlock
25 childbearing, you know, five or six decades ago only a small

1 fraction of U.S. children were born to unmarried parents.
2 Whereas, the most latest data tell us that today about
3 38 percent of children in the U.S. are born to unmarried
4 parents.

5 So that over, say, a five-decade period, if you go
6 back to 1960, that would be a very dramatic example. That rate
7 of growth over a five-decade period, I think, constitutes a
8 very dramatic example of the weakening of the marriage
9 institution.

10 You also would need to look at rates of divorce. The
11 United States has probably the highest divorce rate in the
12 world.

13 And so, as a result, people are -- the weakening of
14 the ideal of marital permanence suggests a lessening loyalty to
15 the institution, and the rise of nonmarital cohabitation; the
16 increasing mainstreaming of third-party participation in
17 procreation and artificial assisted reproductive technologies
18 that disturb the bond between the -- disturb the biological
19 bond between the genitor and the child; and, last, but for our
20 purposes certainly not least, the -- the spread of the idea and
21 reality of same-sex marriage in the view of -- I think, the
22 view of leading scholars, is another aspect or manifestation of
23 this current trend of deinstitutionalization.

24 And I meant to say just for our purposes today, you
25 know, heterosexuals, you know, did the deinstitutionalizing. I

1 mean, you know, if we go back and look at the trends I
2 described, it's very clear that this -- this was not --
3 deinstitutionalization is not something that just cropped up a
4 few years ago whenever we began discussing the possibility of
5 extending equal marriage rights to gay and lesbian people. It
6 predates all that.

7 But what I am saying is that the scholars are telling
8 us that the process of deinstitutionalization would be
9 furthered and accelerated significantly by adopting same-sex
10 marriage.

11 **Q.** Well, what impact, in your opinion, would redefining
12 marriage to include same-sex couples have on marriage, in this
13 deinstitutionalization process?

14 **A.** It's hard to know because you're in some important ways,
15 you know, predicting what will happen in the future.

16 My best judgment is that if we move toward a
17 widespread adoption of same-sex marriage, I believe the effect
18 will be to significantly further and in some respects culminate
19 the process of deinstitutionalization of marriage.

20 If -- if you take an institution that for all of its
21 long history has been understood to have defined public
22 purposes, and through changing its definition you transfer it
23 from the public -- you transfer it from a child-centered public
24 institution to an adult-centered private institution, a
25 question of private ordering among couples, you have in some

1 ways, you know, completed -- that's a culminating trend toward
2 the erasure of marriage's public defined contribution to
3 society.

4 And I think that it's likely that, you know, that --
5 as I say, this did not trigger the trend of
6 deinstitutionalization. Deinstitutionalization has been with
7 us now for a while. But it's a live issue, and there are many
8 people who would like to reverse the trend.

9 But I think the evidence is quite compelling that if
10 we move to a widespread adoption of same-sex marriage, we will
11 very significantly accelerate the process of
12 deinstitutionalization.

13 And the consequence of that will be to weaken the
14 role of marriage, generally, in society. And the consequences
15 of that will be felt by everyone in the society.

16 **Q.** You mentioned earlier other scholars who have recognized
17 the relationship between same-sex marriage or the prospect of
18 it and deinstitutionalization. I want you to turn, now, to the
19 document behind tab 17 of your binder.

20 **A.** Yes.

21 **Q.** And what is that, please?

22 **A.** This is an article by Andrew Cherlin, who's a prominent
23 family sociologist. He teaches at Johns Hopkins. He is a
24 proponent of same-sex marriage. And this article is entitled,
25 "The Deinstitutionalization of American Marriage."

1 Martin Luther King saying, you know, "You ought to ease up.
2 The people aren't ready for these kind of changes. There's
3 going to be a backlash."

4 And his letter from a Birmingham jail explaining why
5 he could not wait to press the civil rights of his fellow
6 citizens is as compelling a statement on that subject that's
7 ever been written.

8 Now, we talked a little bit about -- oh, Mr. Cooper
9 came up with something that I hadn't really heard about until
10 the closing argument in this case. I really don't remember the
11 evidence. "The threat of irresponsible procreation."

12 I tried to figure out what that means, because the
13 clients I represent don't present a threat of irresponsible
14 procreation. They are interested in getting married to someone
15 of the same sex. Mr. Cooper acknowledged they are not a threat
16 of irresponsible procreation.

17 On the other hand, heterosexual couples who practice
18 sexual behavior outside their marriage are a big threat to
19 irresponsible procreation, if that's what it's all about. So
20 if --

21 **THE COURT:** Heterosexuals that have led to the
22 deinstitutionalization of marriage, and heterosexuals ...

23 (Simultaneous colloquy.)

24 **MR. OLSON:** ... that's right. And people will run
25 out, and, yeah, "Well, that's it. That's it."