

Volume 7

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY,)
SANDRA B. STIER, PAUL T. KATAMI,)
and JEFFREY J. ZARRILLO,)
)
Plaintiffs,)

VS.) NO. C 09-2292-VRW
)

ARNOLD SCHWARZENEGGER, in his)
official capacity as Governor of)
California; EDMUND G. BROWN, JR.,)
in his official capacity as)
Attorney General of California;)
MARK B. HORTON, in his official)
capacity as Director of the)
California Department of Public)
Health and State Registrar of)
Vital Statistics; LINETTE SCOTT,)
in her official capacity as Deputy)
Director of Health Information &)
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California Department of Public)
Health; PATRICK O'CONNELL, in his)
official capacity as)
Clerk-Recorder for the County of)
Alameda; and DEAN C. LOGAN, in his)
official capacity as)
Registrar-Recorder/County Clerk)
for the County of Los Angeles,)

) San Francisco, California
Defendants.) Wednesday
) January 20, 2010

TRANSCRIPT OF PROCEEDINGS

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Official Reporters - U.S. District Court

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P R O C E E D I N G S

JANUARY 20, 2010

8:38 A.M.

THE COURT: Very well. Good morning, counsel.

(Counsel greet the Court.)

THE COURT: We have a few items to take up. And let's take up the scheduling item, first.

I just learned that a message from the clerk to Mr. Boutrous, apparently, was not delivered or not received, that we have cleared the calendar and will be able to continue the trial tomorrow.

The clerk put a call in to Mr. Boutrous to that effect, and to Mr. Thompson, and requested each to notify everybody else. Apparently, Mr. Thompson did not do so. And Mr. Boutrous apparently didn't receive the message.

But, be that as it may, we're ready to continue the trial tomorrow, and we'll proceed as expeditiously as possible.

MR. THOMPSON: And, your Honor, I would like to apologize. I had assumed that it was informed counsel on our side. I had not realized that I was supposed to coordinate. And I picked up the message on Tuesday morning. But I do apologize to the Court.

THE COURT: Very well. I accept that. I understand.

Now, we have some discovery and other matters to deal with.

1 The first is proponents' objection to the
2 magistrate's discovery order. And we just filed a written
3 order on that objection a few moments ago. It's very brief.

4 The bottom line is that the magistrate's order, I do
5 not believe, is clearly erroneous, which is the standard. In
6 fact, I think it's quite correct. And so the discovery order
7 by Magistrate Judge Spero will remain undisturbed.

8 The second is proponents' motion to amend the
9 January 8 discovery order to add four names to the core group
10 designation.

11 I tried to communicate with Magistrate Judge Spero
12 this morning, to see if he is available to hear that. I was
13 unable to reach him.

14 Inasmuch as that was a matter before him, it might
15 make sense for him to hear that in the first instance. But I
16 don't want that reference to delay matters. And so if he's
17 unavailable to hear that matter and to give a decision before,
18 say, midday today, I'd prefer to rule on that based upon the
19 submissions here.

20 But what I'll have the clerk do is try to reach him
21 and see what his availability is, and then at least one lawyer
22 from each side can go and discuss the matter with him and take
23 up the issue.

24 As I understand it, the proponents wish to add four
25 names to the core group designation. A Mr. Criswell, a

1 Mr. Wirthlin, a John Doe. And I have forgotten the fourth you
2 are seeking.

3 **MR. PUGNO:** Mr. Rob Wirthlin.

4 **THE COURT:** Mr. Wirthlin, yes.

5 **MS. STEWART:** Peterson.

6 **MR. PUGNO:** I'm sorry. Andrew Pugno for the
7 defendant-intervenors.

8 Mr. Rob Wirthlin is the fourth.

9 **MS. STEWART:** Peterson.

10 **THE COURT:** I mentioned Wirthlin.

11 **MR. PUGNO:** Oh, I'm sorry, Your Honor. It's Richard
12 Peterson.

13 **THE COURT:** Okay. Then we have the plaintiffs'
14 motion to reopen the deposition of Mr. Prentice. We haven't
15 had a response on that, at least I haven't seen one. But I
16 wonder, Mr. Boutrous, whether we really need to have a further
17 deposition of Mr. Prentice.

18 As I understand the situation, you believe that
19 you've discovered documents which call into question the
20 deposition testimony that Mr. Prentice gave.

21 Why can you not simply take that up in your
22 examination of him? When is he going to be called as a
23 witness?

24 **MR. BOUTROUS:** We have listed him, Your Honor, for, I
25 think, tomorrow or Friday. And -- and we thought it would,

1 number one, streamline things if we were able to just walk
2 through these documents with him.

3 It is a fairly voluminous group of documents, which
4 might either make it unnecessary for us to call him live, if we
5 are talking about authenticating documents, or at least would
6 spare the Court some lengthy walking through documents and
7 asking him what they are, and that sort of thing.

8 And so I don't think it needs to be a really long
9 deposition. But we thought for everyone it would be better to
10 just do a deposition, walk through the documents, and then
11 streamline things in the court. And we thought that would be a
12 preferable way to approach it.

13 **THE COURT:** Do proponents have a view?

14 Ms. Moss.

15 **MS. MOSS:** Good morning, Your Honor.

16 And I apologize for not having a copy with me, but we
17 did just file our opposition this morning, and I'm trying to
18 get one printed now.

19 Our position is, we are opposed to reopening the
20 deposition of Mr. Prentice. He was deposed for 14 hours, both
21 as the 30(b)(6) and in his individual capacity.

22 And we believe that their papers suggested they had
23 25 documents that they wanted to go over with him. And we
24 believe that to the extent they think that there is
25 inconsistencies with his testimony, they can explore that on

1 the stand; and that it would be highly prejudicial to us to
2 have to both sit through his deposition at the same time that
3 it's the day before they're saying they are going to put him on
4 the stand. We wouldn't have the ability to really prepare him
5 for his testimony.

6 So we would ask that it not be reopened, or, at a
7 minimum, that it be not the seven hours they have requested
8 but, at most, an hour.

9 **MR. BOUTROUS:** We would take two hours, Your Honor.

10 And if I could just respond to the suggestion that
11 it's the proponents who are sort of getting the short end of
12 the stick on the fairness equation.

13 The proponents withheld these documents, refused to
14 let Mr. Prentice answer questions on things that were clearly
15 within discovery.

16 And Magistrate Spero, when he heard the arguments and
17 ruled, found that -- that the relevance arguments were entirely
18 frivolous, and I think he said outrageous, at one point,
19 because they were clearly documents and things that were within
20 the realm of discovery and this Court's order and the Ninth
21 Circuit's order.

22 So we have been proceeding with extreme diligence.
23 We had teams reviewing these documents for the last week.
24 These documents should have been produced well before
25 Mr. Prentice's deposition.

1 So we think that we're making a modest request for a
2 short deposition, which will benefit everyone, including
3 helping streamline the proceedings.

4 **THE COURT:** I'm inclined to agree with Ms. Moss. I
5 have not forgotten what it's like to try cases and take
6 depositions at the same time. That's difficult under any
7 circumstances.

8 And seems to me you will be able to cross-examine or
9 to examine Mr. Prentice. And if there are, in fact,
10 inconsistencies between his deposition testimony and the
11 evidence that's now been produced, you'll be able to explore
12 that, and can be done just as effectively here at trial as with
13 a further deposition. It may take a little more time with the
14 authentication of documents, but we're in trial. So I'll let
15 you proceed.

16 And, then, I believe the only other matter is the
17 proponents' objection to the next witness.

18 **MR. COOPER:** Actually, Your Honor, before you get to
19 that, there's something in the nature of loose ends.

20 **THE COURT:** All right.

21 **MR. COOPER:** I think --

22 **THE COURT:** Let's tidy up those loose ends.

23 **MR. COOPER:** This won't take but a moment.

24 But yesterday I did maintain a provisional objection
25 to a couple of the documents, as you may recall, that Mr. Boies

1 introduced into evidence. It was PX0188 and PX0189.

2 Since the time of that provisional objection, my
3 friends for the plaintiffs have provided the confirmation that
4 those were indeed provided to us before the deposition of
5 Dr. Badgett.

6 **THE COURT:** Very well.

7 **MR. COOPER:** So we withdraw that objection.

8 **THE COURT:** All right. Thank you very much,
9 Mr. Cooper.

10 Then I believe the only other remaining matter is the
11 issue of the Ryan Kendall testimony.

12 **MR. CAMPBELL:** Yes, Your Honor.

13 **THE COURT:** And you are Mr. --

14 **MR. CAMPBELL:** James Campbell for the
15 defendant-intervenors.

16 **THE COURT:** Mr. Campbell. You took the deposition?

17 **MR. CAMPBELL:** That is correct, Your Honor.

18 Just -- as I understand, Your Honor is familiar with
19 the deposition --

20 **THE COURT:** I read the deposition.

21 **MR. CAMPBELL:** As a brief background, Mr. Kendall is
22 a man from Colorado whose parents forced him, against his will,
23 to attend some type of sexual orientation conversion therapy.
24 And that is the nature of his testimony in this case.

25 We believe that there are at least four reasons why

1 his testimony should be excluded from this case.

2 First of all, Mr. Kendall's testimony is irrelevant.
3 He can only testify about his limited experience, which deals
4 with involuntary, forced conversion therapy. And it is our
5 position, Your Honor, that that is wholly irrelevant to this
6 Court's analysis.

7 Secondly, to the extent that this issue is at all
8 relevant, it is the proper subject of expert testimony, not lay
9 testimony.

10 Simply put, one man's anecdotal account of his
11 experience with a particular type of conversion therapy is
12 irrelevant to this Court's analysis. It's no more relevant
13 than if the defendant-intervenors found some individual and
14 asked them to elicit testimony about a positive experience they
15 had with this type of testimony.

16 So we would just urge the Court that this is the
17 proper subject of expert testimony, if it is at all relevant.

18 And, further to that point, Your Honor, the plaintiff
19 and plaintiff-intervenors have already identified an expert,
20 Dr. Herek, who in his expert report has already opined on the
21 issue of conversion therapy. So if it's relevant, he can
22 discuss it.

23 And, finally, Your Honor -- I think this, perhaps, is
24 one of the more important points -- plaintiff and
25 plaintiff-intervenors' own expert, Dr. Herek, has indicated

1 that self-reports of conversion therapy from many years ago,
2 which of course is the type of testimony that we'll be
3 receiving from Mr. Kendall, is unreliable, often inaccurate,
4 and unhelpful for serious analysis.

5 And what I'm referring to specifically, Your Honor,
6 is Plaintiffs' Exhibit 2563, which I have some copies of.

7 This document, Your Honor, is Dr. Herek's commentary
8 on a study of conversion therapy conducted by a person named
9 Spitzer.

10 And if I could direct the Court's -- specifically,
11 Dr. Herek makes some comments here about self-reporting of
12 conversion therapy, and I think they are particularly
13 enlightening in this context.

14 What he says, on page 438 of this document, and it's
15 the last paragraph on that page, just the first couple of
16 sentences, I quote:

17 "Even if Spitzer respondents sincerely tried
18 to give true accounts of feelings and daily
19 behavior from on average 12 years prior to
20 the interview, their reports cannot be
21 assumed to be reliable. People often are
22 inaccurate when recalling earlier mental
23 states, especially when their emotions,
24 goals, or beliefs have changed in the
25 interim."

1 And he goes on further, Your Honor. So I guess our
2 position on that point is, their own expert recognizes that
3 this type of self-reporting isn't helpful for a serious
4 analysis.

5 **THE COURT:** Let me ask you, Mr. Campbell, isn't this
6 an issue that the proponents themselves have raised and opened
7 in the case?

8 **MR. CAMPBELL:** I don't believe that we've -- we've
9 raised the issue of forced conversion therapy, Your Honor.

10 **THE COURT:** Well, I'm looking at your trial brief.
11 And you say:

12 "The evidence at trial will show that many
13 people freely choose their sexual
14 orientation."

15 Goes on:

16 "The evidence will further demonstrate that
17 however it is defined sexual orientation can
18 shift over time and does so for a significant
19 number of people."

20 And the proposed findings that the proponents have
21 submitted include such items as:

22 "No aspect of sexual orientation has been
23 shown to be immutable."

24 "An individual's sexual orientation can
25 change over the course of a lifetime."

1 "Research shows that many individuals' sexual
2 orientation does change over the course of a
3 lifetime."

4 "Women's sexual orientation tends to be
5 particularly fluid, malleable, shaped by life
6 experiences, and capable of change over
7 time."

8 And:

9 "For many people, adopting a particular
10 sexual orientation is a conscious choice."

11 So these are findings that you yourself have put in.

12 **MR. CAMPBELL:** That's correct.

13 **THE COURT:** Or at least your colleagues.

14 And so it seems to me you have raised the very issue
15 to which this witness is going to testify.

16 **MR. CAMPBELL:** I think the critical distinction, Your
17 Honor, is, we don't ever mention any type of forced or
18 structured therapy that would bring about these changes.

19 Our position in this case and our position in those
20 factual findings are that these changes do occur. Whether or
21 not they occur through some type of structured therapy is not
22 an issue that's relevant.

23 The bottom line is that the change occurs, and that
24 is what's relevant to determining whether a suspect
25 classification applies here.

1 **THE COURT:** What evidence are you going to present on
2 this?

3 **MR. CAMPBELL:** Well, extensive --

4 **THE COURT:** Are you going to present evidence that
5 people have successfully changed their sexual orientation?

6 **MR. CAMPBELL:** We believe that through various
7 cross-examinations of some of the upcoming witnesses, as well
8 as potentially through some of our own, we will show that, Your
9 Honor, exactly what you just mentioned, that people's --

10 **THE COURT:** Other than cross-examination, how do you
11 intend to show this?

12 **MR. CAMPBELL:** Well, you know, as I said, we may call
13 our own witnesses to show this, our own experts to show this.
14 But it is something that we primarily intend to show through
15 cross-examination of the plaintiffs' expert.

16 **THE COURT:** I see.

17 **MR. CAMPBELL:** As well as whatever is on this note.
18 (Laughter)

19 **THE COURT:** Always handy to receive a note from one
20 of your colleagues.

21 **MR. CAMPBELL:** As well as through studies, Your
22 Honor.

23 **THE COURT:** Through studies.

24 **MR. CAMPBELL:** Yes.

25 (Laughter)

1 **THE COURT:** Okay.

2 **MR. CAMPBELL:** Which we will introduce through -- on
3 cross and other various means.

4 Thank you, Your Honor.

5 **THE COURT:** Thank you, Mr. Campbell.

6 By the way, I think you took a good deposition.

7 **MR. CAMPBELL:** Thank you.

8 **THE COURT:** Well, it does seem to me that this is an
9 issue that the proponents themselves have raised in the case,
10 the fluidity of sexual orientation. It is true that this is an
11 issue which largely depends upon expert testimony.

12 But, as with so many aspects of testimony in a trial
13 and evidence in a trial, actual firsthand experience to
14 illustrate points that have been raised is very helpful, and --
15 well, you're not the only one, Mr. Campbell, to receive
16 notes -- is very helpful.

17 And I think the testimony of Mr. Kendall on this
18 issue can be evaluated by the Court and weighed in relation to
19 the expert testimony and all the other evidence that's going to
20 be presented. And so I'm disinclined to exclude his testimony.

21 He has, after all, been deposed. Mr. Campbell has
22 had had a chance to explore this gentlemen's testimony and to
23 prepare himself. And so I think it's not unfair to the
24 proponents, having raised this issue, for Mr. Kendall to
25 testify. And, therefore, the motion to exclude him will be

1 denied.

2 Now, the note I have just been handed is that
3 Magistrate Judge Spero can hear the core group issue right now.
4 So if you would designate one of your number to hightail it to
5 Magistrate Judge Spero, he can hear the matter and render a
6 decision.

7 (Laughter)

8 **MR. COOPER:** Very well, Your Honor.

9 Mr. Pugno is taking the lead for our side on these
10 subject matters.

11 **THE COURT:** Good. Thank you.

12 **MR. BOUTROUS:** And I am sending Mr. McGill in for
13 that one.

14 **THE COURT:** All right.

15 Well, I believe, Mr. Boutrous, you're calling the
16 next witness; are you?

17 **MR. BOUTROUS:** Your Honor, I'm going to have
18 Mr. Boies explain, we're going to, first, play some video clips
19 of depositions, as a prelude to today's testimony from our
20 witnesses.

21 Mr. Boies, would you like --

22 **THE COURT:** All right. Mr. Boies.

23 **MR. BOIES:** Your Honor, we are going to play
24 deposition designations from Dr. Paul Nathanson, initially.
25 And then we are -- we are going to begin with deposition

1 designations from Dr. Paul Nathanson, and then follow that with
2 deposition designations from Professor Katherine Young.

3 Both of these individuals were designated experts
4 from the defendants, but they're -- defendants have withdrawn
5 them, so they are not going to be calling them live.

6 **THE COURT:** Let's see. Katherine Young does appear,
7 yes, to have been designated by the defendants. And the other
8 one is Mr. Nathanson?

9 **MR. BOIES:** Yes, Paul Nathanson, Dr. Paul Nathanson.

10 **THE COURT:** All right.

11 **MR. BOIES:** Thank you, Your Honor.

12 **MR. COOPER:** Your Honor, before we get underway on
13 that, I do want to recall to the Court's attention the
14 discussion about this, that happened a few trial days ago with
15 Mr. Thompson.

16 These witnesses were withdrawn at their insistence.
17 And I understand that Mr. Boies is going to -- going to submit
18 these to the Court under -- under judicial notice, and offer
19 judicial notice.

20 And we -- we are fine with that or we're -- we will
21 not object to that. Although, we to believe that under those
22 circumstances it would be necessary for us to be allowed to
23 also submit to the Court the expert witness reports that
24 provide the basis for these deposition questions and these
25 designations, and also to offer to the Court

1 counter-designations, as soon as we are able to determine what
2 they're putting on and can identify counter-designations from
3 the deposition, if the Court please.

4 **MR. BOIES:** Your Honor, we gave them these
5 designations a week ago. In fact, we told them we might play
6 them last Thursday or Friday, depending on the timing. So they
7 have had the deposition designations.

8 These are clearly admissible under 32 -- it's
9 subsection 4 -- (a)(2)(4), I think. (a)(2)(4). 32(a)(2)(4), I
10 think it is, where a witness is more than a hundred miles away,
11 and we did not procure the witnesses' absence.

12 And I think they would also be admissible under
13 judicial notice. But I think they are admissible as evidence
14 under 32(a)(4)(b). 32(a)(4)(b).

15 **THE COURT:** Well, let's see. Where are these folks
16 located?

17 **MR. BOIES:** Montreal, Canada.

18 **THE COURT:** Both of them?

19 **MR. BOIES:** Both of them.

20 **THE COURT:** Well, that's more than a hundred miles
21 from San Francisco.

22 **MR. BOIES:** I took their depositions, so I know
23 exactly where they are and how cold it is there.

24 (Laughter)

25 **THE COURT:** All right. Well, there are probably

1 (Plaintiffs' Exhibit 2334 received in evidence.)

2 **MR. BOIES:** And, Your Honor, I would offer
3 Plaintiffs' Exhibit 2546 and 2547. 2546 is the disk, and 2547
4 is the transcript of the portions of Dr. Nathanson's testimony
5 that has just been played.

6 **THE COURT:** Very well. And 2546 is the CD of the
7 testimony that we just heard, correct?

8 **MR. BOUTROUS:** May I approach, Your Honor, and
9 provide a copy for the Court?

10 **THE COURT:** 2546 is the CD or the disk of the
11 testimony that we've just heard?

12 **MR. BOUTROUS:** That's correct, Your Honor.

13 **THE COURT:** All right.

14 **MR. COOPER:** Your Honor, I just want to reassert my
15 previously stated objection, and also note that -- that we will
16 offer the Court our counter-designations with appreciation to
17 the Court's permission, tomorrow, if that is okay.

18 **THE COURT:** That will be fine.

19 **MR. COOPER:** Thank you.

20 **THE COURT:** Very well. Are we ready with another --

21 **MR. BOIES:** We are, Your Honor.

22 **THE COURT:** -- witness?

23 **MR. BOIES:** This is Professor Katherine Young's
24 deposition. And I would offer Plaintiffs' Exhibit 2335, which
25 is her resume. And I'd offer it at this time, so the Court has

1 it while she's testifying.

2 **THE COURT:** Very well.

3 **MR. COOPER:** And there's no objection to the resume
4 of Dr. Young.

5 **THE COURT:** Very well.

6 (Plaintiffs' Exhibit 2335 received in evidence.)

7 **MR. BOIES:** And the disk of the resume is Plaintiffs'
8 Exhibit 2335, as well. We also have the disk of testimony,
9 which is Plaintiffs' Exhibit 2544.

10 **THE COURT:** 2544?

11 **MR. BOIES:** 2544, which is the disk of the testimony.

12 **THE COURT:** Very well.

13 (Plaintiffs' Exhibit 2544 received in evidence.)

14 **MR. BOIES:** And Exhibit 2545 is the transcript of the
15 testimony.

16 **THE COURT:** All right.

17 (Plaintiffs' Exhibit 2545 received in evidence.)

18 **MR. COOPER:** Your Honor, again, subject to my
19 previously stated points.

20 **THE COURT:** That will be fine, Mr. Cooper.

21 **WHEREUPON:**

22 KATHERINE YOUNG,

23 called as a witness for the Plaintiffs herein, testified via
24 videotaped deposition played in open court.

25 (Time noted: 9:20 a.m.)

1 **MR. BOIES:** That completes the deposition of
2 Professor Young.

3 Our next witness is Mr. Ryan Kendall, Your Honor.

4 **THE COURT:** Very well.

5 I don't believe I was handed the disk of
6 Professor Young's testimony, but the clerk has it?

7 **THE CLERK:** I do, Your Honor.

8 **THE COURT:** All right. Then, 2544. All right.

9 Why don't we take a very brief break, at this time,
10 while you bring Mr. Kendall forward, and then we'll resume in
11 ten minutes.

12 **MR. BOUTROUS:** Thank you, Your Honor.

13 **MR. FLYNN:** Thank you, Your Honor.

14 (Recess taken from 9:39 to 9:49 a.m.)

15 **THE COURT:** Very well.

16 **MR. FLYNN:** Good morning. Ron Flynn, City and County
17 of City of San Francisco. Ron Flynn, City and County of San
18 Francisco.

19 **THE COURT:** Mr. Flynn.

20 **MR. FLYNN:** Yes, Your Honor.

21 **THE COURT:** Very well.

22 **MR. FLYNN:** I'm here to call the next witness,
23 Mr. Kendall.

24 **THE CLERK:** Raise your right hand, please.
25

1 to work with secure criminal information that's on that
2 database.

3 Q. Mr. Kendall, I want to talk about when you were younger,
4 when you were a child.

5 Where did you grow up?

6 A. I grew up in Colorado Springs, Colorado.

7 Q. And when were you born?

8 A. In 1983.

9 Q. So you are 26 years old now?

10 A. That's correct.

11 Q. Where did you attend elementary school?

12 A. I went to a school called ECA, Evangelical Christian
13 Academy.

14 Q. While you were a child in Colorado Springs, did you learn
15 of the concept of gay people or homosexuality?

16 A. Yes. I remember during the discussion about Amendment 2,
17 during the Amendment 2 campaign, my parents would talk about
18 homosexuals seeking special rights, and how they were
19 essentially evil people; and how they felt threatened and how
20 our family was threatened by homosexuals.

21 Q. At that time, did you know what a homosexual was?

22 A. No, I didn't. I just knew it was a big, long, scary word.
23 And I found the whole concept very frightening.

24 Q. Mr. Kendall, what is your sexual orientation?

25 A. I'm a gay man.

1 Q. When did you first realize that you were gay?

2 A. When I was a little kid, I knew I liked other boys. But I
3 didn't realize that that meant I was gay until I was, probably,
4 11 or 12 years old.

5 Q. How did you come to realize that it meant -- that that
6 meant you were gay?

7 A. I was a precocious kid. So one day I ended up looking up
8 the word "homosexual" in the dictionary. And I remember
9 reading the definition, something along the lines of a romantic
10 attraction between members of the same sex. And it slowly
11 dawned on me that that's what I was.

12 Q. Given your prior testimony about homosexuals, how did you
13 feel when you realized that you were gay?

14 A. Well, once I connected this all together, I realized that
15 what a homosexual was, the fact that I was a homosexual and the
16 fact that my family and community did not like this concept, I
17 was scared by that. I realized this was bad news for me. So I
18 kept this a secret, and I hid it as far away from everyone as I
19 could.

20 Q. Around this time, did anyone talk to you about being gay?

21 A. When I was in seventh grade, I remember being taunted
22 about being gay. Some of the older boys and boys in my class
23 would call me names, and things like that.

24 Q. What kind of names would they call you?

25 A. I was called a fagot. I was called a homo, a queer, or

1 even just gay.

2 **Q.** Other than name calling, did these boys do anything else
3 to you?

4 **A.** I remember one incident -- I have worn glasses since I was
5 like in the third grade. I need them to see. And a couple of
6 the boys took my glasses and played monkey in the middle, keep
7 away, and threw them over my head until, eventually, they broke
8 them.

9 **Q.** What was it like for you to be in that school? How did
10 you feel?

11 **A.** It was scary going into that building, realizing these
12 kids were taunting me with a word that was so close to the
13 truth. And it was very upsetting. I would go home and get in
14 the car when my parents would pick me up, crying and telling
15 them what had been going on.

16 **Q.** What did your parents do?

17 **A.** My parents were horrified that I was being treated so
18 poorly, so, eventually, they took me out of that school and
19 placed me in another one.

20 **Q.** At the time they did that, did your parents know that you
21 were gay?

22 **A.** No, they did not.

23 **Q.** Did your parents ever find out that you were gay?

24 **A.** Yes, when I was 13 years old, at one point my parents
25 discovered my journal. And for the first time in that journal,

1 I had admitted to myself that I was gay. And I had actually
2 written those words. And they found that and read it.

3 **Q.** What happened when they found that journal?

4 **A.** My parents flipped out. They were very upset. They were
5 yelling. I don't remember a lot of what they said, but it was
6 pretty scary, the level of their reaction.

7 **Q.** Can you remember anything they said to you when they found
8 the journal?

9 **A.** Yes. I remember my mother looking at me and telling me
10 that I was going to burn in hell.

11 **Q.** Were you in a religious family?

12 **A.** Yes. I grew up in a very religious family. Church and
13 God were everyday parts of our life.

14 **Q.** So what -- what did you think when your mother told you
15 that?

16 **A.** It was shocking. I never heard anything like that from my
17 mother. I never thought that my parents would ever say
18 anything -- I mean, hell was the worst. You don't get much
19 worse than eternal damnation. And I was just totally stunned
20 that they had said that.

21 **Q.** Did your parents later tell you anything else about you
22 being gay?

23 **A.** After my parents found out, my home life changed a lot.
24 And my parents didn't take it very well. And I remember my
25 mother calling me names.

1 Q. Did they make any efforts to -- to put you in any therapy
2 or to change you in any way?

3 A. Yes. Shortly after this incident, I was sent to a
4 Christian therapist for reversal therapy.

5 Q. Why do you say it was a Christian therapist?

6 A. That's how he was identified to me.

7 Q. Can you tell us the goal of the Christian therapy?

8 A. Yes. I was told that the goal was to make me a
9 heterosexual.

10 Q. How many times did you go to this therapy?

11 A. I went two or three times.

12 Q. Do you remember anything you did at that therapy?

13 A. I remember a little bit. I remember the therapist telling
14 me that homosexuality was inconsistent with Christian teaching,
15 and that my parents didn't want me to be gay, and I needed to
16 change, and that homosexuals were bad people.

17 Q. Did Christian therapy make you feel better about the
18 situation?

19 A. No, it didn't. I -- I always wanted to be a good kid and
20 to make my parents proud. And, suddenly, I was in a situation
21 where they were taking me to see this guy who was telling me I
22 was a bad person, and they were telling me I was a bad person.
23 And I remember feeling very, very alone.

24 Q. Was the therapy successful? By that I mean, did it reach
25 its goal of making you into a heterosexual?

1 **A.** No. I was still gay.

2 **Q.** Did you try to become heterosexual during those therapy
3 sessions?

4 **A.** No, I didn't think it was possible.

5 **Q.** Why not?

6 **A.** I knew I was gay just like I knew I'm short and I'm half
7 Hispanic. And I just never thought that those facts would
8 change.

9 **Q.** When you stopped going to this therapy program, did you go
10 to any other therapy programs?

11 **A.** Yes. My parents had been referred by Focus on the Family,
12 to another organization called NARTH.

13 **Q.** What's Focus on the Family?

14 **A.** Focus on the Family is a Christian family ministry based
15 in Colorado Springs, Colorado, where I grew up.

16 **Q.** And what's NARTH?

17 **A.** NARTH stands for the National Association for Reparative
18 Therapy of Homosexuality. It's a reversal therapy organization
19 based in Encino, California.

20 **Q.** Did you voluntarily go to NARTH?

21 **A.** No. My parents made all of those decisions for me.

22 **Q.** How long were you at NARTH?

23 **A.** About a year and a half.

24 **Q.** From what ages?

25 **A.** 14 to 16.

1 Q. During the time that you were at NARTH, how was your home
2 life?

3 A. My home life had changed a lot. It was like night and
4 day.

5 I remember before this all started I had the kind of
6 parents who would drive me to school, and make my lunches, and
7 write notes and put them in my lunch. And after this, they
8 were always yelling at me. They were calling me names. Uhm,
9 and they were just telling me really horrible things. And it
10 became a really emotionally and verbally abusive environment.

11 Q. What kind of names were they calling you?

12 A. Uhm, my mother would tell me that she hated me, or that I
13 was disgusting, or that I was repulsive. Once she told me that
14 she wished she had had an abortion instead of a gay son. She
15 told me that she wished I had been born with Downs Syndrome or
16 I had been mentally retarded. Things like that.

17 Q. Who did you meet with at NARTH?

18 A. I met with Dr. Joseph Nicolosi.

19 Q. Who was Dr. Joseph Nicolosi?

20 A. Nicolosi was the executive director of NARTH.

21 Q. Was he also a therapist?

22 A. Yes.

23 Q. Where would you -- where would you meet with Mr. Nicolosi?

24 A. Most of the time, I would go into my parents' room. And
25 my dad had a separate line at his desk. And I would call in

1 and do over-the-phone sessions, for like an hour or hour and a
2 half. But I did, actually, fly out to California to do some
3 in-person sessions.

4 **Q.** What would you talk about during those sessions?

5 **A.** I don't recall a lot of what was said during those
6 sessions.

7 I recall Nicolosi saying that, you know,
8 "Homosexuality is incompatible with what God wants for you, and
9 your parents want you to change," and that this is a bad thing.

10 **Q.** Were you given any advice on how you would be able to
11 suppress your homosexuality, in these therapy sessions?

12 **A.** I remember it as a general admonishment, but not a
13 specific technique, no.

14 **Q.** You remained a religious person through your experience at
15 NARTH, correct?

16 **A.** Yes.

17 **Q.** Is it possible that your experience at NARTH helped you
18 reconcile your faith with your identity as a gay person?

19 **A.** At NARTH, I was being told that I had to reject who I was
20 on the most fundamental level because what that was was dirty
21 and bad.

22 While I reconciled my faith with my identity, the
23 therapy I went to at NARTH played no role in that.

24 **Q.** How old were you when you stopped going to reversal
25 therapy?

1 **A.** I was 16 years old.

2 **Q.** And was it successful in that you were able to suppress
3 your homosexuality?

4 **A.** No. I was just as gay as when I started.

5 **Q.** Why did you stop going to reversal therapy?

6 **A.** During this whole thing, my life had kind of fallen apart.
7 I didn't have the world that I grew up in; my faith, which was
8 very important to me; my family, which was even more important.
9 Everything had just kind of stopped.

10 And I just couldn't take any more. And I realized,
11 at one point, that if I didn't stop going I wasn't going to
12 survive.

13 **Q.** What do you mean by that?

14 **A.** Uhm, I would have probably killed myself.

15 **Q.** How is it that you were able to stop going to reversal
16 therapy?

17 **A.** When I was 16, I separated myself from my family and
18 surrendered myself to the Department of Human Services in
19 Colorado Springs.

20 **Q.** And what happened when you surrendered yourself to that
21 department?

22 **A.** I -- I went in, and I spoke with the case worker. And I
23 told her what had been going on in my family, what had been
24 going on with reversal therapy. And I told her that if I went
25 back to that house, I was going to end up killing myself.

1 And so they started a dependency and neglect
2 proceeding to revoke my parents' custody.

3 **Q.** So did you stop living with your parents and stop going to
4 therapy?

5 **A.** That's correct.

6 **Q.** And did things get better?

7 **A.** I was a 16-year-old kid who had just lost everything he
8 ever knew. I didn't really know what to do. I was very lost.
9 And so the next few years I wandered in and out of jobs. I
10 wandered in and out of attempts at school.

11 I was incredibly suicidal and depressed. I hated my
12 entire life. At one point, I turned to drugs as an escape from
13 reality and because I was, you know, trying to kill myself.

14 So, no, things did not get better.

15 **Q.** How long did this period last?

16 **A.** Four or five years.

17 **Q.** During this period, were you able to support yourself?

18 **A.** It was a struggle for survival. I wasn't really able to
19 support myself.

20 **Q.** Did you rely on any public benefits, or anything like
21 that, during this period?

22 **A.** Uhm, well, when my healthcare ran out, you know, I had to
23 go to emergency rooms to get medical care. And the only
24 counseling I could get were through state schools, because I
25 couldn't afford anything else.

1 Q. Mr. Kendall, you told us that you now work for the Denver
2 Police Department, correct?

3 A. That's correct.

4 Q. How long have you done that?

5 A. Over two years now.

6 Q. So it would be fair to say that you've now -- you're able
7 to support yourself and you're stable?

8 A. Yes. It's been a -- a long, hard journey. But I have
9 fought with every bit of myself to take care of myself, to get
10 a good job, to get someplace to live. And I've been able to do
11 that.

12 Q. I just have a couple of questions for you, a couple more
13 questions.

14 Mr. Kendall, are you a member of any organization
15 that advocates for greater rights for gays and lesbians?

16 A. Yes, I am.

17 Q. Can you tell me which ones?

18 A. I'm a member of the National -- or I'm a member of the Log
19 Cabin Republicans. And I'm also the current chair of the
20 Denver Gay, Lesbian, Bisexual, and Transgender Commission.

21 Q. What is that commission?

22 A. It's a advisory body that advises city agencies in the
23 mayor's office on GLBT-related issues within the city and
24 county of Denver.

25 Q. Are you here to testify today as a member of Log Cabin or

1 as a member of that commission?

2 **A.** No. I came here to testify as myself, Ryan Kendall.

3 **Q.** Do you consider yourself personally an advocate for gay
4 and lesbian rights?

5 **A.** In my personal life I am, yes.

6 **Q.** Mr. Kendall, was anything you said today in court shaped
7 by your role as an advocate for gay and lesbian rights?

8 **A.** Absolutely not. I've just told you my story, what
9 happened to me.

10 **MR. FLYNN:** Thank you. I have no further questions
11 for you.

12 **THE COURT:** Mr. Campbell, you may cross-examine.

13 **MR. CAMPBELL:** Thank you, Your Honor.

14 **CROSS EXAMINATION**

15 **BY MR. CAMPBELL:**

16 **Q.** Good morning, Mr. Kendall. I just have a few questions
17 for you.

18 Have you ever lived in the state of California?

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

20 **Q.** And you didn't have any role in the campaign to oppose
21 Proposition 8, did you?

22 **A.** No, I did not.

23 **Q.** You didn't see any of the Yes On 8 campaign materials, did
24 you?

25 **A.** No, I did not.

1 Q. You were contacted by someone from the San Francisco City
2 Attorney's Office who asked you to participate as a witness in
3 this case; isn't that true?

4 A. Yes.

5 Q. When were you contacted by this person from the
6 San Francisco City Attorney's Office?

7 A. I don't recall exactly. I think it was late October.

8 Q. You have never read a scientific study addressing the
9 concept of sexual orientation; isn't that true?

10 A. That is true.

11 Q. And isn't it also true that you have never studied whether
12 a person's sexual orientation can change throughout the course
13 of his or her lifetime?

14 A. No, I haven't studied it.

15 Q. Isn't it also true that you know people who have professed
16 to be one sexual orientation and then, at a later time,
17 professed to be another?

18 A. In public, yes.

19 Q. And isn't it also true that you're not familiar with the
20 American Psychological Association's position on conversion
21 therapy?

22 A. That's also true.

23 Q. You talked at length about your experience with conversion
24 therapy. I just want to touch on some of those points.

25 You were compelled to go to conversion therapy by

1 your parents; isn't that correct?

2 **A.** Yes.

3 **Q.** And nothing involved in conversion therapy was your
4 decision; it was all your parents' decision. Isn't that true?

5 **A.** Yes.

6 **Q.** And when you began conversion therapy, you were not asked
7 to consent to that particular type of counseling; isn't that
8 true?

9 **A.** That is correct.

10 **Q.** At some point during your counseling, you communicated to
11 your parents objections to the counseling treatment you
12 received at conversion therapy. Is that true?

13 **A.** I communicated objections to what I was being told both in
14 my family and conversion therapy, yes.

15 **Q.** But those objections, they didn't make any difference,
16 because you didn't have a choice in the matter, and your
17 parents compelled you to go against your will?

18 **A.** That's correct.

19 **Q.** Your only goal for conversion therapy was to survive the
20 experience; isn't that true?

21 **A.** Absolutely true.

22 **Q.** You didn't have the goal of changing your sexual
23 orientation -- I'm sorry, correction. You didn't have the goal
24 of changing your sexual attraction, correct?

25 **A.** That's correct.

1 Q. Indeed, you admit that you did not truly want to reduce
2 your sexual attraction to persons of the same sex; isn't that
3 true?

4 A. That's correct.

5 Q. You testified a little bit about the alleged emotional
6 harm that you've experienced from conversion therapy; isn't
7 that true?

8 A. Yes.

9 Q. And you also discussed a little bit about some of the
10 various things that your parents, specifically your mother,
11 said to you; isn't that right?

12 A. Yes.

13 Q. But you have acknowledged, haven't you, that your
14 particular family experience that went along with conversion
15 therapy was just as damaging to you as the therapy itself;
16 isn't that correct?

17 A. Yes, I have.

18 Q. At some point -- let me do it this way.

19 At some point, your parents' custody of you was
20 revoked; is that true?

21 A. Yes.

22 Q. And that happened at age 16; is that right?

23 A. Yes.

24 Q. And after that point, sometime after you turned 18, you
25 went back to live with your parents for a short period of time;

1 isn't that true?

2 **A.** Yes, it is.

3 **Q.** You've established through your testimony today you were
4 involuntarily forced to attend conversion therapy, right?

5 **A.** That's correct, sir.

6 **Q.** But you would acknowledge that some people do want and
7 voluntarily choose to undergo some form of conversion therapy?

8 **A.** No, sir, that's not my personal experience.

9 **Q.** So you would not acknowledge that -- that there is anyone
10 who voluntarily chooses to attend conversion therapy?

11 **A.** Well, I don't know everyone. But that's not my
12 experience, sir.

13 **Q.** So my question is: Is it your position that no one has
14 ever gone to conversion therapy voluntarily?

15 **A.** I can't make that absolute assumption, no. But it is my
16 experience that people don't want to go to programs like NARTH.

17 **Q.** Well, you acknowledged in your deposition, did you not,
18 that some people report to have effective results with
19 conversion therapy; isn't that true?

20 **A.** Yes.

21 **MR. CAMPBELL:** I have no further questions, Your
22 Honor.

23 **THE COURT:** Any redirect, Mr. Flynn?

24 **MR. CAMPBELL:** Very brief.

25 **MR. FLYNN:** Very brief, Your Honor.

REDIRECT EXAMINATION

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BY MR. FLYNN:

Q. While you were in conversion therapy, were you introduced to any people who purported -- or were purported to you to have successfully undergone conversion therapy?

A. Yes, I was.

Q. Who was that?

A. I remember during one of the group therapy sessions Nicolosi trotted out his perfect patient, the guy who had been cured of his homosexuality. And his name was Kelly.

Q. Did meeting Kelly have any impact on your views of conversion therapy?

A. I remember once, when Nicolosi stepped out of the room, we were talking amongst ourselves. And Kelly told me that later that night he was going to a gay bar and that he was, essentially, just pretending to be cured for the sake of his family.

(Laughter)

Q. How did that make you feel about the therapy program?

A. I knew I was gay. I knew that could not be changed. And this just confirmed that this wasn't going to be effective for me.

Q. One final thing. You said you returned to live with your parents; is that right?

A. For a brief period, yes.

1 Q. How long?

2 A. Few months.

3 Q. How is your relationship with your mother now?

4 A. I don't speak to my mother.

5 MR. FLYNN: I have no further questions.

6 THE COURT: Very well. Thank you. Mr. Kendall, you
7 may step down.

8 And your next witness.

9 MR. BOUTROUS: Your Honor, the plaintiffs call
10 Professor Gary Segura.

11 With the Court's permission we will be handing out a
12 binder that has the main exhibits for direct testimony to the
13 Court and the witness.

14 THE COURT: Very well.

15 MR. BOUTROUS: Your Honor, Mr. Cooper asked if we
16 could just pause while Mr. Thompson is brought back into the
17 courtroom.

18 THE COURT: That would be fine.

19 MR. BOUTROUS: To be fair.

20 THE COURT: Absolutely.

21 I think we can do the formalities and swear the
22 witness, and get him ready to go.

23 THE CLERK: Raise your right hand, please.

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GARY SEGURA,

called as a witness for the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please, have a seat.

State your name, please.

THE WITNESS: Gary Segura.

THE CLERK: And spell your last name.

THE WITNESS: S-e-g-u-r-a.

THE CLERK: And your first name?

THE WITNESS: Gary, G-a-r-y.

THE CLERK: Thank you.

(Pause)

THE COURT: Is Mr. Thompson back amongst us? Not yet. Well, why don't we just stand up and stretch a minute.

MR. COOPER: He's on his way, presently.

(Pause)

THE COURT: Very well. Mr. Thompson, welcome back.

MR. THOMPSON: Thank you.

THE COURT: Are you organized now?

MR. THOMPSON: Yes, Your Honor.

THE COURT: Oh, good. Then we can begin.

Mr. Boutrous, you have a witness on the stand.

MR. BOUTROUS: Yes. Thank you, Your Honor.

DIRECT EXAMINATION

1
2 **BY MR. BOUTROUS:**

3 **Q.** Good morning, Professor Segura.

4 **A.** Good morning.

5 **Q.** Could you tell the Court a little bit about your academic
6 and professional background.

7 **A.** I'm a professor of political science in the Department of
8 Political Science at Stanford University.

9 I received a Ph.D. in political science in 1992, from
10 the University of Illinois. I've taught at a variety of
11 institutions, and came to Stanford about a year and a half ago.
12 I -- also at Stanford, I serve as the chair of the program on
13 Chicano Studies.

14 And I'm currently president of the Midwest Political
15 Science Association, which is the second largest professional
16 association of political scientists in the United States.

17 **Q.** What is the Stanford Center for Democracy?

18 **A.** The Stanford Center for American Democracy is a
19 newly-established center at Stanford, that I codirect with
20 another professor, designed to use empirical techniques to
21 explore data about the American electorate and its implication
22 for American democracy. Our biggest project is the American
23 National Elections Studies.

24 **Q.** What does the American National Elections Studies entail,
25 briefly?

1 **A.** The American National Elections Studies is the gold
2 standard, as it were, of political science studies of the
3 electorate.

4 They are conducted every four years, during an
5 election year, with some ancillary studies leading up to the
6 election year. And it's been run consistently since 1948, so
7 we have a very long portrait of what the American electorate
8 thinks about politics.

9 And my colleague and I just now are taking over the
10 study.

11 **Q.** Do you serve on any editorial boards of journals in your
12 field of study?

13 **A.** I do. I'm currently on the editorial board of the AJPS,
14 the *American Journal of Political Science*.

15 (Reporter interrupts.)

16 *American Journal of Political Science*. *The Journal*
17 *of Politics*, and *Political Research Quarterly*.

18 I've previously served on the editorial board of *PS:*
19 *Political Science & Politics*.

20 **Q.** Could you describe, generally, the nature of your studies
21 and research work and specialty.

22 **A.** I think of myself as a student of political
23 representation. So my work is primarily political behavior,
24 which is looking at the mass opinions and attitudes and actions
25 of citizens in the society.

1 As a representation theorist, what I try to look at
2 is how these things subsequently connect to the actions of
3 policymakers. So that, obviously, representation has two ends
4 to the relationship.

5 **Q.** Maybe you could just briefly describe what it means to be
6 a representation theorist.

7 **A.** So one of the vexing questions in political science, from
8 its earliest days, is whether or not democratic governance by
9 elected officials is in any way broadly responsive.

10 And so there has been debate off and on about whether
11 or not the elected officials are responsive to changing views
12 of the public, whether or not they are actually leading the
13 public; that is, the public is actually more responsive to
14 elected officials.

15 And so what I try to look at is the dynamics of how
16 communication between elites and the mass public change how
17 people view and how the elite act over time.

18 **Q.** In your work, have you focused on the ability of minority
19 groups to have their views heard and enacted into law?

20 **A.** Yes. I would say that while my work began as sort of a
21 broad understanding of political behavior and its effects, in
22 the last decade and a half or so I've tended to focus more
23 exclusively on minorities. I spent a lot of time looking at
24 racial and ethnic minorities, and particularly Latinos.

25 **Q.** In your work, have you focused at all on the rights of gay

1 men and lesbians, in terms of their activities in the political
2 sphere?

3 **A.** I have.

4 **Q.** And have you published any books in your career?

5 **A.** I have one co-authored book, just out this month. And I
6 have a co-edited volume from several years ago.

7 **Q.** What is the name of the book that's just out this month?

8 **A.** "Latino Lives in America."

9 **Q.** And could you turn to Exhibit 2330, Plaintiffs' Exhibit
10 2330, which is in the binder that you've been provided.

11 **A.** Yes.

12 **Q.** What is that document?

13 **A.** It's my CV.

14 **Q.** Does that include a summary of your professional
15 background?

16 **A.** Yes.

17 **Q.** Does that document also include a list of your
18 publications?

19 **A.** Yes.

20 **Q.** Have you published any articles in peer-reviewed
21 publications, in your career?

22 **A.** Yes.

23 **Q.** Can you give us an overview of the number and type of
24 publications you have published?

25 **A.** So, I have about 42 or so total publications.

1 So about 25 of those are peer-reviewed articles,
2 meaning that it's an article-length document that's submitted
3 for a peer-review process in a journal that publishes a variety
4 of different authors each issue.

5 I also have about, some number, 15 or so chapters in
6 edited volumes, which means that I submitted the article, but
7 then the article was grouped with several others and refereed
8 in that manner.

9 **Q.** Have you given any conference presentations where you lay
10 out the results of your research work and theories?

11 **A.** Constantly.

12 **Q.** Can you give us a ballpark figure over the last decade?

13 **A.** Oh, probably, I don't know, between 20 and 40. I present
14 pretty constantly.

15 **Q.** Thank you.

16 And there's -- there's a list of examples contained
17 in Exhibit 2330, your CV?

18 **A.** Yeah. I think I just put the last ten years or so in.

19 **Q.** Thank you.

20 **A.** Uh-huh.

21 **Q.** Could you please describe your work on gay and lesbian
22 politics and political issues.

23 **A.** I have three pieces published, focusing specifically on
24 gays and lesbians.

25 One is a piece in an edited volume, about the various

1 aspects of gays and lesbians and their participation in the
2 democratic process.

3 And that piece is on how -- whether or not different
4 electoral structures would favor or disfavor gays and lesbians,
5 and focuses specifically on the City and County of San
6 Francisco.

7 The second is an article in a peer-reviewed journal,
8 called "Rationality in Society," where I -- I and my co-author
9 tried to model the self-identification and mobilization
10 behavior of minorities who can pass as a member of the
11 majority; that is, minorities whose identification as a
12 minority is uncertain to the perceiving public.

13 And then the third is an introduction to a symposium
14 in *PS*. And it's a satirical piece in the wake of the 2004
15 election, about the consequences of the 14 state ballot
16 initiatives banning same-sex marriage in that year.

17 **Q.** What is *PS*?

18 **A.** *PS*? *PS* is a journal that serves two purposes. It's
19 published by the American Political Science Association. It
20 serves both as sort of a topical journal, kind of events of the
21 day and what political scientists' take on those events would
22 be, as well as things more suited to those who are functioning
23 in the profession; suggestions about teaching ideas or syllabus
24 ideas, news within the profession. That.

25 So it's both a newsletter for political scientists as

1 well as a presentation of topical research.

2 **Q.** In your classes at Stanford, do you teach any -- any
3 courses that focus on the participation of gay men and lesbians
4 in the political process, recently?

5 **A.** Uhm, I haven't actually taught gay and lesbian politics
6 for probably about a decade.

7 But at Stanford, in the courses I teach on just broad
8 questions of political behavior, and particularly in courses on
9 minority politics, I always include a unit on gays and
10 lesbians.

11 **MR. BOUTROUS:** Your Honor, at this time, I would like
12 to offer Plaintiffs' Exhibit 2330 into evidence, as well as
13 the -- all the other exhibits in this binder.

14 And I will present, with the Court's permission, the
15 clerk with a list. And I believe Mr. Thompson has agreed that
16 there's no objections to this list of exhibits.

17 **MR. THOMPSON:** That's correct, Your Honor.

18 **THE COURT:** Very well. And you are offering --

19 **MR. BOUTROUS:** I'm offering all the documents that
20 are on this list. I can list them or provide it. Would you
21 like an additional list into evidence?

22 **THE COURT:** Let's let the document speak for itself.

23 (Laughter)

24

25

1 (Plaintiffs' Exhibit 489, 490, 491, 492, 493, 494,
2 831, 832, 833, 834, 835, 836, 837, 838, 839, 840,
3 841, 842, 843, 844, 2330, and 2582 received in
4 evidence.)

5 **MR. BOUTROUS:** Thank you, Your Honor. Happy to do
6 that. Thank you, Your Honor.

7 **BY MR. BOUTROUS:**

8 **Q.** In connection with your work on this case, *Perry vs.*
9 *Schwarzenegger*, what issues were you asked to examine?

10 **A.** I was asked to evaluate gays and lesbians --

11 **THE COURT:** You're getting opinions now. Have you
12 qualified --

13 **MR. BOUTROUS:** Oh, yes, Your Honor. Why don't I
14 just -- why don't I just do that, first.

15 Your Honor, I would tender Professor -- I tender
16 Professor Segura as an expert on the subject of the political
17 power or powerlessness of minority groups in the United States,
18 and of gays and lesbians in particular.

19 **THE COURT:** Mr. Thompson.

20 **MR. THOMPSON:** No objection, Your Honor.

21 **THE COURT:** Very well.

22 **MR. BOUTROUS:** Thank you, Your Honor.

23 **THE COURT:** You may proceed.

24 **BY MR. BOUTROUS:**

25 **Q.** Yes, what -- I'll restate my question.

1 What issues were you asked to examine in this case?

2 **A.** I was asked to examine gays and lesbians and their
3 participation and -- and their -- their interest in the U.S.
4 political process, to determine whether or not I saw them as
5 being powerful or powerless, and what evidence would be brought
6 to bear to understand such a thing.

7 **Q.** In conducting your analysis or your work in this case,
8 what -- what did you do to arrive at your conclusions? What
9 type of information did you review, and what kind of things did
10 you study?

11 **A.** Well, the first thing I did is, I read. So there --
12 there's a growing literature on gay and lesbian politics. And
13 so I went out and found out kind of what the state of that
14 literature was. Many of the pieces I was very familiar with.
15 Some were new.

16 The next thing I did was try to go through the
17 statutory status of gays and lesbians, because it varies quite
18 dramatically from state to state, in order to determine what I
19 thought the circumstances of gays and lesbians were with
20 respect to statutory protection or statutory disadvantage in
21 the states.

22 I looked at public attitudes, including very recent
23 data on public attitudes towards gays and lesbians.

24 I examined the presence or absence of gays and
25 lesbians in political office.

1 And then I spent a lot of time looking at ballot
2 initiatives, which are kind of the -- the central question,
3 right now, in gay and lesbian politics.

4 **Q.** In connection with your work, did you review and rely on
5 the documents that are listed on the exhibit list in --
6 contained in the binder, aside from your CV, which is PX2330,
7 in forming your opinions in this case?

8 **A.** I did.

9 **Q.** And did you also rely on your general knowledge and
10 experience and work and reading through your career as a
11 political scientist?

12 **A.** I did. When I was -- when I went through and enumerated
13 the things that I focused on, I realized just exactly how much
14 I read, which would explain my eyesight.

15 I have been -- I started graduate school in 1985.
16 So, at this point, I've read thousands of journal articles and
17 hundreds if not more than a thousand books.

18 So, you know, I've read a lot about -- about politics
19 in the United States. Many of these things inform my views.
20 But the materials that I presented were the ones I focused on
21 to make specific points in the arguments I was making.

22 **Q.** Did you rely at all on a book by Robert Dahl, in forming
23 your opinion?

24 **A.** I did.

25 **Q.** Dahl, D-a-h-l.

1 And is that something you mentioned in your report
2 and in your deposition in this case?

3 **A.** It is.

4 **Q.** And that is not a document we've included in the exhibit
5 list, simply because of length, but is that a classic text in
6 your field?

7 **A.** I would describe it as canonical. Everyone reads Dahl.

8 **Q.** In connection with your work, did you review the
9 deposition testimony of Dr. Nathanson?

10 **A.** I did.

11 **Q.** And did you, today, review the videotape clips that were
12 played from Dr. Nathanson's deposition?

13 **A.** I did. I was in the overflow room.

14 **Q.** And in connection with your work, did you prepare a
15 rebuttal report to Dr. Nathanson's report, when he was put
16 forth as an expert in this case by the proponents of
17 Proposition 8?

18 **A.** I did. And I was deposed a second time on that.

19 **Q.** And did you also review the expert report and deposition
20 of Dr. Miller, one of the proponents of Proposition 8's experts
21 in this case?

22 **A.** I did.

23 **Q.** Did you attend Dr. Miller's deposition?

24 **A.** I did.

25 **Q.** I'd like to publish demonstrative No. 1, and ask you,

1 Professor, to state very briefly, with an overview, what
2 opinions you've arrived at in this case, based on your work.

3 **A.** So I've -- I want to offer three, which I think speak to
4 the questions that I was asked to consider.

5 The first is that, in my view, when we consider the
6 U.S. political system, gays and lesbians do not possess a
7 meaningful degree of political power. They are not able to
8 protect their basic interests and effectuate their interests
9 into law and to secure those.

10 The second is that, relative to some other groups
11 that currently enjoy judicial protection, gays and lesbians are
12 actually, in the statutory and constitutional sense, worse off
13 than some of those groups were when they were granted judicial
14 protection.

15 And, finally, I -- I -- I'm deeply troubled by some
16 of the comments or some of the conclusions that
17 Professor Miller drew in his rebuttal, and I find them
18 unpersuasive.

19 **Q.** Why don't we, as a prelude of getting to the details of
20 your testimony, talk a little bit about what you mean when you
21 talk about political power.

22 How do you define that term for purposes of your
23 analysis here today?

24 **A.** For me, political power is the ability of an individual or
25 group, through mustering their own resources, to achieve and

1 secure their interests in the political system, and to do so
2 relying primarily on their -- on themselves. That is, there
3 has to be an exercise whereby their resources bring about the
4 change that they're hoping to accomplish.

5 **Q.** Is that a definition of political power that is consistent
6 with generally-accepted notions in the literature of political
7 science?

8 **A.** I believe that it is. And, in fact, I think it's drawn
9 directly from Robert Dahl's classic definition that A has power
10 over B when A can get B to do something B otherwise wouldn't
11 do. And there's a key element of that, which is that A is
12 getting B to do something that B may or may not be predisposed
13 to, because that distinguishes political power from simple
14 agreement.

15 My current favorite example is, I happen to be a New
16 Orleans Saints fan. There's lots of other New Orleans Saints
17 fans. But I don't have power over them, we just happen to
18 agree.

19 **Q.** And in your concept and definition of political power, how
20 does the -- the -- the concept of pluralism in our democracy
21 play out?

22 **A.** So there -- there is a theory of American government that
23 was put forward, first, by the founders, by Madison in the
24 Federalist Papers, and then sort of reinvented in 20th century
25 political thought, specifically in the person of Robert Dahl,

1 that one of the biggest threats to society is faction.

2 That is, if you have individuals who are able to
3 secure and hold power over a long period of time without
4 rotation in office, that they might conceivably tyrannize other
5 parts of the society.

6 And so, for Madison, the solution to this was the
7 extended republic; that in the extended republic, there would
8 be many, many interests. And as a consequence of the plurality
9 of interests, none of them would be able to gain the upper hand
10 for a very long period of time; and that would mitigate the
11 dangers of faction and the risk of tyranny.

12 In the 20th century, political theorists have
13 conceptualized this as pluralism; the idea that there's an
14 almost self-equilibrating system. There are groups and
15 interests and if they become too powerful, they disturb the
16 interests of individuals who are -- hold a different opinion.
17 And they organize.

18 And so it's almost Newtonian: To every action,
19 there's a reaction. And this is supposed to prevent the
20 accumulation of power by one group.

21 But it presupposes that there's no such thing as a
22 permanent majority. And it also presupposes that this system
23 of contestation is fair.

24 And one of the chief critics of pluralism, E.E.
25 Schattschneider, has a very famous quote. And the quote is

1 that, "The flaw in the pluralist heaven is that the heavenly
2 chorus sings with a decidedly upper-class accent."

3 That is, in -- in this contestation between groups,
4 it is people with resources that are more likely to achieve
5 outcomes; and people without resources, no matter how
6 dedicated, are going to be disadvantaged in that system.

7 **Q.** How does this concept of pluralism relate to the opinions
8 you are giving here today regarding the power or powerlessness
9 of gay men and lesbians in the United States?

10 **A.** I think that, by any measure, gays and lesbians would have
11 to be understood as a minority faction, in Madison's terms.
12 That is, people who accept the -- the normativity, if it were,
13 of heterosexuality, have held power essentially forever. So it
14 is difficult, with the resources that they have, for gays and
15 lesbians to press their cause in the political system.

16 They -- they just simply don't have the numbers and
17 the resources to be effective advocates in a lot of political
18 arenas.

19 **Q.** Do the courts -- does the judiciary play a role in
20 pluralism, in that concept of pluralism that you've just
21 described?

22 **A.** Well, the reason -- we frequently refer to our system of
23 government as "Madisonian." And we say this as a
24 contradistinction to majoritarianism, because the founders
25 specifically -- the founders and also the proponents of the

1 first ten Amendments of the Constitution, specifically
2 envisioned a set of constraints to sort of rein in the
3 majoritarian impulse.

4 So it is certainly a society that responds to
5 majority rule, but it's also a society where there are
6 limitations on what the majority can do.

7 The majority cannot gather together and vote to deny
8 a whole group of people, say, the right to vote or some other
9 basic right.

10 **Q.** Now, when you talk about obtaining politically favorable
11 outcomes, is that, in and of itself, sufficient to determine
12 whether a particular group has political power in our system?

13 **A.** Uhm, well, certainly, favorable outcomes is certainly a
14 positive thing that I would want to consider. I would also
15 want to know some circumstances of the favorable outcomes.

16 Were they judicially triggered as opposed to
17 legislative? Were they passed with bipartisan majorities or
18 with slim majorities? What's the arena of contestation? Are
19 we talking about a favorable outcome over some advantage that's
20 being accrued to the -- to the group, or are we talking about a
21 favorable outcome trying to ameliorate a severe disadvantage?

22 So we would want to take into account the process
23 whereby the outcome was achieved, and the subject matter of the
24 outcome, before we concluded that the outcome by itself was
25 sufficient evidence.

1 Q. Can you give me an example of a favorable outcome that
2 does not necessarily reflect the successful exertion of
3 political power by gay men and lesbians?

4 A. There's a very good recent one. So, there's been a lot of
5 news recently about the newly elected mayor of Houston, who is
6 a lesbian. And this was talked about extensively in the news
7 media as, you know, holy cow, there's a gay mayor of a major
8 American city.

9 I know a little bit about Houston politics and a
10 little bit about Texas politics, particularly mayoral politics.
11 And it turns out that the race that she was elected in pitted a
12 white lesbian Democrat against an African-American male
13 Democrat.

14 Now, Houston is a city where there's been tremendous
15 racial and ethnic divisions. There have been tremendous
16 divisions over development. That's one of the key fracturing
17 lines in Texas politics: Will the developers be allowed to do
18 what they'd like to do, or should they be constrained?

19 And so there is a fairly complex web of racial and
20 economic and social and partisan fracturing lines in Houston
21 politics.

22 That she was elected certainly is a positive element
23 to consider for gay and lesbian political power. However, I'd
24 have to look at the context. And the context suggests there
25 was a lot else going on in that election.

1 And just a few years back, Houston voters were
2 actually asked to weigh in on the question of whether or not
3 Houston's city employees can have same-sex domestic partner
4 insurance benefits. And by a city-wide plebiscite they voted
5 it down.

6 So while there is now a lesbian mayor of Houston, her
7 partner of 19 years cannot obtain health insurance through the
8 city.

9 **Q.** How about the recent signing into law by President Obama
10 of hate crime legislation that includes hate crimes based on
11 sexual orientation, does that -- how does that -- does it
12 reflect political power?

13 **A.** Uhm, I would say it reflects positively on gay and lesbian
14 political power on one dimension, and negatively on two.

15 So the positive news out of the -- the hate crimes
16 legislation is that this is a 20-year priority for gay and
17 lesbian activists. And it was achieved in November -- or
18 October, I think, of this past fall. So that's clearly
19 something that they were -- were happy about.

20 From the opposite side, I would consider both the
21 context in which it was passed and the subject matter of
22 contestation. So what we are looking at here is a piece of
23 legislation that criminalizes bias-motivated attacks on gays
24 and lesbians.

25 So we're not talking about, you know, a huge victory

1 that, you know, creates, you know, gay spots in a service
2 academy, or something like that. We're talking about sort of
3 ameliorating a real serious element of disadvantage that gays
4 and lesbians face in American society.

5 The other thing is that, in order to get it passed,
6 it was attached as a rider to the Defense Authorization Bill.

7 And it's a common practice in Congress to attach more
8 controversial pieces of legislation to more consensual pieces
9 of legislation, to make it harder for people to vote against
10 it. So it was attached to the Defense Authorization Bill.

11 Even though it was attached to the Defense Bill,
12 75 percent of the Republicans in the United States Senate voted
13 against it. They voted against the Defense Authorization Bill,
14 which is not a customary Republican position in the Senate.

15 So I think that when we consider how the hate crimes
16 bill was passed, and the fact that we're talking about
17 criminalizing pretty vicious behavior, that would weigh against
18 a judgment for political power.

19 **Q.** In analyzing the political power of a particular minority
20 group, is it also appropriate to look at the vulnerability of
21 the favorable outcomes that have been achieved?

22 **A.** Well, I'm not sure it's -- it's necessarily the case in
23 all circumstances, but it's certainly the case for gays and
24 lesbians because of the role of ballot initiatives.

25 So in a number of jurisdictions, most of the western

1 part of the United States, and parts of the east, as well, laws
2 passed by the legislature or laws passed by even city and
3 county legislatures are able to be overturned by popular
4 plebiscite.

5 Or there's a process where citizens can just have a
6 law voted on through the initiative process. And initiatives
7 have been used to roll back legislative gains by gays and
8 lesbians over and over again.

9 In fact, between 1990 and the middle part of the
10 2000s, there's been probably like 150 -- not even counting the
11 same-sex marriage votes, there's been like 150 votes on gay and
12 lesbian -- usually, on gay and lesbian antidiscrimination
13 protections. And they lose about 70 percent of the time.

14 **Q.** Now, when you're looking at political power on a
15 particular issue, is it also a factor to -- that you consider
16 the importance of the issue to the gay and lesbian community,
17 or whatever minority group you're talking about? Is that
18 another factor you apply when you're looking at favorable
19 outcomes?

20 **A.** Well, sure. I think we would want to look at the subject
21 matter of any piece of legislation.

22 So, for example, in California, there's now a
23 standard clause, a standard antidiscrimination clause, that's
24 attached to the end of many pieces of California legislation.
25 And they might have to do with state licensing requirements on

1 some profession or some type of business, or whatever. And
2 then at the end they say "shall not be discriminatory."

3 I wouldn't call that a victory for gay and lesbian
4 rights, because it's not clear that gays and lesbians were, you
5 know, actively working for, you know, rights in insulation
6 contracting or, you know, some other sort of licensing issue.

7 We want to focus -- when we want to focus on
8 estimating political power, we want to focus on the things that
9 are important to the group whose power we are trying to assess.

10 **Q.** Would marriage qualify as one of the salient important
11 issues that would serve as a marker?

12 **A.** Yes.

13 **Q.** Speaking of markers, in your expert opinion, what are the
14 markers of political powerlessness?

15 **A.** So, there were two types of markers I talked about in my
16 report.

17 The first are sort of manifestations: Can we look at
18 the results of power or powerlessness? And then the second
19 were the causes or the factors that might contribute to those
20 results.

21 **Q.** Why don't we start with the manifestations of political
22 powerlessness of gays and lesbians in the United States.

23 Could you give us an example of one manifestation
24 that supports your opinion regarding the powerlessness of gays
25 and lesbians?

1 **A.** Sure. The first thing I would look at is the -- is the
2 absence of statutory protection or the presence of statutory
3 disadvantage. So if -- if there are laws hurting you and there
4 are no laws helping you, that would be evidence that you have a
5 lack of power.

6 **Q.** I would like to display demonstrative 3, which -- and ask
7 you to comment a little bit about the absence of protections in
8 the United States for gay -- gays and lesbians.

9 **A.** Okay.

10 **Q.** And, in fact, could you describe what this demonstrative
11 3, that we put up on the screen, reflects.

12 (Document displayed.)

13 **A.** These are -- this map displays the states that have
14 statewide -- some form of statewide protection for employment
15 nondiscrimination against gays and lesbians.

16 **Q.** And how many states do not include protections based on
17 sexual orientation, against discrimination?

18 **A.** Twenty-nine.

19 **Q.** You watched Dr. Nathanson's testimony this morning,
20 correct?

21 **A.** I did.

22 **Q.** And you heard him mention the Matthew Shepard case?

23 **A.** I did.

24 **Q.** Which state was Matthew Shepard's -- where did that event
25 regarding Matthew Shepard occur?

1 **A.** Wyoming.

2 **Q.** And is Wyoming one of the states that has, since that
3 event, enacted any kind of protection based on sexual
4 orientation discrimination?

5 **A.** Wyoming has no protection. And this is a little bit off
6 the topic, but Wyoming doesn't even have a hate crimes law.

7 **Q.** In terms of the ten largest states in the United States,
8 how many of them have laws that provide protection against
9 discrimination based on sexual orientation?

10 **A.** Three.

11 **Q.** Let's look at the federal system. Are there any statutory
12 absences in the federal system that, to your mind, indicate, in
13 your expert view, a lack of political power on the part of gay
14 men and lesbians?

15 **A.** Uhm, yes. And I would say there are also statutory
16 disadvantages at the federal level. So there is no
17 federal-level antidiscrimination protection for housing and
18 employment. There's no federal-level protection, really, on
19 any level beyond the recently passed Hate Crimes Bill.

20 There is federal legislation prohibiting gays and
21 lesbians from receiving partner benefits in federal employment,
22 as an incident of the Defense of Marriage Act.

23 There is the exclusion of gays and lesbians from
24 service in the military.

25 And, historically, at one point, gays and lesbians

1 were completely forbidden from working for the federal
2 government.

3 **Q.** How long ago was that?

4 **A.** I think that actually ended in the 1970s, but it started
5 as far back as immediately in the post-war era, maybe President
6 Eisenhower.

7 **Q.** And in that regard, are you familiar with a man named
8 Frank Kameny?

9 **A.** I am.

10 **Q.** Can you tell us a little bit about Mr. Kameny's
11 experience?

12 **A.** So, in the early days of the homophile movement, the first
13 pro gay organization -- and "pro gay" is a strange way to
14 describe this, but the first organization working to ameliorate
15 the disadvantages faced by gays and lesbians was an
16 organization called the Mattachine Society. And it started on
17 the coasts, particularly Los Angeles and New York. This was in
18 the early 1950s. It then kind of fell on hard times, in part
19 because they faced a lot of repression.

20 In the 1960s, the Mattachine Society was revived in
21 Washington, D.C., and Frank Kameny was essentially the
22 principal organizer. And he took a much more proactive stand
23 than the leaders of the Mattachine in Los Angeles and New York
24 did.

25 So Kameny regularly would send letters to the U.S.

1 Government, demanding that the prohibitions on gay employment
2 be dropped; or, you know, asking, you know, why there were
3 these various obstacles to tax deductions or other benefits
4 that other nonprofits enjoyed. So he was much more likely to
5 engage the political system.

6 **Q.** Was he employed by the federal government?

7 **A.** I believe he had been dismissed. I don't remember the
8 exact circumstances of his participation.

9 **Q.** Let me ask you this: In terms of protections -- well, let
10 me back up.

11 In terms of statutory protections, does the fact that
12 California includes a number of antidiscrimination provisions
13 that apply to gay men and lesbians affect your view regarding
14 the lack of political power of that group?

15 **A.** Well, it was certainly something I considered. The
16 presence of statutory protections is preferable to the absence
17 of statutory protections in evaluating power.

18 That said, I would still want to look at the
19 circumstances by which they were passed, the degree to which
20 they are secure in the political system, and also the subject
21 matter over which they are covered.

22 So in some instances -- in most of these instances,
23 these are attempts to redress discrimination. So if we look at
24 a hate crimes protection or we look at an antidiscrimination
25 ordinance, the purpose of that is to ameliorate a disadvantage,

1 ameliorate a wrong that exists.

2 While it's certainly good to have that, it's
3 difficult to conclude that that's a measure of political power
4 in and of itself.

5 It would be akin to saying that because you have more
6 prescriptions, clearly you're healthier. No. You have
7 prescriptions because there's a problem.

8 And the same would be true here. We have
9 antidiscrimination statutes because there's discrimination.

10 The second thing I would want to look at is how those
11 ordinances were passed. In some instances, some of the
12 California ordinances were passed in the wake of court
13 decisions ordering that policies be adopted. This is true for
14 California's anti-employment discrimination ordinance.

15 And even though the courts had already held this,
16 that political process was quite contested. For example, the
17 first version placed the -- the first attempt to codify this
18 court decision placed gay and lesbian employment and housing
19 protections in the Fair Employment and Housing Act of
20 California. And that was vetoed by the governor.

21 So when the decision was codified, it was codified in
22 the Labor Code of the state, which has a shorter time period
23 for complaint and a much more relaxed sort of regulatory
24 mechanism.

25 So there was -- it was really -- there was quite a

1 bit of opposition even to codifying a decision that had already
2 been handed down by the courts.

3 And, of course, the minority party in this state, as
4 a part of its platform, made it clear that it would like to
5 repeal all of those. So I'm not sure I would be certain that
6 they're, you know, permanent protection.

7 A third concern I would raise would be that it's
8 problematic to focus only on a single jurisdiction, because a
9 domestic partnership ordinance in California does not provide
10 any protection for you if your partner becomes ill on a trip to
11 Las Vegas or attending the Mardi Gras in New Orleans.

12 That when we look at -- particularly when we look at
13 Prop eight, these are national questions; that the politics of
14 the proposition was national, the politics of most of the
15 ballot initiatives on same-sex marriage and on
16 anti-discrimination involved activists on both sides from
17 around the country.

18 So I'm not sure I would conclude on the basis of some
19 positive statutory outcomes, ameliorating some severe
20 disadvantages, that that alone constitutes political power.

21 **Q.** Let me ask that demonstrative two that you prepared be
22 displayed and ask you -- this is a quote from *Romer versus*
23 *Evans*. Perhaps you could read that so it's into the record,
24 and then explain to me how that bears on your evaluation of
25 California's protections against discrimination to the extent

1 they exist for gays and lesbians?

2 **A.** So I will preface it with the -- there is a trope in the
3 argument against protections for gays and lesbians, that these
4 are special rights that gays and lesbians don't need.

5 And speaking specifically to that argument in *Romer*,
6 Justice Kennedy writes:

7 "We find nothing special in the protections
8 Amendment 2 withholds. These are protections
9 taken for granted by most people, either
10 because they already have them or do not need
11 them."

12 **Q.** What protections had Amendment 2 withheld in Colorado?

13 **A.** Amendment 2 was a breathtaking piece of legislation. So
14 at the time several small cities -- I believe it was like
15 Aspen, Boulder and Denver, that sounds right -- had passed --
16 Denver, a big city obviously -- had passed anti-discrimination
17 ordinances.

18 And so Colorado's Amendment 2 would have amended the
19 Colorado constitution to eliminate those local ordinances that
20 were anti-discrimination ordinances, but it would also have
21 prohibited any locality or the state legislature from enacting
22 any future protections from gays and lesbians.

23 So it was not just -- it didn't just reverse the
24 existing laws, it preempted any future action.

25 **Q.** How have ballot initiatives in this country affected the

1 rights of gay men and lesbians in terms of their political
2 power?

3 **A.** Well, for starters, there is no group in American
4 society -- and I would include in this undocumented aliens, who
5 are probably a distant second.

6 There is no group in American society who has been
7 targeted by ballot initiatives more than gays and lesbians.
8 The number of ballot initiative contests since the first one in
9 the late 1970's is probably at or above 200. Gays and lesbians
10 lose 70 percent of the contests over other matters. They have
11 essentially lost a hundred percent of the contests over
12 same-sex marriage and now on adoption.

13 The initiative process nationalizes issues because
14 money and activism crosses state lines. So even if there is a
15 local legislative majority to enact something for the
16 protection of gays and lesbians, participation of people around
17 the country can play a role in shaping a ballot process that
18 would reverse it.

19 The initiative process has been really the waterloo
20 of gay and lesbian politics.

21 **Q.** We would like to display demonstrative number four, which
22 you can elaborate, but it lays out what I think you just said
23 concerning ballot initiatives.

24 But let me ask you this: What is it about gay and
25 lesbian politics and ballot initiatives that has in your view,

1 your expert opinion, caused the ballot initiative process to be
2 unleashed in this manner against that particular group?

3 **A.** Well, the -- you know, it's a hard question to answer.
4 There is -- proponents and opponents of gay rights would say
5 that there is a culture war going on in the society. And as a
6 consequence, these are things that people feel very deeply
7 about and it gets them hot under the collar.

8 Initiative processes have -- they are a mixed bag
9 historically. On the one hand, they serve as a reasonable
10 check on the behavior of the legislature if the population is
11 dissatisfied.

12 On the other hand, they are frequently been used to
13 target minorities, and this is not just gays and lesbians. But
14 no group has been more targeted than gays and lesbians.

15 And I think from a political science standpoint, what
16 we would think about is sort of expanding the scope of
17 conflict; that if your side is not doing well in the
18 legislature, perhaps because of the partisan distribution, then
19 you try to move the arena of contestation to the populace where
20 you can motivate people through, you know, campaign
21 commercials; you know, you inflame momentary passions.

22 **Q.** In your expert view, does the ballot initiative process
23 put the gay and lesbian community at a particular disadvantage
24 in the political process?

25 **A.** I would say yes, first and foremost because of the

1 numbers. So in the end the ballot initiative process is a
2 plebiscite and you need notes. You need 50 percent plus one.

3 The ballot initiative process in California is
4 particularly problematic, in part, because we allow the
5 amending of the state Constitution with a simple majority and,
6 in part, because we have really widely varying rates of turnout
7 between, say, ballot initiative contest and the contest that
8 would produce a state legislature, so that the state
9 legislative distribution looks a lot more like the underlying
10 population than a turnout in the state-wide election. And, of
11 course, this allows money and organizations to transcend state
12 lines. So it moves the focus of the contest away from state
13 politics alone and into a national arena.

14 **Q.** How many ballot initiatives have been passed relating to
15 marriage between individuals of the same gender in the last
16 decade?

17 **A.** I believe 33 of 34. Because in one state it failed and
18 then they came back in the next election and passed it, and
19 that was Arizona.

20 **Q.** You mentioned that there have been other examples of the
21 use of ballot initiatives against minority groups -- you
22 mentioned *Romer*.

23 Could you give us a couple of other examples relating
24 to other groups?

25 **A.** Sure. In the 1960's there was an attempt to overturn the

1 implementation of the Fair Housing Act in California by having
2 a state-wide ballot initiative saying that landlords and
3 property owners could rent or sell to whomever they wanted,
4 even if that was discriminatory in its practice.

5 There have been a whole host of ballot initiatives
6 targeting immigrants, and in some instances targeting more than
7 immigrants. Prop 187 would be an example of that.

8 **Q.** What happened to Prop 187?

9 **A.** Prop 187, as I understand, was struck down at the lower
10 court level and the state declined to appeal that ruling.

11 Prop 187 was really contentious because the
12 official -- the language of the initiative was that state
13 employees could withhold state services from any person they
14 suspected of being an undocumented immigrant, but the basis of
15 that suspicion was not particularly clear in the legislation.

16 Latino activists in the state felt that that would
17 create essentially open season a Latinos; that, you know, if
18 you walk in with a Spanish accent or with dark skin, you know,
19 that would be the basis for a state employee withholding state
20 services from you until you could prove otherwise.

21 **Q.** And what happened to the Fair Housing -- the housing
22 proposition that you mentioned from the 1960's?

23 **A.** It was struck down.

24 **Q.** Now, if the -- is there an effect on the ability of gay
25 men and lesbians to achieve political power based on the fact

1 that they find themselves fighting these ballot initiatives?

2 **A.** Umm, I would say there are two effects, one of which is
3 obvious and one of which is maybe less obvious.

4 The obvious effect is that legislative gains that
5 are, you know, hard earned get overturned and in some instances
6 gays and lesbians find themselves, even in the events where
7 they win, contesting the same issues over and over again and
8 spending a lot of resources on this.

9 I think that the less visible effect is that it
10 chills legislatures. Legislatures thinking about passing some
11 statute that would be advantageous to gays and lesbians think
12 twice about that because no legislator relishes being
13 overturned by a plebiscite.

14 **Q.** How does the fact that ballot issues can be used to amend
15 state constitutions effect the political power of gay men and
16 lesbians?

17 **A.** The amendment process in many states -- in fact, in most
18 states -- require that the vote of the people take place.

19 So even were it the case that every elected official
20 in California decided that Prop 8 were a bad idea, there is,
21 frankly, nothing they can do to change it unless there is a
22 vote of the people.

23 **Q.** Are gays and lesbians underrepresented in political office
24 in the United States?

25 **A.** They are. At last count only six people have ever served

1 in the House of Representatives who have been openly gay and
2 only two of those were elected as openly gay. So in the other
3 four instances their sexuality became a matter of public record
4 after their initial election.

5 There has never been an openly gay senator or cabinet
6 member or certainly, you know, president.

7 There is only about one percent of the state's
8 legislatures that are gay and an even smaller, much smaller
9 percentage of local elected officials.

10 **Q.** Do you recall the percentage of local officials?

11 **A.** I believe it's five-hundredths of one percent.

12 **Q.** How about state -- total state legislatures, what is the
13 percentage?

14 **A.** I think it's right around one percent.

15 **Q.** Thank you.

16 Now, in your view, how does the low number of
17 officeholders who are gay or lesbians affect the political
18 power or powerlessness of gay men and lesbians in the United
19 States?

20 **A.** So in political science we call the election of a
21 representative who shares a demographic characteristic of their
22 constituents descriptive representation. Theorists who have
23 examined descriptive representation identify two effects.

24 The first effect is that there is the direct
25 representation; that having a gay man or lesbian sitting at a

1 legislative table debating a particular issue, working out the
2 policy, increases their voice. They are able to have their
3 wishes, at least, considered in the process or whatever.

4 And the second is that the presence of -- and less
5 clear is that the presence of gay men or lesbians in public
6 office -- or, for that matter, racial and ethnic minorities or
7 any other group -- really serves to constrain some of the bad
8 behavior of other members of the legislature --

9 There is a famous case when Senator Moseley Braun was
10 representing Illinois in the Senate where the Senate kind of
11 voted on, without comment, reauthorizing the U.S. -- the
12 Congressional resolution creating the Daughters of the
13 Confederacy, and this just kind of swept through without any
14 discussion.

15 And Carol Moseley Braun went down to the well of the
16 Senate and gave an impassioned speech about what that felt like
17 and what that looked like to African-Americans, and the Senate
18 promptly reversed themselves as a consequence of her presence.
19 And at the time she was the only African-American member of the
20 body.

21 So having someone from the group certainly directly
22 represents their voices, but, also, makes others a little less
23 willing to engage in some thoughtless or disparaging behavior.

24 **Q.** So how does the lack of participation or representation in
25 high ranking and other government positions undermine political

1 power of gay men and lesbians?

2 **A.** Well, for starters in many parts of the country elected
3 officials have absolutely no problem speaking about gays and
4 lesbians in a way that you could not imagine them speaking
5 about any other member of the electorate.

6 So in addition to gay and lesbian concerns not being
7 considered meaningfully, for example, in the U.S. Senate, there
8 are members of the United States Senate who, in public
9 speeches, have compared same-sex marriage to marrying a box
10 turtle. There is a member of the Senate who has a hold on a
11 judicial nomination because the nominee attended a lesbian
12 commitment ceremony.

13 Senator Coburn has gone on record saying that the gay
14 and lesbian agenda is the greatest threat to freedom in the
15 United States today.

16 And a Senator from South Carolina, when he was
17 elected to the Senate said during the course of his campaign
18 that gays and lesbians shouldn't be allowed to teach in the
19 public schools.

20 It's difficult to imagine an elected official saying
21 such a thing about, really, almost any other citizen group in
22 the United States.

23 **Q.** Is the fact that some public officials feel so free to
24 publicly denounce gay men and lesbians a factor that
25 contributes to the lack of political power of that group?

1 **A.** Absolutely. And, again, I think it plays out in multiple
2 ways.

3 First, this demonstrates a real hostility of that
4 legislator, or perhaps his party, to the interests of gays and
5 lesbians.

6 But secondly, when someone in a position of authority
7 communicates to you that this is okay, then it moves those
8 thoughts into the mainstream.

9 So if -- if two U.S. senators compare same-sex
10 marriage to bestiality, that makes that part of the mainstream
11 conversation. That's not the fringe. That's a United States
12 senator. And as a consequence, it legitimizes some of these
13 deeply hostile beliefs.

14 **Q.** Can you provide us with another example of a factor that
15 contributes to the political powerlessness of gay men and
16 lesbians?

17 **A.** The simplest one would be their numbers. There just
18 simply aren't enough gays and lesbians in any jurisdiction of
19 any size to shape outcomes.

20 **Q.** Do the attitudes of other people towards gay men and
21 lesbians affect their political power?

22 **A.** I think that the role of prejudice is profound. So when
23 we are engaged in the pluralist struggle, as Dahl and others
24 envisioned it, we are engaged in a contest of ideas where I'm
25 trying to persuade you of the rightness of my position and you

1 are trying to persuade me of the rightness of your position.

2 But if the group is envisioned as being somehow or
3 another morally inferior, a threat to children, a threat to
4 freedom, if there's these deeply-seated beliefs, then the range
5 of compromise is dramatically limited.

6 It's very difficult to engage in the give-and-take of
7 the legislative process when I think you are an inherently bad
8 person. That's just not the basis for compromise and
9 negotiation in the political process.

10 **Q.** Did Dr. Nathanson's testimony that was played in court
11 about the prejudice and hostility towards gay men and lesbians
12 affect your view on this issue concerning political power?

13 **A.** It was consistent with my view in that I felt like he was
14 agreeing with the position that I would take; that there is a
15 lot of hostility to gays and lesbians.

16 It is still the case, even today, that a majority of
17 Americans find sex between two persons of the same gender to be
18 morally unacceptable in all cases. Another huge percentage
19 finds it morally unacceptable in most cases.

20 So I think he -- he sort of validated the belief that
21 I had based on my examination of the data in the literature.

22 **Q.** I would like to display demonstrative number six, which
23 you prepared based on your report and deposition and ask you
24 some questions about what political scientists call a feeling
25 thermometer.

1 A. Okay.

2 MR. BOUTROUS: And I resisted the temptation to use a
3 thermometer graphic, your Honor.

4 BY MR. BOUTROUS:

5 Q. What in your field is a feeling thermometer?

6 A. So a feeling thermometer is a simple question that we can
7 ask respondents, and it's an unobtrusive measure of sentiment.

8 So I ask you: On a scale from zero to 100, how
9 warmly do you feel about Evangelical Christians? How warmly do
10 you feel about African-Americans? How warmly do you feel about
11 Democrats, about Republicans, et cetera. And you could put any
12 group in.

13 What's nice about a feeling thermometer is because we
14 don't -- they don't know -- we are not asking them to compare,
15 Do you like one group better than another, people are going to
16 give us fairly honest answers. They might bias those answers
17 upward. People tend to say they feel warmly about everybody,
18 which is, I guess, nice to see, but a little bit dubious.

19 But they can say they feel warmly, but if there are
20 still between group differences, we are identifying sort of
21 differences in attitudes by the general public across different
22 groups.

23 Q. In connection with your work on this case, did you study
24 opinion data relating to this sort of -- this feeling
25 thermometer analysis?

1 **A.** I did.

2 **Q.** What conclusions did you reach based on your analysis of
3 that data concerning the political power of gay men and
4 lesbians?

5 **A.** The conclusion I reached is that the American public is
6 not very fond of gays and lesbians.

7 So on a scale from zero to 100, almost every group
8 you could imagine that had any demographic identity, that would
9 be the source of contestation. So religion, race and ethnicity
10 were scoring in the upper 60's. So people were giving them a
11 score somewhere between 65 and 69.

12 And every group has its haters. And it turns out
13 that for African-Americans and Hispanics, Catholics and Jews,
14 some number of people placed the group below the midpoint,
15 below the 50 score; between a third and, say, 45 percent.

16 For gays and lesbians, instead of the mean score
17 establishing between 65 and 70, the mean score was 49.4. So it
18 was as much as 16 to 20 points below the average score for
19 these other groups about whom we know there is already some
20 amount of societal distance. So, you know, Hispanics and
21 African-Americans are held in higher esteem than gays and
22 lesbians.

23 And over 65 percent of the respondents placed gays
24 and lesbians below the midpoint, below the score of 50;
25 whereas, only, again, a third to 45 percent did the same for

1 other groups.

2 **Q.** Do you think that those numbers and those measurements had
3 anything to do about the ballot initiatives that have been put
4 on the ballot in so many states in recent years?

5 **A.** I do. And I think that it speaks to the larger question
6 of the variation of opinion across the states and how that may
7 affect my notion of political power.

8 So when you see that approximately two-thirds of all
9 respondents are giving gays and lesbians a score below 50,
10 that's telling elected officials that they can say bad things
11 about gays and lesbians, and that could be politically
12 advantageous to them because, indeed, many parts of the
13 electorate feel the same way.

14 It's also suggesting that the initiative process
15 could be fertile ground to try to mobilize some of these voters
16 to the polls for that cause and for other causes.

17 So similarly we might find, for example, that about
18 half of all people think that sex between two people is morally
19 wrong, but in some states that number would be a lot higher,
20 and so you could use that as a place to target gays and
21 lesbians.

22 **Q.** And do you believe that the views of major religious
23 denominations have an effect on the political power of gay men
24 and lesbians in this country?

25 **A.** I do.

1 Q. What is your view?

2 A. I think that religion is the chief obstacle for gay and
3 lesbian political progress, and it's the chief obstacle for a
4 couple of reasons.

5 The first is that after government, it's difficult to
6 think of a more powerful social entity in American society than
7 the church. Religion is something that deeply connects to
8 people's lives. Indeed, America is a very church-going nation
9 compared with other western democracies. It provides the
10 opportunity for people to meet together on a weekly basis.

11 So it's a very powerful organization, and in large
12 measure they are arrayed against the interests of gays and
13 lesbians. There are exceptions, but in large measure they are
14 arrayed against gays and lesbians.

15 This is an important contrast with African-Americans,
16 because except for the Southern Baptist Church, virtually every
17 denomination was supportive of the civil rights movement at the
18 time.

19 Q. Do you recall Dr. Nathanson's testimony earlier this
20 morning about religious organizations and their views on gay
21 men and lesbians?

22 A. I do.

23 Q. And did that effect your views in any way on this issue of
24 the interaction between religious groups and gays and lesbians
25 as it relates to political power?

1 **A.** It confirmed what I had previously believed, which is that
2 biblical condemnation of homosexuality and the teaching that
3 gays are morally inferior on a regular basis to a huge
4 percentage of the public makes the political ground, the
5 political opportunity structure very hostile to gay interests.
6 It's very difficult to overcome that.

7 **Q.** And are you aware from your work in responding to
8 Dr. Nathanson, that he's a professor of religious studies?

9 **A.** I don't believe he actually holds a professorial position
10 anywhere.

11 **Q.** That his area of specialty is religious studies?

12 **A.** That's correct.

13 **Q.** And did you also -- do you recall professor -- Dr. Young's
14 testimony earlier this morning regarding the views of religious
15 denominations in the United States as to gay men and lesbians?

16 **A.** I do.

17 **Q.** And what is your understanding of Dr. Young's position?

18 **A.** I think Dr. Young freely admits that religious hostility
19 to homosexuals is an important role in creating a social
20 climate that's conducive to hateful acts, to opposition to
21 their interest in the public sphere, and to prejudice and
22 discrimination.

23 **Q.** Can you point to any other situation in which religious
24 groups in the United States have been so unified in their
25 opposition to a particular minority social group?

1 **A.** I could not. A moment ago I gave the example of the
2 relatively high level of unity during the black civil rights
3 movement in favor of the social group, but there is even an
4 interesting piece of work that I relied on in my opinion by a
5 scholar of religion and politics who suggested that opposition
6 to homosexuality has been a real boost in the arm for the
7 ecumenical movement because it's something on which many
8 different sects could agree, and so it's served as the basis of
9 cooperation between religious denominations.

10 **Q.** Is violence against gay men and lesbians another factor
11 that you believe, in your expert opinion, contributes to the
12 lack of political power of that group?

13 **A.** It is.

14 **Q.** Why is that?

15 **A.** So it's important to understand conceptually what we think
16 a hate crime is. So a hate crime is distinguished from a
17 simple assault in that it targets not just the individual who's
18 being assaulted, but it is intended to send a message to the
19 entire group.

20 That's why there has to be the extenuating
21 circumstances to suggest that the person was targeted for their
22 identity.

23 So if a gay man is beaten in a particular part of
24 town, it's not just that he is the victim; the intended message
25 is that you shouldn't be here in this part of town, or you

1 shouldn't be engaging in the behavior in which you are
2 engaging, or you are not supposed to have a public expression
3 of self in the normal commerce of everyday life. Creates a
4 fear that really constrains or chills what individuals would do
5 in the normal daily activities of life.

6 So it's designed to make you pull back, to make you
7 less active.

8 If you have a fear of violence, you are less likely
9 to self identify. If you have a fear of violence, you are less
10 likely to go to a place where someone might see that by virtue
11 of your being there, you actually are gay or lesbian. If there
12 is violence you might know that if you go to a certain place
13 there is some chance that you will be hurt.

14 I have known of individuals who simply don't leave a
15 bar without two people because it's just not safe. In many
16 parts of the country it can be quite hazardous.

17 **Q.** In your work on this case did you study and review the FBI
18 Hate Crime Statistics that are now in evidence as Plaintiff's
19 Exhibits 489 through 494 covering the years 2003 through 2008?

20 **A.** I reviewed 2003 through 2007 for my report and deposition.
21 The 2008 numbers had not yet been released when I was deposed.

22 **Q.** Have you since reviewed the 2008 statistics?

23 **A.** I have.

24 **Q.** Did you also review the Los Angeles Hate Crime Report that
25 has now been admitted as Plaintiffs' Exhibit 834?

1 **A.** I did.

2 **Q.** And when did you review that?

3 **A.** That, too, was released after my deposition. It was
4 released in the latter part of last year.

5 **Q.** With the Court's permission I would like to display
6 demonstrative number seven.

7 (Document displayed)

8 **Q.** And ask you, Professor Segura, have rate crimes been on
9 the increase or the decrease in the United States as directed
10 against gay men and lesbians?

11 **A.** The data that I observed show that over the last decade,
12 there has been no real improvement, no real decline; and over
13 the last five years, there has actually been an increase in
14 violence directed towards gay men and lesbians.

15 **Q.** And in 2008 -- we have those overt demonstrative -- was
16 there an increase between 2007 and 2008 in hate crimes?

17 **A.** There was a substantial increase.

18 And I would also point to the next column of figures,
19 which is the share of all hate crimes. So what's happening is
20 that gays and lesbians are representing a larger and larger
21 portion of the number of acts of bias motivated violence.

22 **Q.** And when we talk about hate crimes and when the FBI talks
23 about hate crimes, what is your understanding in terms of the
24 definition of a hate crime offense?

25 **A.** My understanding of a hate crime offense, as the FBI

1 collects it, is that there has to be an underlying criminal
2 offense on which there are exacerbating characteristics
3 suggesting that the purpose of the offense was bias related.

4 So it's not just simply a shouting an epithet. It's
5 shouting an epithet in association with an act of vandalism, or
6 in association with a felonious assault, or in association with
7 a robbery, or something like that.

8 **Q.** How did the hate crime figures for 2008 compare to the
9 levels each year over the prior decade?

10 **A.** 2008 is the highest, I think, for the last period of time
11 and represents a pretty substantial increase. I know that the
12 numbers are also up in California and in Los Angeles County.

13 It's also important to look at the intensity. So we
14 don't want to look at just the number of crimes, but we want to
15 look at the type of crimes.

16 So one of the things the FBI does is it looks at what
17 percentage of the hate crimes were violent, as opposed to
18 simply an act of vandalism. And it turns out that gays and
19 lesbians are far more likely to experience violence. Like, I
20 think the number is 73 percent of all the hate crimes committed
21 against gays and lesbians also include an act of violence.

22 And in 2008 -- we are talking about the most extreme
23 forms of hate based violence, so rape and murder. 71 percent
24 of all hate-motivated murders in the United States were of gay
25 men and lesbians in 2008.

1 Fifty-five percent of all hate-motivated rapes were
2 against gays and lesbians in 2008.

3 There is simply no other person in society who
4 endures the likelihood of being harmed as a consequence of
5 their identity than a gay man or lesbian.

6 **Q.** I asked you about the Los Angeles data. I would like to
7 have displayed Plaintiffs' Exhibit 834 and ask you a few
8 questions and have you turn to that exhibit in your binder.

9 (Document displayed)

10 **Q.** And that is the 2008 Los Angeles Hate Crimes Report.

11 **A.** Okay.

12 **Q.** You have reviewed this document --

13 **A.** I have.

14 **Q.** (Continuing) -- correct?

15 What does it tell you about the situation concerning
16 hate crimes with respect to gay and lesbian individuals in Los
17 Angeles?

18 **A.** It tells me a couple of things. So I'm -- I particularly
19 took note of two items, and there are perhaps others.

20 The first is that how many times on the basis of
21 race, ethnicity and national origin from 2007 to 2008 declined
22 by 16 percent.

23 **Q.** Which page are you looking at?

24 **A.** Nine.

25 **MR. BOUTROUS:** Put page nine on the screen? Thank

1 you.

2 (Document displayed)

3 **BY MR. BOUTROUS:**

4 **Q.** Continue. I'm sorry I interrupted you.

5 **A.** No problem.

6 So there is a decline in race -- racial and ethnic
7 hate crimes, which I think is a good thing. But in the same
8 period of time, there's an increase of 21 percent in
9 bias-motivated crimes against gays and lesbians. So even if
10 there is a sort of general negative drift overall, the drift
11 for gays and lesbians is positive.

12 The second thing I took note of was that on page 14,
13 Los Angeles County documented a fair number of hate crimes
14 specifically related to the Proposition 8 ballot initiative.

15 **Q.** And what did -- and what did the report conclude
16 specifically?

17 **A.** That there were some number of crimes. I believe there
18 were nine acts of vandalism. There were a number of other
19 smaller numbers of physical assaults associated with
20 Proposition 8. These included acts of graffiti, the targeting
21 of cars, et cetera.

22 **Q.** It you'll see at the bottom it says, "In addition, there
23 were four violent crimes"?

24 **A.** I'm sorry?

25 **Q.** At the --

1 **A.** Yes. "Four violent crimes." That's the very last line.

2 **Q.** I would like you to turn to page 26, please.

3 (Witness complied.)

4 **Q.** And perhaps you can describe what this -- what the report
5 concludes here and how that affects your views concerning the
6 political power of gay men and lesbians?

7 **A.** Well, so this reports the distribution of crimes by --
8 targeting people on the basis of real or perceived sexual
9 orientation.

10 And it shows that in a couple of categories the
11 number declined, and in most of the categories the numbers
12 increased and increased sizably.

13 **Q.** And were you in court yesterday during the testimony of
14 Mayor Sanders from San Diego?

15 **A.** I was in the overflow room upstairs, yes.

16 **Q.** Did you see the advertisement that was played during his
17 testimony concerning alleged acts of vandalism relating to
18 Proposition 8 proponents?

19 **A.** I did.

20 **Q.** Does that undermine your view that hate crimes and
21 violence directed against gay men and lesbians is a factor that
22 undermines, that detracts, that renders less the political
23 power of gay men and lesbians?

24 **A.** I wasn't quite sure what to make of that video. On the
25 one hand -- let me state categorically, I think those sorts of

1 behaviors are unacceptable.

2 And I would also state that as a political scientist,
3 I am aware of and there is a small literature on act of
4 vandalism, even in candidate-based elections. Electioneering
5 activities are frequently not pleasant; tearing down of signs,
6 et cetera.

7 That notwithstanding, I thought it was interesting
8 that their video certainly doesn't report any acts in the
9 opposite direction. Acts of vandalism, as Mayor Sanders
10 pointed out, you know, even in front of his own house, the
11 tearing down of Pro 8 signs, the hundred or more acts of
12 violence against gays and lesbians during the course of 2008;
13 that a more balanced way to look at what the effect of these
14 behaviors, would be to look at the effects from both sides.
15 And, obviously, that was, you know, not the interest of the
16 advocates producing the video, but...

17 **Q.** In your view, in the political world and in American
18 society, is there pressure on gay men and lesbians to remain
19 invisible to a certain extent?

20 **A.** Certainly --

21 **THE COURT:** To remain visible?

22 **MR. BOUTROUS:** Remain invisible.

23 **THE COURT:** Invisible.

24 **A.** I think that the sort of the psychology of the closet and
25 the social and economic pressures of the closet are still quite

1 relentless and insidious.

2 They do vary dramatically across the country and they
3 do vary across racial and ethnic groups and across
4 socioeconomic status.

5 So for people who are in sort of working class
6 occupations, for people who are from the deep south or the
7 great plain states, self-identification as a gay man or a
8 lesbian can be quite detrimental to one's health, one's income.
9 There is still a profound incentive to not self-identify.

10 **BY MR. BOUTROUS:**

11 **Q.** How does that factor contribute in any way to the
12 political powerlessness of gay men and lesbians, in your view?

13 **A.** For starters, if you can't self-identify, you are not
14 really available for political mobilization.

15 Any rational person would include that, you know,
16 even though I'm secretly gay or lesbian, I'm going to go to the
17 gay rights march; that that's not going to work out for them,
18 because their attendance at the gay rights march would be, at
19 least, an indicator to the public that, perhaps, you are a
20 member of the community. So if you are in the closet, you are
21 unlikely to mobilize.

22 If you are in the closet, it's difficult for you to
23 even necessarily have information about what other gays and
24 lesbians are doing. It's harder for gays and lesbians to find
25 one another for political mobilization, particularly in places

1 where their density is smaller.

2 The other effect is that it creates a misperception
3 in the public. So when the public sees gays and lesbians, what
4 they see are gays and lesbians in major cities. And they
5 conclude, Gee, you know, there's lots of gay activism and
6 there's -- you know, all the gay men I have ever seen have
7 advanced degrees and whatnot, when, in fact, that's something
8 of a misperception because it's the gays and lesbians you don't
9 see that present the other side of that picture; people who,
10 for economic necessity or for physical safety, have chosen not
11 to self-identify.

12 So the public has a lower estimation of the total
13 number of gays and lesbians. They have a misinformed
14 estimation of the socioeconomic status of gays and lesbians.
15 And I think they have a misperception of the quality of life or
16 the level of societal treatment of gays and lesbians. Not
17 every gay man is Will from Will and Grace.

18 **Q.** What does that have to do, though, with political power or
19 powerlessness?

20 **A.** Well, because people are likely to perceive gays and
21 lesbians as not having any political needs.

22 Going back to my Will and Grace example, you know,
23 Will was an attorney in Manhattan with a large apartment and a
24 private practice. That is not the reality of every gay men in
25 America and, as a consequence, when people see this, they are

1 going to say, Well, you know, these are not individuals who
2 need any form of protection. What do you mean we need
3 anti-discrimination laws? There's lot of gay people in
4 prominent jobs.

5 So it makes the public a little bit less sympathetic.
6 It make the public think that there's less need for some of
7 these protections. It also makes the public view the numbers
8 of gays and lesbians as being smaller and, therefore, maybe not
9 as politically interesting.

10 **Q.** How about the concept of censorship? Are gay men and
11 lesbians in society censored in any way that's relevant to the
12 concept of their political power?

13 **A.** Over the last 25 years or so there have been statutory
14 enactments preventing, for example, the discussion of
15 homosexuality in public health classes in school.

16 Some states specifically forbid the mentioning of
17 homosexuality in health classes or actually instruct teachers
18 to tell students that it's not an acceptable lifestyle and it's
19 unhealthy.

20 There was a ban on the funding of any art that had
21 homoerotic images in it for the National Endowment for the Arts
22 for a period of time.

23 There was even a period of time where one of the
24 states had a provision in their anti-HIV education program that
25 said that no -- no portrayal of homosexuality can be used in

1 the discussion of safe sex instructions to prevent HIV
2 transmission, which struck me as particularly odd.

3 If we go back historically, of course, there were
4 periods of time when gays and lesbians weren't allowed to use
5 the mails; that the transmission of material through the U.S.
6 mails related to gay and lesbian political activity was
7 considered to be obscene and, therefore, illegal.

8 **Q.** Is there anything in the Yes On 8 campaign that occurred
9 here in California that illustrates the censorship point you
10 just made?

11 **MR. THOMPSON:** Your Honor, I would object. This is
12 not a subject that's addressed in his report.

13 **MR. BOUTROUS:** Censorship certainly was an issue in
14 the report, your Honor.

15 And I believe Mr. Thompson vigorously questioned the
16 witness about his views as to what prompted the passage of
17 Proposition 8, questioned him in great detail about Proposition
18 8 in the campaign.

19 **MR. THOMPSON:** My objection stands. I don't believe
20 it's in the report.

21 **THE COURT:** Well, I gather you are not disputing that
22 this was a subject explored at the witness's deposition.

23 **MR. THOMPSON:** We did discuss the motivations behind
24 Proposition 8, yes, your Honor.

25 **THE COURT:** Then I think it's appropriate to explore

1 that in his testimony.

2 You may proceed, Mr. Boutrous.

3 **MR. BOUTROUS:** Thank you, your Honor.

4 **BY MR. BOUTROUS:**

5 **Q.** Is there anything about the Proposition 8 campaign by the
6 Yes On 8 campaign that illustrates the censorship point that
7 you discussed a few moments ago?

8 **A.** So one of the enduring sort of tropes of anti-gay
9 argumentation has been that gays are a threat to children. And
10 one particular instance in the Prop 8 campaign was a campaign
11 advertisement saying, "At school today, I was" -- a young girl
12 saying, "At school today, I was told that I could marry a
13 princess too." And the underlying message of that is that the
14 public school -- that if Prop 8 failed, the public schools are
15 going to turn my daughter into a lesbian.

16 At some level the notion is a little bit amusing or
17 risible, but at another level it's sort of a reflection that
18 there is a very strong taboo about the portrayal of
19 homosexuality as anything other than pathological in the views
20 of a lot of Americans. It's never to be talked about; not only
21 not positively, but even neutrally.

22 **Q.** How does that affect, in your view as a political
23 scientist, the public's view concerning the value of the
24 contributions made to society by gay men and lesbians?

25 **A.** Well, it certainly lowers their familiarity. So if the

1 public is not aware of any contributions of gay people to
2 American life or to world society, or if they are aware of the
3 contributions, but the individual is not identified as being
4 gay or lesbian, then the public might reasonably conclude that
5 they don't have any evidence of significance social
6 contributions by gay men and lesbians.

7 **Q.** How does that affect the political power?

8 **A.** Again, it demeans the relative worth of the community
9 vis-a-vis all others.

10 **Q.** Does it make other groups not take gay men and lesbians as
11 seriously when they speak out on behalf of a particular issue?

12 **A.** Conceivably, it means that they are not taken as
13 seriously.

14 It also might mean that they are not seen as
15 desirable coalition partners. And at the same time it makes
16 them easier targets. It's easier to target people who have
17 never contributed anything.

18 **Q.** You don't dispute, do you, that gay men and lesbians do
19 have some allies in the political system, in California and in
20 the United States?

21 **A.** They do, of varying reliability, but they do.

22 **Q.** Why doesn't that give that group political power in this
23 country?

24 **A.** Okay. So the question of allies is an important one
25 because we need to look at allies with respect to both their

1 reliability, with respect to the range of their potential
2 actions on behalf of gays and lesbians, and with respect to
3 kind of what potential outcomes they can and can't secure with
4 the structure of the governmental system.

5 So it is nice to have allies; and if those allies are
6 reliable, that's even better. But there are a number of
7 instances where ostensible allies of the gay community, when
8 faced with difficult decisions that might be electorally risky,
9 retreat and retreat quickly.

10 Or, there is also the disconnect between, say,
11 rhetoric on the one hand and action on the other. So if you
12 think of the major groups in society, you know, outside of the
13 commercial enterprises, you think about, you know, the
14 military, the church, the Democratic and Republican parties.
15 These are the power centers in American society. And of those
16 only the Democratic party purports to be an ally of gays and
17 lesbians.

18 But the Defense of Marriage Act was signed into law
19 by a Democratic president. "Don't ask, Don't tell" was passed
20 by a Democratic Congress and signed into law by a Democratic
21 president.

22 The current president describes himself as a fierce
23 advocate of gay and lesbian civil rights, but, yet, has
24 actually taken no steps to overturn either of those and,
25 actually, I understand has refused an order by the chief judge

1 of the Ninth Circuit to provide domestic partner benefits to
2 his clerk and has filed briefs hostile to gay and lesbian
3 interests.

4 So even fierce advocates are submitting briefs
5 supporting the Defense of Marriage Act, comparing gay and
6 lesbian same-sex marriage to bestiality. This is not a
7 reliable ally.

8 Now, certainly, some allies are more reliable than
9 that, but we have to look at the disconnect between rhetoric
10 and action.

11 **Q.** In your view, is a smaller group in society more in need
12 of reliable allies in the political sphere?

13 **A.** Well, just from the absolute numerical question of
14 electoral politics, the smaller the group, the more allies
15 necessary in order to sustain the day. That's clearly the
16 case.

17 If you are particularly insular or you are
18 geographically isolated, without allies you are very unlikely
19 to have an impact beyond, you know, fairly limited geographic
20 circumstances.

21 **Q.** In your expert opinion, does the gay and lesbian community
22 have any reliable allies in the way you are using that term
23 from a political science standpoint?

24 **A.** Umm sure. I wouldn't say that they have no reliable
25 allies. I think that would be an unfair statement.

1 I think that when we look at kind of across the
2 country and across the range of issues, the number of allies on
3 which gays and lesbians can count on in a tough fight is fairly
4 small, but I wouldn't say it's zero.

5 **Q.** Do you think that those -- that group of reliable allies
6 is sufficient to give gay men and lesbians political power in
7 the United States?

8 **A.** In my view, no.

9 **Q.** What has been the impact of HIV and Aids on the political
10 power of gay men and lesbians in this country?

11 **A.** So I spoke before about the fairly small numbers of gays
12 and lesbians. Those numbers are diminished by over 300,000
13 deaths of men engaged primarily in same sex sexual behavior
14 from HIV, another quarter of a million infections in the same
15 category.

16 So that's done a couple of things. One is, it's
17 diminished the voting power of a group that's already small.

18 Second, the disease has rather dramatically sapped
19 the financial resources of the group. Obviously, the 300,000
20 who have passed are not in a position to make contributions.
21 Those who are ill, are frequently on disability, spending
22 untold treasure on their medications.

23 More importantly, resources from the healthy are
24 being directed towards HIV activities and action, prevention
25 campaigns, HIV support, charities and whatnot, quite rightly.

1 And, finally, during the period of the worst severity
2 of the Aids epidemic, that was, frankly, the more important
3 agenda item; that gays and lesbians turn their attention first
4 to surviving before engaging the political system.

5 So I think HIV has been a real setback, certainly,
6 for the people who have been infected, but for the cause as
7 well.

8 **Q.** When a group, when a minority group faces a well
9 orchestrated, well-funded opposition, does that affect its
10 powerlessness in our political system?

11 **A.** Right. And so I think this really kind of gets to one of
12 the central problems that gays and lesbians face in the
13 political system.

14 So you could imagine for the sake of hypothesis that
15 there are two groups with exactly the same number of voters,
16 with exactly the same number of dollars. Are they equally
17 powerful? And the answer is, no, because that depends on what
18 their opposition is.

19 So you can imagine a group that faces relatively
20 little hostility or relatively little opposition, and we would
21 assume that they would be more powerful than a group that faces
22 well-funded and coordinated opposition to simply even with the
23 same amount of resources, because it's tougher sledding. It's
24 an uphill battle for the group with strong opposition.

25 **MR. BOUTROUS:** Your Honor, I'm going to ask to

1 approach to provide the witness with another smaller collection
2 of exhibits in a binder and provide the Court and opposing
3 counsel with those exhibits, if that's okay?

4 **THE COURT:** Very well.

5 **MR. BOUTROUS:** Thank you.

6 (Whereupon, binders were tendered
7 to the Court, counsel and the witness.)

8 **MR. BOUTROUS:** And, your Honor I'm going to present
9 the clerk with a listing of exhibits for convenience of the
10 Court. I have provided a copy to the witness and opposing
11 counsel as well.

12 **THE COURT:** Very well.

13 **BY MR. BOUTROUS:**

14 **Q.** Professor Segura, I would like you to start out by opening
15 the binder to Plaintiffs' Exhibit 1550 --

16 (Witness complied.)

17 **Q.** (Continuing) -- and ask you if this is a document that you
18 reviewed in connection with your testimony in this case?

19 **A.** It is.

20 **Q.** And before I ask you questions about that document, did
21 you study the Proposition 8 campaign and draw any conclusions
22 about the degree of opposition that gay men and lesbians faced
23 during the Proposition 8 campaign?

24 **A.** I generally familiarized myself with the details of the
25 campaign, but I can't say as I went into any depth on the

1 organizations of the two sides.

2 So I know what money was spent, et cetera, but I
3 didn't really have available to me a lot of information about,
4 for example, volunteerism and those sorts of things.

5 **Q.** And since you have been involved in this case, were you
6 provided with certain documents that were received by the
7 plaintiffs during the discovery over the last week from the
8 proponents of Proposition 8 in this case?

9 **A.** I was.

10 **Q.** And is one of those documents Plaintiffs' Exhibit 1550?

11 **A.** It is.

12 **Q.** And could you tell us what, if anything -- well, describe
13 this document and explain to the Court what, if anything, it
14 tells you about the political opposition arrayed against gay
15 men and lesbians?

16 **A.** It appears to be a flyer or perhaps a web screen capture
17 then sent as an electronic mail.

18 There are two things in it that I took note of when I
19 was looking through it. The first is on the second page the
20 role of the LDS Church in supporting Prop 8.

21 **MR. BOUTROUS:** And, your Honor, I would move
22 admission of Plaintiffs' Exhibit 1550.

23 **MR. THOMPSON:** No objection, your Honor.

24 **THE COURT:** Very well. 1550 is admitted.

25

1 (Plaintiffs' Exhibit 1550 received in evidence.)

2 **BY MR. BOUTROUS:**

3 **Q.** And if we could display Plaintiffs' Exhibit 1550?

4 (Document displayed)

5 **Q.** And, Professor Segura, I would ask you to direct us to the
6 portion that you are referring to on page two and read the
7 portion that you found relevant.

8 **A.** Page two under the title "LDS Church takes an active
9 role." I'm particularly interested in a couple of notes.
10 First, the second sentence:

11 "A letter from the First Presidency of the
12 LDS Church in Salt Lake announced the
13 church's official position during Sunday
14 services on June 29th. The LDS Church rarely
15 takes an official stand on political issues,
16 but in this case the First Presidency sent a
17 letter to the highest worldwide church
18 leaders and California local LDS leaders."

19 **Q.** And why do you find that relevant to the question of
20 political power and powerlessness of gay men and lesbians?

21 **A.** Churches -- many churches, and the LDS Church I would
22 include in this, are hierarchical. They have very clear
23 patterns and lines of communication.

24 All churches have the good fortune to essentially be
25 able to speak to their flock once a week or more, which makes

1 for a very strong communications network.

2 And so to me this illustrated that the LDS Church was
3 very active, not just on the financial side, but even in the
4 sort of grassroots side of pushing forward the proposition.

5 **Q.** Please turn to page three of Plaintiffs' Exhibit 1550?

6 (Witness complied.)

7 **Q.** Is there anything on that page that you found relevant to
8 your analysis of the political forces arrayed against gay men
9 and lesbians gay men and lesbians in the Prop 8 campaign?

10 **A.** Sure. Under the subtitle "Pastor's Committee."

11 **Q.** If you could read that for the record and then explain
12 what, if any, relevance it has to your opinions?

13 **A.** On 17 -- excuse me:

14 "On June 17, 2008, Jim Garlow, senior pastor
15 of Skyline Church in San Diego, released an
16 invitation letter to the state's pastor
17 community asking them to participate in a
18 state-wide conference call for pastors. The
19 call, which marked the first in a series of
20 pastor meetings, served to kick off an
21 aggressive grassroots campaign among churches
22 of varying denominations. A total of 1700
23 pastors based in 101 locations across the
24 state participated."

25 **Q.** What relevance does that passage have to your analysis of

1 the political powerlessness issue in this case?

2 **A.** So in going through these documents, Reverend Garlow's
3 name appears frequently and he ends up organizing this team,
4 and it goes on to become, I believe, Protect Marriage CA.

5 And they were very instrumental in trying to involve
6 the Evangelical community in supporting the proposition.

7 And I was particularly taken aback by the notion of
8 1700 pastors. That is a profound network of influence. I
9 think most campaigns, candidate campaigns, initiative
10 campaigns, party coordinated campaigns would be thrilled to
11 have 1700 volunteers across the state on any given conference
12 call. I think that that would be considered a heroic success.

13 So this is an admirable organization at some level.
14 I mean, it's enviable.

15 **Q.** And you are not suggesting there is anything wrong with
16 like-minded groups and like-minded organizations, including
17 churches, banding together to fight for a cause they believe
18 in, right?

19 **A.** Umm, well, of course, there are limitations under the tax
20 code about political advocacy; but of terms of individual
21 groups working together on their own behalf, they are perfectly
22 allowed to do that. And, in fact, that's kind of the center
23 piece of pluralist democracy, is that people get to advocate
24 for what they believe in.

25 I think what takes me back here is just sort of the

1 sheer breadth of the organization and its level of coordination
2 with Protect Marriage.

3 **Q.** Let's turn to Plaintiffs' Exhibit 2310, which is the
4 second document in the binder.

5 (Witness complied.)

6 **Q.** Is this a document that you reviewed in connection with
7 your work on this case over the last week?

8 **A.** It is.

9 **Q.** And could you describe your understanding of what this
10 document is?

11 **A.** This document appears to be a cover page screen capture of
12 ProtectMarriage.com's website.

13 **MR. BOUTROUS:** Your Honor, I move admission of
14 Plaintiffs' Exhibit 2310.

15 **MR. THOMPSON:** No objection, your Honor.

16 **THE COURT:** 2310 is admitted.

17 (Plaintiffs' Exhibit 2310 received in evidence.)

18 **BY MR. BOUTROUS:**

19 **Q.** Professor Segura, was there anything about this document
20 that caught your eye as you evaluated the relative political
21 power of gay men and lesbians vis-a-vis others?

22 **A.** Frankly, it was just the word "coalition."

23 So the very first subpoena is:

24 "ProtectMarriage.com is a broad-based

25 coalition of California families, community

1 leaders, religious leaders, pro-family
2 organizations and individuals from all walks
3 of life who have joined together to support
4 Proposition 8."

5 And so coalitions we know exist, you know, in an
6 informal sense in all forms of political contestation. And
7 this appeared to be sort of a stipulation of a more formal
8 association.

9 So it was more of an impression that I got from that
10 sentence that -- you know, that there was an organized effort
11 here, rather than just simply a group of people who happened to
12 agree.

13 **Q.** Based on your evaluation of the record in this case before
14 you saw these documents and in connection with public
15 statements that you had seen previously, was the use of the
16 word "coalition" significant to you in this document?

17 **A.** When I evaluate the political opportunity structure that
18 gays and lesbians face in my evaluation of their level of power
19 or powerlessness, it enhances my understanding and enhances my
20 estimation of the strength of their opposition.

21 **Q.** Professor Segura, please turn to Plaintiffs' Exhibit 2314.

22 (Witness complied.)

23 **A.** I'm there.

24 **Q.** Have you reviewed this document?

25 **A.** I have.

1 Q. What does -- could you describe this document? And then I
2 will ask that it be moved into evidence before you go on. But
3 just give your over -- overall description of the document,
4 please?

5 A. This is also a screen capture of a website called "The
6 Pastor's Rapid Response Team," which sounds fun and --

7 (Laughter.)

8 A. I'm sorry. The term "rapid response" just struck me as
9 odd. Again, it's headed by Jim Garlow from Skyline Church.

10 MR. BOUTROUS: And, your Honor, I move admission of
11 Plaintiffs' Exhibit 2314.

12 MR. THOMPSON: No objection, your Honor.

13 THE COURT: Very well, 2314 is in.

14 (Plaintiffs' Exhibit 2314 received in evidence.)

15 MR. BOUTROUS: Thank you, your Honor.

16 Please display 2314.

17 (Document displayed)

18 BY MR. BOUTROUS:

19 Q. In political parlance, Professor Segura, what is a rapid
20 response team?

21 A. It's an unusual term in political science. I'm more
22 accustomed to the term with respect to toxic waste bills or
23 fires or medical emergency sorts of things. So I'm not sure
24 what they had in mind when they coined the term.

25 I would assume that what they wanted to do would be

1 in a position to put out responses to or to stage a public
2 event quickly in response to sort of developments throughout
3 the course of the campaign, the word "rapid" and "response"
4 being the key words there.

5 But I was just more taken aback that there was an
6 organization who was sort of regularly monitoring everything
7 and ready to go at a moment's notice.

8 **Q.** Well, thank you. Let's turn to Plaintiffs' Exhibit 2389.

9 **MR. THOMPSON:** Your Honor, I would like to say we are
10 getting to a part of this binder where there are many documents
11 that are stamped "Attorneys' Eyes Only," "Highly Confidential."
12 This document doesn't have that stamp on it, but we believe it
13 is confidential.

14 We haven't had an opportunity to have dialogue with
15 plaintiffs' counsel about the extent to which we might be able
16 to lift those designations, but we are certainly concerned
17 about these documents being discussed in open court without
18 having an opportunity to assess that.

19 And I might suggest that we take a lunch break and
20 look and see whether we can work with plaintiffs' counsel to
21 resolve those issues without having to take the Court's time
22 fighting document by document over this on the fly.

23 **MR. McCARTHY:** If I may, your honor, attorney Vincent
24 McCarthy. I represent Pastor Jim Garlow and Pastor Miles
25 McPherson.

1 I have concerns regarding these documents, which I
2 haven't seen, your Honor. I'm presently in the process of
3 discussing with counsel for the plaintiffs a potential
4 agreement on the motion to quash and for a protective order
5 that I filed in this matter.

6 My clients are currently reviewing certain documents
7 and disks, some of which appear to be the documents that are
8 being introduced here, to make a decision as to whether or not
9 they will agree to the introduction of those documents and/or
10 authenticity of the documents.

11 For plaintiffs to be introducing these while telling
12 me that they want my clients to review them on the issues of
13 both authenticity and admissibility, I think is somewhat
14 misleading. We are still reviewing these documents and if they
15 are going to be introduced at this point or counsel is going to
16 seek to introduce them, then I would like to have the motion to
17 quash and for a protective order decided, because the part of
18 the motion that goes to a protective order goes to any
19 testimony by Pastors Garlow and McPherson. And if these
20 documents include testimonial matters regarding these two
21 pastors, then they are included within the motion for
22 protective order.

23 As your Honor knows, we have argued not only under
24 the earlier *Perry* decision, but the *Trump* decision, that there
25 are First Amendment implications to the introduction of

1 testimonial evidence from pastors. Particularly, a lot of
2 this, I think, concerns sermons that they have given, speeches
3 they have given to other people regarding their biblical
4 beliefs, and all of which we believe are protected by the First
5 Amendment and have been argued in the motion papers that your
6 Honor presently has.

7 **THE COURT:** Well, Mr. Boutrous, I guess there are two
8 suggestions; Mr. Thompson's suggestion for lunch, and the
9 comment raised by counsel for Reverend Garlow.

10 **MR. BOUTROUS:** I have no objection to the lunch
11 suggestion.

12 (Laughter.)

13 **MR. BOUTROUS:** Let me make that clear, but let me
14 address two of the points.

15 First, counsel -- we provided this gentleman with
16 disks, documents. Asked him over the weekend, as I represented
17 to the Court we would do, to review the documents that we might
18 use to absolve his clients of having to appear and testify
19 about them.

20 He sent us back an email, which I can provide the
21 Court -- I was hoping to spare you having to delve into this --
22 basically that it would be too burdensome for his clients to
23 review the documents to tell us whether they had any objection
24 to us using them, and essentially refused to participate in the
25 back-and-forth on the documents. That's number one.

1 Number two. This document that is -- as Mr. Thompson
2 astutely noted, the next exhibit, Plaintiffs' Exhibit 2389,
3 does not say "Attorneys' Eyes Only." It was not designated
4 confidential. It's an email from Ned Dolejsi, who was on the
5 executive committee of ProtectMarriage.com, and we obtained it
6 from the formerly anonymous Mr. Swardstrom in production
7 without any limitation on our using this document whatsoever.

8 The third point I would make, your Honor, is that
9 these are documents that were produced after the Ninth Circuit
10 amended its opinion in footnote 12, after Judge Spero ruled
11 regarding the scope of the privilege. These are documents that
12 were disseminated widely, widely.

13 Some of the documents you will see, your Honor, they
14 talk about 3,000 pastors on a conference call in order to
15 disseminate more messages to huge numbers of people.

16 So they are clearly not within any cognizable scope
17 of a First Amendment privilege and they're covered -- and this
18 is -- covered by the order that the Court today upheld from
19 Judge Spero.

20 So and, finally, we did redact the names. We did not
21 do it on this document because it was not produced pursuant to
22 any protective order. But the version I have provided the
23 Court and the witness and that I was going to seek admission of
24 evidence, we redacted the names that we believed had not been
25 made public or we didn't know, consistent with the agreement

1 that I made with Mr. Cooper last week regarding the use of
2 these documents.

3 And we did have a dialogue with -- with the
4 proponents' counsel over the weekend in terms of redaction, and
5 I think some of the things we did agree on and others -- we are
6 in the middle of trial with witnesses. We just took our best
7 good faith effort to eliminate names of people we didn't have
8 information concerning, the extent to which they had been
9 publicly revealed.

10 So I don't think there's any basis for any objection
11 to these documents. They are documents produced by the
12 proponents or the individual members of the executive
13 committee, in the latter case, without any limitation on our
14 use.

15 **THE COURT:** You are representing that Exhibit 2389
16 and the other document that are contained in this binder came
17 from the sources you identified rather than from counsel's
18 client?

19 **MR. BOUTROUS:** Correct, your Honor.

20 **MR. MCCARTHY:** Your Honor, if I may just correct the
21 record?

22 I don't think one hand knows what the other is doing
23 with regard to plaintiffs' team. There is an attorney named
24 Lazarus, who I am dealing with, who presented me yesterday with
25 a separate binder with, I believe, eight disks in it and about

1 10 or 12 documents.

2 She stated to me on the phone that if my clients
3 would review them, she would -- and agree to the
4 admissibility -- or not admissibility, authenticity of the
5 documents, she would withdraw the subpoenas.

6 Now, I sent those documents in good faith, together
7 with the disks, by overnight mail yesterday to my clients
8 because the prior package that had been sent to me was over 40
9 hours in length and the plaintiffs wanted my clients to review
10 them on a Sunday and Martin Luther King holiday, which it was
11 impossible to get the documents to them and for them to spend
12 30 hours on that on a Sunday on Martin Luther King's birthday.
13 So right now my clients are reviewing them thinking that there
14 is an offer on the table here.

15 So we are completely taken by surprise. And if
16 counsel is going to proceed with this, apparently, then they
17 are withdrawing the offer that they made earlier to me
18 yesterday and I would like an opportunity to argue the motion
19 to quash.

20 And we've also prepared a motion to stay, because we
21 would like to have the Ninth Circuit take a look at this as
22 well. We know of no instance in which pastors have been called
23 to testify regarding their sermons and other biblical
24 interpretations to their congregants and others.

25 **THE COURT:** Well, that's a separate issue, is it not,

1 from the documents that Mr. Boutrous is proposing to use with
2 this witness?

3 **MR. McCARTHY:** Unless they include testimonial
4 materials, your Honor. Then they would be covered by the
5 motion for a protective order.

6 **THE COURT:** A protective order motion is different.
7 As I understand it, these are not the documents that were
8 produced by or came from the files of your client.

9 **MR. McCARTHY:** Right. But I'm objecting not only to
10 the authenticity of the documents, but, also, to the
11 admissibility of the document because of the First Amendment
12 consideration set out in our motion.

13 **THE COURT:** That is a separate issue, isn't it?

14 **MR. McCARTHY:** It's only separate if there is no
15 testimonial materials in the documents that have been
16 introduced.

17 **THE COURT:** Now, what do you mean "testimonial
18 material"?

19 **MR. McCARTHY:** In other words, if there are
20 statements from either Pastors Garlow or McPherson in these
21 documents, then what plaintiffs are doing is getting in
22 statements by my clients over the motion for protective order
23 that I have made protecting any statements made by my clients
24 under the First Amendment.

25 **THE COURT:** If the statements, however, were made to

1 third parties, what possible protection could there be for
2 these statements?

3 **MR. McCARTHY:** Your Honor, I don't even -- I haven't
4 seen these before. I have no idea what's in them. I was
5 provided with a --

6 **THE COURT:** That would tell you whether there is some
7 kind of privilege that attaches to the statements, would it
8 not?

9 **MR. McCARTHY:** Well, it would, sure. If the material
10 in these documents includes biblical interpretations of my
11 clients of the issues that are being talked about here, then
12 the Court is really asking a pastor to testify as to his of
13 view of traditional marriage, of same-sex marriage, and we
14 believe that would violate the First Amendment rights of a
15 pastor to do that, your Honor.

16 **MR. BOUTROUS:** Your Honor, may I make one point?
17 This was a pastor who was on the Pastor's Rapid
18 Response team. So he injected himself into the political
19 sphere.

20 **THE COURT:** You are saying he can respond quickly, is
21 that it?

22 (Laughter.)

23 **MR. BOUTROUS:** I wish I had thought of that.

24 **THE COURT:** All right. Lets take Mr. Thompson's
25 suggestion and have lunch, and you and Mr. Thompson can work

1 out whatever you want with respect to these documents.

2 One other piece of information for counsel. I have
3 been informed that Magistrate Judge Spero has heard the parties
4 on proponents' motion to expand the designation of the
5 proponents' core group.

6 Magistrate Judge Spero granted proponents' motion
7 with respect to John Doe, but denied the motion with respect to
8 Rob Wirthlin, Richard Peterson and Bill Criswell. So you may
9 consider that in the course of your discussions.

10 **MR. BOUTROUS:** Thank you, your Honor.

11 **THE COURT:** All right.

12 (Whereupon at 12:12 p.m. proceedings
13 were adjourned for noon recess.)

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P R O C E E D I N G S

JANUARY 20, 2010

1:09 P.M.

THE COURT: Very well. With regard to the matter that we were discussing just before the luncheon recess, I want to advise counsel that I'm going to make a reference of the motion to quash, that counsel is addressing, to Magistrate Judge Spero so that he may attend to that while we proceed with the trial.

And so I would urge Counsel, whose name I'm afraid I have forgotten --

MR. MCCARTHY: McCarthy, Your Honor.

THE COURT: Oh, yes, Mr. McCarthy.

MR. MCCARTHY: Yes, Your Honor.

THE COURT: If you and your opposite numbers on the plaintiffs' team and on the proponents' team would make yourself available to Magistrate Judge Spero, he will be able to attend to this matter and deal with it.

MR. MCCARTHY: Thank you, Your Honor.

MR. BOUTROUS: Your Honor, may I just confer with Mr. McGill, for one moment?

THE COURT: Of course.

(Pause)

THE COURT: Ready to go?

MR. BOUTROUS: Yes, Your Honor.

1 Q. And without disclosing the names or the titles of the
2 individuals to whom this e-mail was sent, can you generally
3 describe the nature of the -- the people to whom this e-mail
4 was sent?

5 A. In broad terms, I would describe it as the senior
6 leadership of the Roman Catholic Church in California.

7 Q. And could you generally describe the subject matter of
8 this e-mail, at least as to the first page of the document.
9 Again, without going into any detail concerning the actual
10 specific contents.

11 A. Uhm, it appears to be sort of half of a thank you note,
12 half of a celebratory message on the election day, recounting
13 the specific contributions that Catholic organizations and the
14 Church itself played in prosecuting the Yes On 8 campaign.

15 Q. In going back to the top of the document. Under the
16 "from" line there's a "subject" line. Could you read that for
17 me.

18 A. It says, "Go to confession."

19 Q. And what is the date of the e-mail?

20 A. November 4, 2008.

21 Q. And is there a time stamp on it?

22 A. 9:28, in the morning.

23 **MR. BOUTROUS:** Your Honor, I move admission of
24 Plaintiffs' Exhibit 2389. The parties did -- we did discuss
25 this document.

1 There is still a dispute about whether the whole
2 thing can come in. I propose that it be entered into evidence
3 subject to redaction, and that I would only display the
4 portions of the document that the parties agreed to be
5 displayed, published to the public and put on the screen for
6 now. And then we could resolve the -- any other -- I still
7 believe this document is not covered by any privilege. But to
8 move things along, would suggest we proceed that way.

9 **THE COURT:** Mr. Pugno.

10 **MR. PUGNO:** Thank you, Your Honor. Is this on?

11 **THE COURT:** I believe it is.

12 **MR. PUGNO:** I'm sorry, Your Honor.

13 Thank you. And thank you for pronouncing my name
14 correctly. Everyone gets it wrong.

15 **THE COURT:** Oh, well.

16 **MR. PUGNO:** We discussed this at length during the
17 break, and we're doing everything we can to accommodate the
18 plaintiffs on this.

19 And we identified some portions of this that we were
20 comfortable having read to the witness. But the -- but the --
21 this is, as has been described by the witness, a communication
22 between the executive director of the Catholic Conference of
23 Bishops and the bishops who make up the Catholic Conference of
24 Bishops. And, you know -- and the subject matter has to do
25 with the Church's involvement, as I understand it from the

1 witness.

2 We don't agree to lift, voluntarily, the attorneys'
3 eyes only privilege for this entire document. But we did,
4 earlier, work out some highlighted portions that could be read
5 to the witness without our objections. So that's where we are
6 at this moment.

7 **THE COURT:** Well, then, do I understand it's mutually
8 agreeable to the parties that we proceed with respect to the
9 portions that you've highlighted and as to which there is no
10 objection to being read to the witness?

11 **MR. BOUTROUS:** Yes.

12 **MR. PUGNO:** That is correct. But as to the admission
13 of the entire document into evidence, we haven't gotten there
14 yet.

15 **THE COURT:** All right. Well, we'll deal with that
16 when and if we reach that point.

17 **MR. PUGNO:** Thank you, Your Honor.

18 **MR. BOUTROUS:** Thank you, Your Honor.

19 At this time, I would like to publish the newly
20 redacted first page of Exhibit -- Plaintiffs' Exhibit 2389.

21 And then I'll ask the witness to read from the
22 sections that have not been redacted, those paragraphs. And
23 then I'll ask the witness a couple of questions about that.

24 Maybe we can enlarge it, so it's easier to read.

25 (Document displayed.)

1 **MR. BOUTROUS:** Thank you.

2 **THE WITNESS:** Would you like me to read it in its
3 entirety?

4 **BY MR. BOUTROUS:**

5 **Q.** Yes, if you could, Professor. Thank you.

6 **A.** (As read)

7 "Today is election day. I am sure you share
8 my relief that it is finally here. We have
9 all been subjected to the longest campaign
10 for President in American history. And in
11 our own state, the intensity of the campaign
12 around Proposition 8 has been incredible.
13 The direct involvement of the CCC has been
14 unusual - although not unprecedented."

15 **MR. PUGNO:** Your Honor, I'm sorry to interrupt. But
16 what's been posted on the screen is more than what has been
17 highlighted and agreed to by the parties.

18 **MR. BOUTROUS:** Oh, I'm sorry. Were you -- do you
19 want additional sentences? I had this sort of blocked. I
20 thought --

21 **MR. PUGNO:** That's fine.

22 **MR. BOUTROUS:** -- we had agreed to those two
23 paragraphs.

24 **MR. PUGNO:** What's highlighted.

25 **MR. BOUTROUS:** Okay. Well, maybe I can ask our team

1 to redact, in that second paragraph, everything -- not that I
2 like asking to have things redacted. Let me just make that
3 clear. But to move this along, the sentences that -- up until
4 the sentence that begins, "The Catholic conference has
5 played..." So, basically, the first two sentences of the
6 second paragraph. If we can redact those as well.

7 My apologies for the delay, Your Honor.

8 Yes. There we go. Thank you.

9 (Document displayed.)

10 **BY MR. BOUTROUS:**

11 **Q.** Professor Segura, could you pick up reading with the now
12 slimmed-down version -- slimmed-down version of this exhibit.

13 **A.** (As read)

14 "The Catholic Conference has played a
15 substantial role in inviting Catholic
16 faithful to put their faith in action by
17 volunteering and donating. Led by the
18 Knights of Columbus national donation of
19 \$1.15 million, other million-dollar donors,
20 and countless major donors, and with a
21 significant percentage of the 90,000 online
22 donors, the Catholic community has stepped
23 up. Of course, this campaign owes an
24 enormous debt to the LDS Church. I will
25 comment specifically at a later time, under

1 separate cover, about their financial,
2 organizational and management contribution to
3 the success of the effort. The
4 ProtectMarriage.com campaign has surpassed
5 \$37 million in donations."

6 **Q.** Thank you, Professor Segura.

7 What about this document, and in particular those
8 passages that you read, bears on your analysis of the array of
9 political opposition that gay men and lesbians face in the
10 United States in general, and in particular in California as it
11 relates to Proposition 8.

12 **A.** Well, certainly, it suggests that the fairly substantial
13 monetary resources of the Roman Catholic Church and its
14 faithful were mobilized in substantial portion on behalf of the
15 Yes On 8 campaign.

16 It also suggests a fairly close cooperation between
17 the Catholic Church and the LDS Church, which is certainly
18 remarkable from a historic perspective.

19 And I was taken aback, frankly, by the phrases
20 "financial, organizational and management contributions to the
21 success of the effort," which suggests a very close
22 coordination between those organizations and the campaign.

23 **Q.** In your study of American politics and political science,
24 to your recollection, have you ever seen an example where two
25 churches of the scope and size and power of the Catholic Church

1 and the LDS Church had banded together and arrayed themselves
2 against a particular minority group in society?

3 **A.** I don't -- I wouldn't claim to have an exhaustive
4 knowledge of the political action of those churches forever,
5 but I would suggest that this is unprecedented in my
6 experience.

7 **Q.** Let's turn to the next exhibit, Plaintiffs' Exhibit 2552.

8 **MR. BOUTROUS:** And, Your Honor, I would move -- I
9 would move -- actually, let me can ask the witness a couple of
10 questions first.

11 **BY MR. BOUTROUS:**

12 **Q.** Is this a document that you've seen before, sir?

13 **A.** Yes, it is.

14 **Q.** And is it a document you've reviewed this week, in
15 preparing for your testimony, once we received this document in
16 the production that proponents of Proposition 8 made to the
17 plaintiffs in this case?

18 **A.** Yes, it is.

19 **MR. BOUTROUS:** Your Honor, I move admission of
20 Plaintiffs' Exhibit 2552.

21 **MR. THOMPSON:** No objection, Your Honor.

22 **THE COURT:** Very well. 2552 is admitted.

23 (Plaintiffs' Exhibit 2552 received in evidence.)

24 **MR. BOUTROUS:** Thank you, Your Honor.

25

1 **BY MR. BOUTROUS:**

2 **Q.** Professor Segura, can you describe your understanding of
3 this document and how it relates to your analysis of the
4 political powerlessness of gay men and lesbians.

5 **A.** This document appears to be a personal e-mail from the
6 chairman of the protect marriage effort. And it recounts the
7 financing of the signature petition gathering -- signature
8 gathering phase of the Prop 8 campaign.

9 **MR. BOUTROUS:** I would like to publish this exhibit,
10 2552, to the screen, please.

11 (Document displayed.)

12 **BY MR. BOUTROUS:**

13 **Q.** In your understanding, is the e-mail line from -- and
14 maybe we can highlight that -- "ronp" of CaliforniaFamily.org,
15 who do you understand "ronp" to be?

16 **A.** Ron Prentice.

17 **Q.** And who do you understand Ron Prentice to be?

18 **A.** The chairman of ProtectMarriage.com, or the head.

19 **Q.** What about -- what was it about this document, what
20 portion of this document did you find shed light on the
21 opinions that you formed, that you're giving in this case?

22 **A.** On the second page, the paragraph about a third of the way
23 down the page that begins with "the total."

24 **Q.** Could you read that for the record.

25 **A.** (As read)

1 "The total projected cost for the
2 qualification effort has been set at
3 1.5 million. Thus far, 1.25 million has been
4 raised and spent. The monies have come from
5 four primary sources thus far: The Catholic
6 community of San Diego, due to the
7 involvement of Auxillary Bishop Cordileone,
8 Fieldstead & Company, who pledged 50 cents
9 for each dollar raised in January for the
10 effort, Focus on the Family, and small gifts
11 from direct mail efforts by
12 ProtectMarriage.com."

13 **Q.** Are you knowledgeable, generally, about the organization
14 Focus on the Family?

15 **A.** I am.

16 **Q.** What is Focus on the Family?

17 **A.** It's a nationally prominent evangelical organization
18 dedicated to supporting issue positions consistent with the
19 evangelical community's preferences.

20 **Q.** Is it a group that has been known to be politically
21 active?

22 **A.** Very much so.

23 **Q.** And going back to page 1 of the document, the first
24 paragraph of the document, if we could pull that up.

25 (Document displayed.)

1 Could you -- could you read -- just read that
2 paragraph, just into the record, so we have it.

3 **A.** Okay. (As read)

4 "I spoke with" -- person redacted -- "in your
5 office, who suggested I send along some
6 information. I serve as the CEO of the
7 California Family Council. Our 501c4
8 organization, California Renewal, is the
9 sponsoring organization for the marriage
10 amendment that is attempting to qualify in
11 California. Thus, I serve as the volunteer
12 chairman of ProtectMarriage.com steering
13 committee."

14 **Q.** What is it about this document that relates to your
15 opinions on political powerlessness of gay men and lesbians?

16 **A.** Well, I drew from this two things. First of all, was the
17 very early involvement of the organized religious communities
18 in the signature and petition gathering phase of the campaign.

19 And the second thing I drew from it was that this
20 was, really, a national political campaign; that Focus on the
21 Family is, of course, a national organization; and, therefore,
22 communities, organizations, and leaders far and wide were
23 involved in the effort.

24 **Q.** Adding Focus on the Family and the organizations -- the
25 other organizations mentioned in this document, to the LDS

1 Church and the Catholic Church, that was discussed in the prior
2 document, is that a coalition you've seen before, arrayed
3 against a particular minority group in the United States in a
4 political battle?

5 **A.** I would say that there's probably one other issue position
6 against which such a coalition might emerge, and that would be
7 a Pro Choice abortion rights position.

8 Apart from that, I can't think of a minority group
9 against whom such a coalition has been raised.

10 **Q.** Thank you.

11 I would like you to now turn to Plaintiffs' Exhibit
12 2554. And I'm going to ask you some general questions about
13 this document.

14 I would like you to refrain from mentioning any of
15 the names, but -- because, as you can see by the approach of
16 Mr. Thompson, there's an objection to admission of this
17 document.

18 But have you seen this document before?

19 **A.** I have.

20 **Q.** Does this document shed any light on the powerful
21 political forces arrayed against gay men and lesbians in
22 connection with the Proposition 8 campaign?

23 **MR. PUGNO:** Your Honor, if I may object, this --

24 **THE COURT:** Let's get an answer to the question
25 first.

1 **MR. PUGNO:** I'm sorry, Your Honor.

2 **THE WITNESS:** Yes, it sheds light.

3 **THE COURT:** All right. Mr. Pugno.

4 **MR. PUGNO:** Yes. Your Honor, this is still under
5 attorneys' eyes only confidentiality.

6 As the Court can probably see from the body of the
7 message, the "to" and the "cc" designations, from all
8 appearances, this is an internal communication among leadership
9 of a particular church.

10 I don't see anything that connects it to the Prop 8
11 campaign, or that it was disclosed beyond the church leadership
12 officials that are listed there.

13 So we would object to testimony about this document.

14 **THE COURT:** Mr. Boutrous.

15 **MR. BOUTROUS:** Thank you, Your Honor.

16 First, without revealing anything other than the
17 following, I think I can reveal that it references the fact
18 that the effort being discussed in the -- in this e-mail is in
19 concert with the leaders of many other faiths and community
20 groups forming part of the ProtectMarriage.com Coalition.

21 This is a document that we received in production
22 from the proponents of Proposition 8 in this case, in the wake
23 of the order rejecting their First Amendment claims and
24 defining the core group.

25 So I think it's not subject to a First Amendment

1 privilege. It was clearly disseminated more widely than those
2 who saw it. And, therefore, I believe it should be admissible.

3 **MR. PUGNO:** Your Honor --

4 **THE COURT:** This Mr. Bentley is not one of the
5 individuals that has been designated -- that have been
6 designated as in the core group. Is that correct?

7 **MR. BOUTROUS:** That's correct, Your Honor.

8 **MR. PUGNO:** Your Honor, I really must clarify, this
9 document -- how do I say this?

10 Whether or not any of these individuals are in the
11 core of ProtectMarriage.com is completely a different issue.

12 This is a document in the possession of one of our
13 clients who is -- or, at the time, was a church official and
14 had a document in his possession revealing communications with
15 other church officials. And that's the body of this.

16 Now, it may relate to Prop 8, but there is -- I think
17 that we are -- it would be very troublesome to say that
18 religious organizations, churches, lose their ability to
19 communicate within their leadership in the church because the
20 church works with other churches and other organizations, even
21 in a cooperative way in a campaign.

22 **THE COURT:** But, as I understand it, this is a
23 document that was in ProtectMarriage.com's files.

24 **MR. PUGNO:** No, Your Honor. In the file of an
25 individual who is an official proponent.

1 **THE COURT:** One of the parties?

2 **MR. PUGNO:** One of the intervenor individuals, not
3 the campaign committee.

4 **THE COURT:** But it was in that individual's files?

5 **MR. PUGNO:** That's right.

6 **THE COURT:** That individual is not part of this
7 religious organization, correct?

8 **MR. PUGNO:** He is, Your Honor. That individual is a
9 member of the organization -- a member of the religious
10 denomination, and at the time had a position of authority in
11 that church and was -- sent this e-mail in that -- in
12 connection with his -- in other words, Your Honor, someone can
13 be on the executive committee and be an official proponent, and
14 they can also be involved with their church.

15 And this is a communication about Prop 8 among church
16 officials with one of our proponents who was also a church
17 official.

18 In other words --

19 **THE COURT:** Well, but he's one of the proponents.
20 He's an individual intervenor-defendant in the case.

21 The document relates to the Prop 8 campaign. If
22 there has been a disclosure --

23 **MR. PUGNO:** It relates to the churches' support for
24 Prop 8.

25 This is not a publication of the campaign. This is

1 not a document produced by ProtectMarriage.com. This is an
2 internal church communication.

3 **THE COURT:** I don't understand how, if it is a
4 document that relates to the Prop 8 campaign, in the files and
5 possession of one of the defendant-intervenors, how it can have
6 some kind of privilege attached to it.

7 **MR. PUGNO:** Well, there's -- there's --

8 **THE COURT:** It obviously falls outside the
9 First Amendment privilege as defined by the Ninth Circuit.

10 **MR. PUGNO:** Absolutely agree with that, Your Honor,
11 because that First Amendment privilege articulated by the Ninth
12 Circuit was with regard to the campaign's internal formulation
13 of messaging strategy.

14 We are on a completely different field here. We're
15 dealing with the religious association of a religious
16 denomination and their ability to communicate with one another
17 within the walls of the church.

18 **THE COURT:** Mr. Boutrous.

19 **MR. BOUTROUS:** Your Honor, I would make a couple of
20 points.

21 First, I don't see how Mr. Pugno and
22 ProtectMarriage.com have standing to assert this
23 First Amendment privilege on behalf of the people who wrote
24 this document, number one --

25 **THE COURT:** Well, he can assert it on behalf of the

1 individual that he represents.

2 **MR. PUGNO:** Right, the individually-named defendant.

3 **MR. BOUTROUS:** Mr. Jansson.

4 **THE COURT:** Which named defendant are we talking
5 about?

6 **MR. BOUTROUS:** Mr. Jansson.

7 **THE COURT:** Mr.?

8 **MR. BOUTROUS:** Jansson.

9 **THE COURT:** Mr. Jansson.

10 **MR. BOUTROUS:** Yes.

11 **THE COURT:** Okay.

12 **MR. BOUTROUS:** So assuming there is some level of
13 standing, the -- I would direct the Court to the first
14 sentence. And, again, I think I can read this without bringing
15 down the First Amendment.

16 **MR. PUGNO:** I am going to object, Your Honor, to
17 this -- this internal church communication being read aloud in
18 court.

19 **MR. BOUTROUS:** Let me try it this way, Your Honor.
20 The document, on its face, says it relates to the role in
21 Public Affairs of the Prop 8 campaign.

22 And then in the third -- or the fourth paragraph, it
23 talks all about the campaign and the fact that certain
24 officials -- who I won't name, even though I don't think that
25 name is confidential -- who report directly to the

1 ProtectMarriage.com Coalition leaders.

2 So it seems to me this is a classic -- it's a
3 document that's in the files of a person who sat on the
4 executive committee of ProtectMarriage.com precisely to play
5 this role in this broad coalition that breaches and breaks down
6 any limits between these groups for this effort in the
7 political sphere, and then arrays against the folks on the
8 other side of Proposition 8.

9 So I think it -- it's hardly the kind of sensitive
10 religious tract that might otherwise be subject to protection
11 under the First Amendment.

12 **MR. PUGNO:** Your Honor, Mr. Jansson testified in his
13 deposition that he, at this time, was a member of -- forgive
14 me. I don't remember the exact name. But it was the Public
15 Affairs something something office of the Church of Jesus
16 Christ of Latter-day Saints.

17 That was a role that he played independent of the
18 executive committee of ProtectMarriage.com.

19 The references in capital letters, in title caps, to
20 "Public Affairs" are a reference to those church officials.
21 And there's also a mention in the cc to -- to -- I won't say it
22 aloud, but other leadership in the church.

23 So this is an internal communication of the church.
24 It certainly refers to the larger Prop 8 effort. But unless
25 there is a communication from Mark Jansson to another

1 organization in his capacity as an official proponent or as an
2 executive committee member -- which this is not -- then we
3 really are not having to be even concerned with what the core
4 is, and so on.

5 This is an individually-asserted First Amendment
6 protected right of Mr. Jansson to have in his possession an
7 internal church memo that he does not have to produce in court.

8 **THE COURT:** The content of the document appears to
9 relate to the messaging of the campaign.

10 Mr. Jansson is a party to the litigation. The issue
11 of his role in the campaign is very much an issue in the case.
12 He intervened to serve as a party in the case. And I think it
13 is appropriate that the plaintiffs have sought from and
14 obtained discovery concerning his role. And, apparently, his
15 role relates to his religious affiliation. I'm not aware of
16 any privilege that attaches to that, under these circumstances.
17 And the objection will be overruled.

18 **MR. BOUTROUS:** Thank you, Your Honor.

19 With that, I would like to publish the original
20 version as redacted. Not any other version, but the original
21 version to the screen. Thank you.

22 (Document displayed.)

23 **BY MR. BOUTROUS:**

24 **Q.** Professor Segura, I'd like you to look at the very first
25 paragraph of this document.

1 **MR. BOUTROUS:** And enlarge that on the screen so we
2 can take a look at it.

3 (Document displayed)

4 **BY MR. BOUTROUS:**

5 **Q.** If you could read that into the record, and then give me
6 your views on any -- the significance, if any, of that
7 statement to your opinions.

8 **A.** (As read)

9 "Since the first Presidency letter was read
10 in every ward throughout California last
11 month, I have been frequently asked what our
12 role in Public Affairs will be in the Prop 8
13 campaign."

14 **Q.** And in the third paragraph, that begins "as you know," if
15 you could read that. And then maybe you can talk about the
16 significance, more generally, with respect to the entire
17 document, rather than going through it one by one, paragraph by
18 paragraph.

19 **A.** Sure. (As read)

20 "As you know from the first Presidency
21 letter, this campaign is entirely under
22 priesthood direction - in concert with
23 leaders of many other faiths and community
24 groups forming part of the
25 ProtectMarriage.com Coalition. I believe" --

1 name redacted -- "will be the LDS chair for
2 all of California, with the help in Southern
3 California from" --

4 **Q.** Why don't you just skip --

5 **A.** Skip that.

6 **Q.** -- that for now.

7 **A.** I will.

8 "All of us working in public affairs will
9 simply stand by and prepare to be anxiously
10 engaged, like all citizens and lay members,
11 when that time comes."

12 **Q.** And then if we jump down to the next -- the paragraph that
13 begins, "What is the necessary step in this campaign?" Could
14 you read -- read that into the record, and then tell me your
15 views about this document.

16 **A.** (As read)

17 "What is the next step in this campaign? I
18 understand that all grass roots organizing
19 efforts in OC will be led by ..."
20 I believe his name is not protected?

21 **Q.** I believe that's correct.

22 **A.** (As read)

23 "... Gary Lawrence, who will report directly
24 to the ProtectMarriage.com Coalition
25 leaders."

1 **MR. PUGNO:** Your Honor, somewhat after the fact, I
2 need to object that Mr. Lawrence's role in another capacity was
3 not protected, and was disclosed, and has been open -- open and
4 public in this whole trial.

5 His capacity here has been, as far as I know,
6 protected, not disclosed.

7 **THE COURT:** Well, recall that the Ninth Circuit --

8 **MR. PUGNO:** It would have been nice to have a chance
9 to redact this, maybe, with regard --

10 **THE COURT:** Well, the Ninth Circuit protected
11 communications, internal communications involving the core
12 group.

13 This would appear to be a communication that mentions
14 Mr. Lawrence, but it's outside a communication among the core
15 group. So the mere fact that an individual is in the core
16 group does not mean that his or her name cannot come out in
17 some other way in the course of discovery.

18 **MR. PUGNO:** I don't disagree with that at all, Your
19 Honor. Just that individuals have privacy rights to be able to
20 be involved in a campaign and to not have their name become
21 part of the public record, against their will, in connection
22 with things that they did not do in a public way.

23 **THE COURT:** Well, but Mr. Lawrence has been afforded
24 core group protection for his internal communications. This is
25 not one of those communications.

1 **MR. PUGNO:** He was a polling and researcher for the
2 campaign, polling and so on. Actually, the protection was
3 Lawrence Research, the company. And Judge Spero's order of
4 January 8 says that the protection is given to Lawrence
5 Research, the company through which the campaign did polling.

6 This is attempting to reveal, without an opportunity
7 to redact, a completely different role that he had, that was
8 not a public role.

9 **THE COURT:** Mr. Boutrous.

10 **MR. BOUTROUS:** Your Honor, Mr. Lawrence's name was
11 public. He was publicly associated with the campaign.

12 And this paragraph talks about the fact that the
13 efforts in OC -- which I guess is Orange County -- will be led
14 by Gary Lawrence, who will report directly to
15 ProtectMarriage.com Coalition leaders.

16 So it's talking about his role in a campaign, a
17 public campaign to pass a law in California. And the fact that
18 religious organizations participate in the political debate is
19 a perfectly fine thing.

20 But once they do, and they're public, there's no
21 support for the notion that we suddenly keep people's names
22 secret even though they are associated publicly.

23 And from a First Amendment perspective, probably one
24 of the most basic principles is that once something is public,
25 courts and other governmental bodies aren't allowed to keep it

1 secret without a compelling reason.

2 So Mr. Lawrence's name is public. He has been
3 well-known to be associated with the campaign. I can't see a
4 First Amendment interest in not noting that he was playing a
5 principal role and liaison role here, with this broad-based
6 group of coalition leaders.

7 **THE COURT:** Last word, Mr. Pugno.

8 **MR. PUGNO:** Your Honor, I realize the nuance that his
9 company did research and polling. He had a completely
10 different hat that he wore in this campaign, that was not a
11 public hat.

12 And if we're going to start revealing those, I don't
13 see a distinction between this and production of a list of
14 every volunteer who helped in the campaign.

15 **THE COURT:** Well, this individual appears not to fit
16 the category of the famous Mrs. McIntyre, who was the subject
17 of a good deal of litigation in the Supreme Court.

18 It's important to bear in mind, this is a public
19 campaign. This is a political campaign. It was out in the
20 open. And the people who advocate on either side, as a result
21 of their advocacy, and particularly their participation in the
22 litigation that follows, inevitably subject themselves to
23 disclosures of the kind that are contained in this document.

24 So I don't see, frankly, Mr. Pugno, that there is a
25 privilege or protection that applies to this document, or that

1 applies to Mr. Lawrence's role in this communication. An
2 internal communication with other members of the core group is
3 a different matter, entirely.

4 Very well. Proceed, Mr. Boutrous.

5 **MR. BOUTROUS:** Thank you, Your Honor.

6 **BY MR. BOUTROUS:**

7 **Q.** Professor Segura, if you could finish reading that
8 paragraph, and then we can -- we can move on to your opinions
9 regarding this document as it relates to political power.

10 **A.** Okay. (As read)

11 "He has also been hired by the coalition to
12 do polling work for Prop 8. The main
13 California grass roots leaders are in the
14 process of being called as, quote, area
15 directors, end quote, with the responsibility
16 for areas that generally correspond to each
17 of the 17 LDS coordinating councils for the
18 LDS mission boundaries. Thereafter,
19 priesthood leaders will call local prop
20 coordinators over each stake and leaders by
21 zip code within each ward - potentially
22 working not only with LDS, but also LDS
23 volunteers."

24 **Q.** In your opinion, Professor Segura, what does this document
25 relate to, in analyzing the degree of political power of gay

1 and lesbians, and particularly with respect to the Prop 8
2 campaign?

3 **A.** There are at least two things worthy of note.

4 The first is that there is a very close coordination
5 between people involved in the church and the campaign, from an
6 organizational standpoint.

7 Phrases like, you know, "This entire campaign is
8 entirely under priesthood direction" are -- are notable.

9 The other thing that I take notice of is the term
10 "called." So it is customary, in the practice of the LDS
11 Church, for volunteers to be solicited through encouragement.

12 So it appears that there was an LDS volunteer in
13 every zip code, to coordinate those activities. Which is, once
14 again, a very enviable political organization. I think any
15 political candidate would be pleased to have such a thing.

16 **Q.** Thank you.

17 **MR. BOUTROUS:** Your Honor, I wanted to make sure that
18 with all the back and forth, that Plaintiffs' Exhibit 2554 had
19 been admitted into evidence.

20 **THE COURT:** It has.

21 (Plaintiffs' Exhibit 2554 received in evidence.)

22 **MR. BOUTROUS:** Thank you, Your Honor.

23 **BY MR. BOUTROUS:**

24 **Q.** Professor Segura, let's move on to Plaintiffs' Exhibit
25 2555.

1 Is this a document that you have reviewed over the
2 past week, in connection with your work on this case and your
3 analysis of the issues in the case?

4 **A.** It is.

5 **MR. PUGNO:** Your Honor, I apologize, but I must lodge
6 another objection. And perhaps I could just lodge what will be
7 a standing objection.

8 These are the minutes of a church meeting. I cannot
9 imagine how this is not protected from disclosure in a federal
10 court trial, especially -- Your Honor, this has got to be
11 protected information.

12 **THE COURT:** Well, I think we need a foundation for
13 this document.

14 **MR. BOUTROUS:** I will -- I will establish one, Your
15 Honor. Thank you.

16 **THE COURT:** All right.

17 **BY MR. BOUTROUS:**

18 **Q.** Professor Segura, did you -- you reviewed this document.
19 And did it shed any light on your analysis of political power?

20 **THE COURT:** Well, is this witness able to lay a
21 foundation for the document?

22 **MR. BOUTROUS:** This witness can testify that this was
23 a document we represented to him was produced by proponents in
24 this case pursuant to the production order, and that he
25 reviewed it, and that it's relevant to his opinion.

1 **THE COURT:** And your representation is, from what
2 source did the document come?

3 **MR. BOUTROUS:** This document was produced by the
4 defendant-intervenors in response to our request for
5 production, after they began to comply with Judge Spero's order
6 rejecting their First Amendment claim.

7 So I think it falls into the same category as the
8 last document, 2554.

9 **THE COURT:** It does appear to be the minutes of a
10 Stake meeting.

11 I gather, Mr. Pugno, this is a document that came
12 from the files of ProtectMarriage.com, or one of the individual
13 intervenor-defendants?

14 **MR. PUGNO:** I can say, Your Honor, it was one or the
15 other. I'm not certain which. But I suspect it was --

16 **THE COURT:** Well, if it is, in fact, what it appears
17 to be, and that is minutes of a Stake meeting, but it was,
18 nonetheless, in the files of an organization other than a
19 religious organization, I can't see how it would enjoy any
20 religious institution privilege, if there is one.

21 **MR. PUGNO:** Well, Your Honor, just to clarify, I'm
22 almost certain this came from Mr. Jansson's file.

23 As far as the named defendant-intervenors, he's the
24 only one that I'm aware of that is a member of the LDS church.

25 These are the minutes of a meeting of church members

1 and officials. And the fact that it was in Mr. Jansson's
2 possession, I cannot imagine, abrogates the privilege to be
3 able to communicate with -- with -- there really is no
4 First Amendment protection here, Your Honor, if having a copy
5 of your correspondence with other members of your church in
6 your possession becomes -- abrogates -- abrogates your
7 First Amendment rights.

8 **THE COURT:** Well, it's rather lengthy attorney-client
9 privilege. Confidentiality must be maintained. And it appears
10 that that was not done in connection with this document.

11 Mr. Jansson may have had multiple roles, but his role
12 here is his role in the campaign. And this document apparently
13 relates to that activity.

14 **MR. PUGNO:** Your Honor, there's no evidence here that
15 this was sent to anyone, by Mr. Jansson. This is in
16 Mr. Jansson's shoebox under his bed. This is the minutes of a
17 meeting that I don't -- I don't even -- I haven't looked to see
18 whether he was in attendance at the meeting. But this -- I
19 know that he was a -- a Public Affairs official at the time of
20 the campaign.

21 But my point is, is that Mr. Jansson did not send
22 this to anybody. The only reason this is here is because a
23 federal court order told him to take it out of his shoebox and
24 bring it in to court.

25 **THE COURT:** Shoebox?

1 (Laughter)

2 **MR. PUGNO:** It illustrates the point, Your Honor. He
3 did not send this to his neighbors. These are his private
4 records of his private political religious associations. How
5 in the world can that be compelled to be brought into court and
6 laid bare in the public record?

7 **THE COURT:** But this appears to relate to the Prop 8
8 campaign.

9 **MR. PUGNO:** It clearly relates to this religious
10 denomination's Public Affairs meeting, part of which included a
11 discussion of a ballot measure and the efforts of their
12 members, in which anyone on either side of the issue has a
13 fundamental right to associate with others, including in their
14 religious organizations --

15 **THE COURT:** Of course. Of course, no one is
16 questioning the fundamental right of association. No one is
17 questioning the right of Mr. Jansson to participate in the
18 political campaign.

19 But that does not afford a right against the
20 disclosure of his role, what he did.

21 **MR. PUGNO:** Well, Your Honor, then I would suggest
22 that unless there is something in this document for which a
23 foundation can be laid that he had anything to do with the
24 matters discussed in here, then I have to object on a lack of
25 foundation.

1 **MR. BOUTROUS:** I think I can lay that foundation,
2 Your Honor.

3 **THE COURT:** I beg your pardon?

4 **MR. BOUTROUS:** I think I can lay that foundation.

5 **THE COURT:** All right.

6 **MR. BOUTROUS:** On page 10685, which would be the
7 second page -- and this is, really, the -- the paragraph that
8 begins "Legislative Update"?

9 **THE COURT:** Yes.

10 **MR. BOUTROUS:** That's really -- the remaining
11 portions of this document I think we could probably redact even
12 more, if it goes into the record.

13 But this is the key part, the part that says, "Mark
14 Jansson reported on the California Constitutional Amendment
15 Proposition 8."

16 And then it goes on to describe the public activities
17 with ProtectMarriage.com, this broad-based coalition. That's,
18 really, what I would like to direct the witness's attention to.

19 **THE COURT:** Very well. The objection will be
20 overruled, and 2555 is admitted.

21 (Plaintiffs' Exhibit 2555 received in evidence.)

22 **MR. BOUTROUS:** Thank you, Your Honor.

23 Please publish Plaintiffs' Exhibit 2555. Focus on --
24 if we can go right to page 10685, the paragraph that is
25 entitled "Legislative Update."

1 (Document displayed.)

2 **MR. BOUTROUS:** And, actually, if you can put the
3 paragraph that follows that, as well.

4 (Document displayed.)

5 **BY MR. BOUTROUS:**

6 **Q.** And while that's happening, Professor Segura, give me your
7 impression as to what this document, this portion of the
8 document, relating to Legislative Update, is doing in terms of
9 this memorandum.

10 **A.** As I read it, Mr. Jansson is reiterating the strategy
11 that's to be employed, with how church leaders and church
12 members should present themselves with respect to the Prop 8
13 campaign.

14 **Q.** And in what -- what is it about this document that leads
15 you to that conclusion?

16 **A.** Particularly, the first two sentences of the second
17 paragraph. Quote:

18 "Brother Jansson emphasized that we are not
19 to take the lead on this proposition but to
20 join in coalition with ProtectMarriage.com.
21 Salt Lake City conducted a teleconference
22 with 159 of 161 Stake presidents in the State
23 of California, and told the presidents LDS
24 are involved in this issue but are not to
25 take the lead; teach youth and young adults

1 the doctrine of marriage by using the" -- I
2 assume that's "letter read in sacrament
3 meetings, and LDS are encouraged to
4 contribute the fund-raising \$30 suggested
5 donation. Brother Jansson announced that
6 5 million is the projected goal in addition
7 to general fund-raising. Donations are best
8 provided to ProtectMarriage.com."

9 **Q.** Then, if we could turn to the next page, 10686, which is
10 the stamped number on the bottom of the page, the paragraph
11 begins, "We were asked."

12 **A.** Uh-huh.

13 **Q.** I would like to focus you on the first and the last
14 sentence of that paragraph. And then tell me your views on the
15 connection between this document and political power.

16 (Document displayed.)

17 **A.** (As read)

18 "We were asked to wait patiently for talking
19 points from the Coalition."

20 **Q.** And then how about the last sentence?

21 **A.** (As read)

22 "Director Holland highlighted the luxury of
23 having Mark Jansson on key committees, and
24 that he will receive direct communications,"
25 I assume, "from him."

1 Q. As a political scientist, what is it about this document
2 and these statements that is relevant to analyzing the balance
3 of political power between gay men and lesbians and religious
4 organizations to the extent they're involved in political
5 activities in California?

6 A. Well, with respect to the Proposition 8 campaign, it makes
7 it clear that there was a sort of two-way flow of information,
8 where strategic talking points were being provided to religious
9 leaders by the campaign. And, in turn, the religious leaders
10 were providing volunteers to the campaign.

11 But there was this cautious strategic
12 not-to-take-the-lead notion so as to provide a -- I don't know,
13 plausible deniability or respectable distance between the
14 church organization per se and the actual campaign.

15 Q. And does that have an impact on how the power of gay and
16 lesbians is viewed by public officials and in the public, that
17 kind of approach to political advocacy?

18 A. Well, certainly, because as we're looking at the political
19 opportunity structure, sort of how fertile the ground is for
20 political action, and how strong your opponents might be, we
21 might look at the religious belief as a source of opposition to
22 homosexuality and say some number of religious adherents went
23 out and voted their -- their beliefs on election day. And I
24 think that that's, in fact, kind of the end of it.

25 But, in fact, this appears to suggest fairly close

1 coordination between hierarchy and officials within church
2 organizations -- as in some of the past documents have
3 illustrated -- and the leaders of the ballot initiative.

4 **Q.** Have you ever, in your studies, in your review of the
5 literature, and your analysis of political activity in the
6 United States, ever seen this kind of structure constructed and
7 deployed in an effort to eliminate a fundamental state
8 constitutional right of a community group?

9 **A.** This is new in my experience.

10 **Q.** Let's -- let's jump ahead to Plaintiffs' Exhibit 2557.

11 **A.** Okay.

12 **MR. PUGNO:** Your Honor, I need to lodge an objection
13 to the use of this document. Again, it is under attorneys'
14 eyes only confidential privilege.

15 This is a post-election document. And it refers to
16 activities and financial activities post-election.

17 And so the -- the relevance is a problem, and it --
18 to the extent this reveals confidential inner-workings of
19 relationships between organization that supported Prop 8, this
20 is highly, highly revealing and -- and confidential, and we
21 object.

22 **THE COURT:** Well, not to make light of that, usually
23 why people want to introduce documents is because they are
24 revealing.

25 (Laughter)

1 But it does appear that this is a communication
2 amongst individuals who are part of the core group. Is that
3 not correct, Mr. Boutrous?

4 **MR. BOUTROUS:** It's a communication from someone
5 outside the core group, to people who are in the core group.
6 Which --

7 **THE COURT:** Oh, I see.

8 **MR. BOUTROUS:** Yes.

9 **THE COURT:** I see.

10 **MR. BOUTROUS:** The "from" line.

11 **THE COURT:** The "from" line.

12 **MR. BOUTROUS:** And, Your Honor, the foundation --
13 there is no question this is an authentic document. It was
14 sent to the -- you know, the entire -- basically, the entire
15 executive committee, Mr. Dolejsi, Mr. Pugno himself,
16 Mr. Jansson, Mr. Schubert, who is the political consultant,
17 Jeff Flint, another political consultant. And it -- it -- and
18 they are all copied on it.

19 And the reason that it's relevant, without disclosing
20 the full contents, is that it really shows the degree of
21 connection between ProtectMarriage.com and the organization
22 that sent this document, in terms of the funding.

23 And the ProtectMarriage.com in this court before Your
24 Honor, and in the depositions, and in other context, have taken
25 the position that these other organizations were not really

1 that connected to ProtectMarriage.com and the official
2 campaign.

3 This document goes directly to that. And, as
4 relevant to Professor Segura's testimony, demonstrates this
5 significant, broad coalition that was connected by not only the
6 same views about Proposition 8, but by an incredible
7 fund-raising mechanism and relationships.

8 So I think it's directly relevant. It was produced
9 by proponents of Proposition 8. It includes people outside the
10 core group. So I think it should -- it should be admitted.

11 **MR. PUGNO:** Your Honor, maybe we can confirm the
12 sender. If I could see an unredacted copy of this.

13 **MR. BOUTROUS:** I can show you that right now. Your
14 Honor, I could --

15 **THE COURT:** Sure.

16 **MR. PUGNO:** Your Honor, the sender is a person
17 identified in Judge Spero's order of January 8 as a member of
18 the core group. Otherwise, we'll just state our continuing
19 objection.

20 **THE COURT:** You say he was identified as part of the
21 core group, the sender?

22 **MR. PUGNO:** Well, he was under seal. And he was
23 identified by the -- by Judge Spero, by a reference to
24 paragraph and line number, as a member of the core group. Not
25 by his -- his name doesn't appear in the order. It refers to a

1 sealed declaration.

2 **THE COURT:** You've lost me.

3 **MR. PUGNO:** There are six members of the --

4 **THE COURT:** Did Spero include this individual as a
5 member of the core group?

6 **MR. PUGNO:** Yes, Your Honor.

7 **MR. BOUTROUS:** That one, Your Honor, I don't -- there
8 is, I think, one -- maybe a core group member or two that I
9 don't even know about. But I would suggest there --

10 **THE COURT:** Is this John Doe?

11 **MR. PUGNO:** No, it's not, Your Honor.

12 Well, this morning's John Doe?

13 (Laughter)

14 **THE COURT:** John Doe 1. John Doe 2.

15 **MR. PUGNO:** I believe, Your Honor, that there were as
16 many as six individuals --

17 **THE COURT:** How many?

18 **MR. PUGNO:** As many as six individuals that were
19 identified to Judge Spero, by John Doe 1, John Doe 2, or
20 something in that nature, under a sealed declaration.

21 And the order which lists the members of the core
22 group includes those six individuals. And that is the
23 individual who sent this communication.

24 **THE COURT:** My inclination is to do this. I'm not
25 sure I follow the John Doe business. But accepting Counsel's

1 representation that the sender is a member of the core group,
2 the document is a post-election document. The document is
3 being offered to establish a connection between the religious
4 organization and the campaign; that being a subject that I
5 think, Mr. Boutrous, you have pursued and have introduced
6 significant evidence on.

7 So I will sustain an objection, basically, on
8 cumulative grounds.

9 **MR. PUGNO:** Thank you, Your Honor.

10 **MR. BOUTROUS:** Thank you, Your Honor.

11 And I just have a couple more documents here, Your
12 Honor, that I think the next document, Plaintiffs' Exhibit
13 2561, this is one to which there is no objection, I'm pleased
14 to announce.

15 **BY MR. BOUTROUS:**

16 **Q.** Professor Segura, is this a document that you have
17 reviewed?

18 **A.** It is.

19 **Q.** And did -- did it -- did you consider it in forming your
20 opinions, the opinions that you're giving here today?

21 **A.** I did.

22 **MR. BOUTROUS:** Your Honor, I move admission of
23 Plaintiffs' Exhibit 2561.

24 **MR. THOMPSON:** No objection, Your Honor.

25 **THE COURT:** Very well. Music to my ears,

1 Mr. Thompson.

2 (Laughter)

3 (Plaintiffs' Exhibit 2561 received in evidence.)

4 **MR. BOUTROUS:** That was refreshing.

5 If we could publish Plaintiffs' 561 please.

6 (Document displayed.)

7 **BY MR. BOUTROUS:**

8 **Q.** Professor Segura, briefly, what is it about this document
9 that reflects on political power, in your view?

10 **A.** Going to the heart of the matter, the last sentence of the
11 first paragraph reads, quote:

12 "You may know that the Mormons have been out
13 walking neighborhoods the past two Saturdays,
14 with about 20,000 total volunteers."

15 **Q.** And why is that important in evaluating the political
16 power in this context?

17 **A.** Again, I -- I would suggest that any political consultant
18 would be thrilled to have 20,000 precinct walkers on any given
19 Saturday.

20 So I think it speaks to the -- the breadth and size
21 of the opposition to gay and lesbian interests.

22 **Q.** Please turn to Plaintiffs' Exhibit 2562.

23 Is Plaintiffs' Exhibit 2562 a document you reviewed
24 over the last week, in connection with your testimony?

25 **A.** It is.

1 **MR. BOUTROUS:** Your Honor, I move admission of this
2 document, Plaintiffs' Exhibit 2562. It's another document that
3 was produced by the proponents over the last week.

4 **MR. THOMPSON:** No objection beyond our standing
5 objections, Your Honor.

6 **THE COURT:** Thank you, Mr. Thompson. Very well.

7 (Plaintiffs' Exhibit 2562 received in evidence.)

8 **MR. BOUTROUS:** Please publish this exhibit.

9 (Document displayed.)

10 **BY MR. BOUTROUS:**

11 **Q.** And I would like to direct, the witness just to expedite
12 things, to the second page. Actually, let me ask, go to the
13 first page.

14 What is this document, Professor, in your
15 understanding, if you could describe it?

16 **A.** Uhm, it appears to be an e-mail from the chair of
17 ProtectMarriage.com, to others, dealing with some issue
18 regarding how designated gifts take place to the campaign.

19 **Q.** Then, let's go to the next page. And are there -- is
20 there anything on this page that caught your eye as you
21 evaluated the issue of political power?

22 **A.** There are three things. The first would be everything
23 under the numeral 1.

24 **Q.** What is it about that portion of the document that's
25 relevant to what you're talking about today?

1 **A.** Numeral 1 recounts the early organizational efforts,
2 largely among evangelicals to get church leadership involved in
3 the campaign, and reports that in these very, very large
4 teleconferences when sort of message -- the message that the
5 campaign wanted to send through the pulpit was -- was
6 discussed, there were 1700 participants in June, and 3,000
7 participants in July of 2008.

8 And the third bullet point suggests that their goal
9 was to have as many as 5,000 California pastors participate in
10 one of these calls.

11 **Q.** Thank you. And, finally, Plaintiffs' Exhibit 2598.
12 Please turn to that exhibit.

13 **MR. BOUTROUS:** And, Your Honor, in conversations with
14 Mr. Pugno, there are a couple of names in this that I'm happy
15 to redact, that we missed. I will refrain from publishing
16 them. But, other than that, I don't believe there's an
17 objection to this document, and would move its admission.

18 It's another one, a document produced by the
19 proponents.

20 **MR. THOMPSON:** Subject to the redaction, no
21 objection, Your Honor.

22 **THE COURT:** Very well. 2598 is admitted.

23 Yes, go ahead.

24 (Plaintiffs' Exhibit 2598 received in evidence.)

25 **MR. BOUTROUS:** Thank you, Your Honor.

1 **BY MR. BOUTROUS:**

2 **Q.** Professor Segura, since there's this redaction issue, I'm
3 not going to put this up on the screen.

4 What is this document, and what is it about it that
5 sheds light, in your view, on the political power issue?

6 **A.** It appears to be a fund-raising letter. And it's to
7 someone who has given generously to the Family Research Council
8 in the past.

9 And the reason I found it interesting was it -- it
10 suggests a -- a coordination of potential donor bases, a sort
11 of sharing of sort of people with capacity, as endowment folks
12 like to say, who -- who are potentially able to give.

13 **Q.** In that regard, could you turn to the very last page,
14 which is stamped 009699.

15 **A.** Uh-huh.

16 **Q.** At the top of the page, the sentence that begins, "We have
17 the."

18 **A.** Yes.

19 **Q.** Could you read that, and then give me your impressions on
20 that, in terms of political power.

21 **A.** (As read)

22 "We have the political and financial support
23 of groups such as Focus on the Family, Family
24 Research Council, American Family
25 Association, The Arlington Group, and many

1 others."

2 **Q.** And are those significant groups, in terms of political
3 power in the United States, when banded together?

4 **A.** Separately and together, each of them are a fairly
5 powerful interest group representing the evangelical movement
6 in national politics.

7 **Q.** Based on the factors that you've described today, as well
8 as the manifestations that you described earlier this morning,
9 relating to political powerlessness, what is your opinion
10 regarding the political powerlessness of gay men and lesbians
11 in the United States and in California?

12 **A.** My opinion is that when we take together the moments of
13 legislative victory, the moments of legislative defeat, the
14 presence of ballot initiatives, the absence of statutory or
15 constitutional protection, the presence of statutory or
16 constitutional disadvantage, and a host of circumstances,
17 including small numbers, public hostility, hostility of elected
18 officials, and a clearly well-integrated, nationally prominent,
19 organized opposition, I conclude that gays and lesbians lack
20 the sufficient power necessary to protect themselves in the
21 political system.

22 **Q.** Now, I have two principal lines of questioning for you, as
23 we finish things off here.

24 The first is, I would like you to explain whether you
25 conducted any comparison with the political power of gay men

1 and lesbians with other -- other groups in society, including
2 women, African Americans.

3 **A.** I did.

4 **Q.** What were your conclusions regarding the comparison, in
5 terms of the relative political power between gay men and
6 lesbians, on the one hand, and women in the 1970s, for example?

7 **A.** So I -- I'll begin with the conclusion. I concluded that,
8 relative to the position of women in the early 1970s, gay men
9 and lesbians are more disadvantaged today than women were in
10 the 1970s.

11 For starters, women constituted then and constitute
12 today a majority of the population. And were they so
13 motivated, they could determine most if not all political
14 outcomes.

15 Second, while there were certainly sexism -- and I
16 wouldn't want to, you know, understate the importance of that
17 historically -- being a woman is not inherently controversial.
18 Families don't hate their daughters. In fact, women are quite
19 beloved by many, many people.

20 Third, there were women in public office.

21 (Laughter)

22 Some of whom are men, some of whom are women.

23 (Laughter)

24 There were women in public office.

25 But, perhaps most importantly, there was already

1 statutory protection. The 1963 Equal Pay Act, certain
2 provisions of the 1964 Civil Rights Act, clearly protected
3 women at the federal level.

4 So, in addition to having more political power, more
5 votes, less or no hostility, there is also the matter that they
6 enjoyed statutory protection.

7 **Q.** What were your conclusions regarding the relative
8 political power between gay men and lesbians on the one hand,
9 and African Americans on the other hand, before the Civil
10 Rights Act of 1964?

11 **A.** This is a -- this is a comparison which is a little bit
12 more complex to explain, so I would want to try to separate out
13 the political circumstances on the one hand from the social and
14 economic circumstances on the other.

15 Let me begin by saying that being an African American
16 prior to the enactment of civil rights legislation was a very
17 difficult thing to do in this country. And the quality of life
18 and the day-to-day experiences of African Americans,
19 particularly in the south, is something that we should take
20 quite seriously as historically quite damaging.

21 That notwithstanding, I would turn my focus to the
22 political circumstances, which is what I was asked to evaluate.

23 At the time that suspect classification was extended
24 to cover racial and ethnic minorities, there were three
25 amendments to the United States Constitution that formally

1 established civil equality for racial and ethnic minorities.

2 Admittedly, these were not enforced. Admittedly,
3 there was all sorts of statutory nonsense that took place in
4 the wake of those amendments. But the establishment, at the
5 Constitutional level, of equality was complete.

6 There were any number of statutes that had taken
7 place to protect the interest of African Americans. All of the
8 New Deal legislation, for example, was explicitly race neutral,
9 and made a point of -- of making it clear that
10 African Americans were entitled to the activities of the New
11 Deal.

12 Immediately prior to the second World War,
13 President Roosevelt issued Executive Order 8803, which
14 prohibited the government contracting, the War Department
15 especially, with any business that was engaged in
16 discriminatory practices against African Americans.

17 And, of course, the government is the largest single
18 purchaser of all products in this society, so that had a fairly
19 substantial ripple effect in the manufacturing sector.

20 And in 1948, President Truman desegregated the
21 United States military.

22 So, again, I think it would be fair to say that
23 socioeconomic conditions were very bad for African Americans in
24 the middle part of the 20th century. But there were a number
25 of instances of statutory protection and even

1 constitutionally-established equality that African Americans
2 enjoyed. And, at that point, it was the -- the civil rights
3 movement was an effort to bring the social reality in
4 countenance with the constitutional establishment.

5 By contrast, gays and lesbians are in a different
6 position. So they're subject to statutory disadvantage.

7 Some would suggest that gays and lesbians aren't as
8 oppressed as African Americans were, and there might be good
9 reason to suggest that that's true for at least some gays and
10 lesbians in more open social environments.

11 But the hour is moving in the opposite direction. So
12 in 1990, there was not a single constitutional establishment of
13 inequality for gays and lesbians, and today there are -- in
14 about three-fifths of the states, there is
15 constitutionally-established inequality.

16 So as a constitutional matter, gays and lesbians are
17 moving in the opposite direction than African Americans were in
18 the 1940s.

19 **Q.** How about group size, in terms of African Americans and
20 gay men and lesbians, in terms of populating jurisdictions?

21 **A.** So, African Americans in the 1940s were approximately 10
22 or 11 percent of the national population. Today, that number
23 is closer to 13 percent.

24 That varies quite widely by jurisdiction. There are
25 a number of southern states where the black population is well

1 north of 30 percent. In some cases around 40 percent.

2 Certainly, many cities in which African Americans are a
3 majority of the population.

4 By contrast, there is no jurisdiction with which I'm
5 familiar -- there might be, you know, a small resort town here
6 or there, but there's no jurisdiction of any size, with which I
7 am familiar, that has a gay majority.

8 **Q.** Bringing us forward to today, how do the manifestations of
9 political powerlessness of African Americans compare to the
10 manifestations of political powerlessness of gay men and
11 lesbians?

12 **A.** So thinking a little bit more broadly about the subject
13 matter of race and ethnicity, there are now 69 persons of color
14 serving in the House of Representatives. There have been as
15 many as four senators.

16 That's not the case right now. Some people left to
17 join the administration.

18 And so, obviously, that compares favorably to the six
19 gay and lesbians who have ever served, and the three who
20 currently serve in the House of Representatives.

21 Minorities are elected to public office in many parts
22 of the United States. The 1965 Voting Rights Act, and
23 particularly the judicial implementation of Section 2, as it
24 was amended in 1982, have provided numerous opportunities for
25 persons of color to elect members of their community to public

1 office.

2 And, in fact, have even been interpreted as an
3 affirmative responsibility, particularly under
4 Section-5-covered jurisdictions, that they have to provide
5 opportunities for racial and ethnic minorities to vote for
6 first-choice candidates.

7 **Q.** How about the presidency?

8 **A.** Oh, yeah, there's that.

9 (Laughter)

10 We do have our first Hawaiian president. But,
11 obviously, the election of an African American to the
12 presidency is a big deal.

13 I would also go so far as to say, however -- and I
14 don't want to provide the impression that I don't think
15 African Americans and the category of race and ethnicity isn't
16 still of significant concern in our society. And, indeed, a
17 significant portion of my scholarship addresses that. Just
18 that in terms of political power today, compared to gays and
19 lesbians, they are doing quite well.

20 **Q.** Finally, I would like to display demonstrative number 8,
21 and ask, Professor Segura, whether you have any opinions
22 regarding the deposition and report and opinions expressed by
23 proponents' proffered expert on political power, Dr. Miller.

24 **A.** So -- I do.

25 **MR. THOMPSON:** Your Honor, we would object that the

1 witness has not put in any report that addresses
2 Professor Miller's analysis. And we haven't had an opportunity
3 to depose him on it.

4 **THE COURT:** Well, I assume, Mr. Boutrous, you had the
5 witness read Mr. Miller's deposition.

6 **MR. BOUTROUS:** He attended it, Your Honor.

7 **THE COURT:** He attended it?

8 **MR. BOUTROUS:** Yes.

9 **THE COURT:** Objection overruled.

10 **BY MR. BOUTROUS:**

11 **Q.** Professor Segura, if you could give us kind of the broad
12 outlines of your critique of Dr. Miller's opinions and
13 approach.

14 **A.** Sure.

15 Professor Miller approached the question of political
16 power of gays and lesbians somewhat differently than I did.
17 And in his deposition, a number of things became clear about
18 both his analytical structure and the breadth of the
19 information that he considered.

20 The first point is that Professor Miller, frankly,
21 doesn't know anything about gay and lesbian politics.

22 During the course of his deposition, he could not
23 identify many of the critical historical figures in the early
24 part of the movement; was not familiar with political science
25 work, including very prominent political science work that had

1 focused on gays and lesbians.

2 He was aware of some judicial scholarship on gays and
3 lesbians because that is -- is his field of endeavor, but, even
4 there, wasn't familiar with some of the key pieces on -- on how
5 political science would address gays and lesbians.

6 It was also curious that he was unfamiliar, at all,
7 with the political science work on prejudice; of which there is
8 an enormous amount, and of which was well-known.

9 **Q.** How about his -- sorry.

10 **A.** Go ahead.

11 **Q.** How about his knowledge concerning the presence or absence
12 of legal protections relating to gay men and lesbians?

13 **A.** Uhm, I think it's fair to say that Professor Miller did
14 not look beyond the boundaries of California.

15 He focused exclusively on California statute. And
16 when he was asked about other states, he had almost no answer
17 for anything. And, in fact, even proceeded to suggest that he
18 would be shocked if it were the case that a majority of the
19 states have no legal protections for gays and lesbians. Which,
20 of course, is the case.

21 When asked how many of the top ten states don't have
22 any protection, he didn't know the answer.

23 With respect to the protections that have been passed
24 in California, he actually didn't really know the legislative
25 history of most of those, as well.

1 So it was -- it was really quite striking how little
2 information he had on this.

3 To put it in starkest terms, in 29 states, there is
4 no anti-discrimination protection for gays and lesbians. And
5 Professor Miller concluded that gays and lesbians possessed
6 political power, without being aware of that fact.

7 **Q.** Did you agree with Professor Miller's definition of
8 political power as he applied it in reaching his opinions?

9 **A.** There were a couple of problems with Miller's definition
10 of power. First, what there was of a definition was actually
11 quite vague. And he was asked about it in deposition.

12 He arrived at a definition that said that a group had
13 political power if they received a fair hearing from the
14 lawmakers.

15 But he -- there was no investigation in his report as
16 to whether or not gays and lesbians had in fact received a fair
17 hearing from the lawmakers.

18 And, of course, this is an initiative process. So
19 who are the lawmakers? The lawmakers are the proponents of the
20 ballot initiative and the voters.

21 So in the absence of any investigation, I don't
22 understand how, even under his definition, he could conclude
23 that the threshold for political power had been met.

24 But in the case of the statutory enactments, where he
25 wanted to say, well, these -- these pieces of legislation

1 constituted evidence of political power, some of those pieces
2 of legislation were actually pursuant to court cases that --
3 decisions that had already been handed down.

4 And the attorney deposing him actually asked him, so,
5 are -- are favorable court decisions an element of political
6 power? And he said yes.

7 Well, judicial intervention on -- on behalf of
8 insular minorities cannot be considered an element of political
9 power, in a fair sense, if the measure of political power is
10 what we're using to decide whether or not judicial intervention
11 is appropriate.

12 **Q.** Finally, Professor Segura, how did Dr. Miller's testimony
13 and report square with his own writings regarding ballot
14 initiatives?

15 **A.** Professor Miller's scholarship focuses on how the
16 judiciary has reacted to ballot initiatives. So he spent a
17 fair amount of time researching those.

18 In his actual published research, he has suggested,
19 first, that ballot initiatives are very likely to result in bad
20 law because they are not as deliberative as the legislative
21 process, and that ballot initiatives frequently target
22 minorities.

23 And on both of those things, I'm highly inclined to
24 agree with him.

25 **MR. BOUTROUS:** No further questions, Your Honor.

1 Q. Okay. And do you recall that the subject of Prop 8 came
2 up during that discussion?

3 A. It certainly did.

4 Q. And do you recall your colleague saying that you felt very
5 strongly about Prop 8?

6 A. I don't remember exactly what he said. I don't have it
7 committed to memory. It wouldn't surprise me.

8 Q. You do feel very strongly about Prop 8, don't you?

9 A. I believe in the equality of persons under the law. And
10 as a consequence, the constitutional establishment of
11 inequality is something I find deeply offensive.

12 Q. And I'd like to nail down some terms that you used during
13 your direct.

14 When an individual answering a poll is asked about
15 gays or lesbians, a variety of things might enter their mind;
16 is that correct?

17 A. Presumably, yes.

18 Q. It might mean sexual conduct to some, correct?

19 A. It may.

20 Q. Or it could be some sort of behavioral trappings of what
21 the person might stereotypically believe to be gay or lesbian,
22 correct?

23 A. It may.

24 Q. Or it may be associated with an individual person, a
25 member of the family or co-worker, correct?

1 **A.** That's correct.

2 **Q.** It is really hard to say what jumps into someone's mind
3 when they hear the term "gay or lesbian," correct?

4 **A.** Hard to say in the sense that there's more than one notion
5 that could enter their mind. We could define the universe of
6 likely items that would be considered by a respondent, so
7 that's not particularly hard to say.

8 But to ask what any individual is thinking of when he
9 or she answers the question, it could be a fairly limited set
10 of options.

11 **Q.** All right. Now let's talk about the definition of
12 political power. The exercise of power, in your opinion, is
13 moving someone from opposition or fence-sitting into your own
14 column, correct?

15 **A.** Uhm, that would be part of it. Another possibility would
16 be persuading them to stand down, to no longer oppose, even if
17 they themselves haven't changed their opinion. Or it may be
18 mustering the political forces necessary to circumvent them.

19 **Q.** And under your definition of power, if the group had
20 power, it would be able to cajole or compel members of the
21 legislature to produce an outcome that they may not have been
22 predisposed to produce, correct?

23 **A.** That would be part of it. I would also want to be
24 concerned about secure. So it's not just achieving an outcome
25 but sort of securing it from likely reversal.

1 Q. And you believe that gays and lesbians have to rely almost
2 exclusively on allies who are regularly shown to be
3 insufficiently strong or reliable to achieve or protect their
4 interests, correct?

5 A. I believe as a general proposition that that's true, that
6 there are allies, even reliable allies. But that if we looked
7 across the universe of potential allies, that the number of
8 allies is smaller than is necessary, and that many of those
9 allies are unreliable.

10 Q. And applying your definition of political power, you
11 believe the NAACP had had a meaningful degree of political
12 power even when Newt Gingrich was the Speaker of the House,
13 correct?

14 A. I think it is the case that they had less power when Newt
15 Gingrich was the Speaker than when the Democrats controlled the
16 House of Representatives. But even under those circumstances,
17 I would say that they had a fair degree of influence.

18 Q. All right.

19 MR. THOMPSON: Your Honor, we'd like to pass out some
20 binders, if we may?

21 THE COURT: Very well.

22 MR. THOMPSON: Thank you, Your Honor.

23 THE COURT: I wondered where the binders were.

24 (Laughter)

25 MR. THOMPSON: May I approach, Your Honor?

1 **THE COURT:** You may.

2 **BY MR. THOMPSON:**

3 **Q.** Professor, I'd like to direct your attention to tab 7.
4 And in particular -- this is the 2007 annual report of the
5 Human Rights Campaign. It's DIX1330.

6 And the Human Rights Campaign is a leading gay rights
7 advocacy group; is that correct?

8 **A.** That's correct.

9 **Q.** And I'd like to direct your attention to page 4 of this
10 document. It's actually the sixth page of the exhibit. It has
11 a little 4 in the bottom left-hand column.

12 **A.** I'm there.

13 **Q.** Okay. And directing your attention to the third
14 paragraph, it says in the second sentence:

15 "We were named by the well-respected national
16 journal the single most effective nonunion
17 progressive organization working in the 2006
18 midterm elections."

19 Using your definition of political power, do you
20 think the Human Rights Campaign had a meaningful degree of
21 political power in the 2006 midterm elections?

22 **A.** I do not.

23 **Q.** All right. And in the next sentence the annual report
24 says:

25 "We played a decisive role in electing

1 fair-minded majorities to the U.S. House and
2 Senate, and to legislatures from Oregon to
3 New Hampshire."

4 But using your definition of political power, you
5 don't believe the Human Rights Campaign has a meaningful degree
6 of political power, correct?

7 **A.** I don't.

8 **Q.** And in California the incoming speaker is John Perez; is
9 that correct?

10 **A.** That's correct.

11 **Q.** Of the Assembly?

12 **A.** Yes.

13 **THE COURT:** I think he's already taken office; hasn't
14 he?

15 **THE WITNESS:** He may have, actually.

16 **MR. THOMPSON:** Thank you, Your Honor.

17 **BY MR. THOMPSON:**

18 **Q.** And Mr. Perez is openly gay; is that correct?

19 **A.** That's my understanding.

20 **Q.** And he was unanimously elected to the speakership of the
21 California Assembly, is that correct, by the Democratic caucus?

22 **A.** After the alternative candidates withdrew, yes.

23 **Q.** And -- but under your definition of political power, gays
24 and lesbians do not have a meaningful degree of political power
25 in the California Assembly, even though the speaker is openly

1 gay, correct?

2 **A.** That's correct, because, again, outcome does not reveal
3 process.

4 **Q.** Applying your definition of political power, Biblical
5 literalists have more political power in the California
6 legislature than the gay and lesbian community, correct?

7 **A.** If we looked at their representation among the elected
8 officials, that would be my conclusion.

9 **Q.** And if we look at outcomes, would that be your conclusion,
10 as well?

11 **A.** Again, outcomes are a particularly difficult thing to rely
12 upon because we have to understand how the outcome came about.

13 **Q.** Well, if we look at domestic partnerships, the gay and
14 lesbian community supported those in 1999 in California,
15 correct?

16 **A.** That would be my assumption, yes.

17 **Q.** And the Biblical literalists opposed it, correct?

18 **A.** That's correct.

19 **Q.** And the gay and lesbian community won that fight, correct?

20 **A.** Again, process matters. But, yes, the answer to that is:
21 That's correct.

22 **Q.** And then in 2003, there was an expansion of the domestic
23 partnership law in California, correct?

24 **A.** That's what I understand.

25 **Q.** And the gay and lesbian community supported that

1 expansion?

2 **A.** I'm sure they did.

3 **Q.** And the Biblical literalists opposed it?

4 **A.** I would assume.

5 **Q.** And even though the gay and lesbian community won that
6 fight, you say they have less power in the California
7 legislature than Biblical literalists, correct?

8 **A.** I say that they have less power in the California
9 legislature because they're less represented. Their
10 representation is augmented by Democratic control. Should
11 there be Republican control, they would have no power,
12 whatsoever.

13 **Q.** If a group is successful in getting legal protections
14 against discrimination aimed at that group, that would be a
15 positive factor that you would weigh in assessing political
16 power, correct?

17 **A.** It would be a positive factor with the consideration that
18 the discrimination exists in the first place.

19 **Q.** And gays and lesbians in California have many legal
20 protections against discrimination, correct?

21 **A.** Uhm, I'm sorry, "many"? I don't under- -- you'd have to
22 be specific about what that term means.

23 **Q.** Well, haven't there been over 50 pieces of legislation
24 over the last ten years, that have sought to protect the legal
25 rights of gays and lesbians in California?

1 **A.** I don't think it would be a fair statement to say that in
2 50 cases, the interests of gays and lesbians were codified into
3 law.

4 I think it would be fair to say that there are
5 anti-discrimination lines in at least 50 pieces of legislation.

6 Now, you are correct that some of those pieces of
7 legislation did, in fact, grant protection from discrimination
8 to gays and lesbians. And as I indicated in my direct, some of
9 that was in response to court decisions.

10 **Q.** Can you identify any state in the union that has more
11 legal protections for gays and lesbians than California?

12 **A.** I cannot.

13 **Q.** Using your definition of political power, can you give any
14 examples of the Hispanic community in Congress exercising
15 political power during the last ten years?

16 **A.** Uhm, well, I could think of the role they may have played
17 in attempting to stop immigration legislation when the current
18 minority was the majority.

19 They certainly played a role in rallying forces to
20 stop the attempt to criminalize the presence in the
21 United States of undocumented persons. That would be an
22 example.

23 **Q.** Any other examples?

24 **A.** Uhm, I'm sure if I thought for a while, I could.

25 **Q.** Now, in New Hampshire, gays and lesbians have secured

1 through the legislative process the right to same-sex marriage,
2 correct?

3 **A.** That's my understanding, yes.

4 **Q.** But using your definition of political power, your initial
5 reaction would be that gays and lesbians do not have a
6 meaningful degree of political power in New Hampshire, correct?

7 **A.** Uhm, that would be my initial reaction because I would
8 need to understand the legislative history and the legislative
9 circumstances surrounding the enactment of that protection. I
10 would also want to know whether or not that protection is
11 likely to be subject to reversal.

12 **Q.** And so do you have an opinion on whether gays and lesbians
13 in New Hampshire have a meaningful degree of political power?

14 **A.** I don't have sufficient information in my hand to answer
15 that.

16 **Q.** And in Vermont, gays and lesbians have secured through the
17 legislative process the right to same-sex marriage, correct?

18 **A.** Uhm, again, I'm uncomfortable with this notion that gays
19 and lesbians have "secured." The Vermont legislature has, in
20 fact, passed same-sex marriage legislation. That's my
21 understanding.

22 **Q.** At the urging of the gay and lesbian community?

23 **A.** Well, certainly not with their opposition, but they
24 weren't in a position to compel the legislature to do so, but
25 certainly they asked.

1 Q. But using your definition of political power, you would
2 suggest that gays and lesbians do not have a meaningful degree
3 of political power in Vermont, correct?

4 A. Again, it would be difficult for me to make a full-length
5 statement about the circumstances in Vermont without knowing
6 the legislative history and the circumstances of gays and
7 lesbians in the various state and county governments.

8 I also want to reiterate that my understanding of
9 political power is very nationally oriented. That is, that
10 those gays and lesbians newly enfranchised with the right to
11 marry in New Hampshire and Vermont don't have those marriages
12 recognized by the federal government.

13 Nor can the domestic partners registered in
14 California visit ill domestic partners in Nevada or Louisiana.
15 There's no guarantee those rights are accepted.

16 So we need to think of this not solely on a
17 jurisdiction-by-jurisdiction basis, but also across layers of
18 government.

19 Q. Well, is a jurisdiction-by-jurisdiction basis irrelevant
20 to your analysis?

21 A. It's not irrelevant, but we certainly would have to
22 consider both.

23 Q. Okay. Now, gays and lesbians have the right to marry in
24 Massachusetts, correct?

25 A. That is correct.

1 Q. And gays and lesbians were able to defeat an effort to
2 restore the traditional definition of marriage in
3 Massachusetts, correct?

4 A. "Defeat" is an interesting term. My understanding was
5 that in the legislature there was some maneuvering to prevent
6 it from coming up for a vote.

7 I'm sorry, I don't have an exhaustive command of the
8 Massachusetts legislature.

9 Q. And at present in Massachusetts, there is no effort to
10 repeal same-sex marriage, because any such effort would be
11 futile, correct?

12 A. Again, I don't know if I could conclude that. I would
13 think as long as the Democrats retained the majority in the
14 commonwealth lower house, that it would be difficult to do
15 that. But I -- I can't say for sure that there would be none.

16 Q. But using your definition of political power, gays and
17 lesbians do not have a meaningful degree of political power in
18 Massachusetts, correct?

19 A. To the extent that they, mustering their own resources,
20 cannot defend their basic rights and that those rights do not
21 travel with them across state lines, no, they do not.

22 Q. And would the same answer obtain for Connecticut, that
23 even though there's same-sex marriage, under your definition,
24 gays and lesbians do not have a meaningful degree of political
25 power in Connecticut?

1 **A.** And Iowa.

2 (Laughter)

3 **Q.** Okay. Thank you.

4 In Washington, D.C, the D.C. City Council passed a
5 bill that would legalize same-sex marriage in the District of
6 Columbia, correct?

7 **A.** That's my understanding.

8 **Q.** But using your definition of political power, gays and
9 lesbians do not have a meaningful degree of political power in
10 Washington, D.C, correct?

11 **A.** Again, thinking of the context moving across levels of
12 government, I would say that no gay and lesbian in the
13 United States enjoys a meaningful degree of political power.

14 **Q.** And in Houston, where there's an openly lesbian mayor,
15 your opinion would be that there's not a meaningful degree of
16 political power in Houston for gays and lesbians; is that
17 correct?

18 **A.** Nor are there even domestic partner benefits for city
19 employees, so that is correct.

20 **Q.** Now, Mayor Sanders has testified that two out of the eight
21 city council members in San Diego are openly gay. Are you
22 aware of that?

23 **A.** I am.

24 **Q.** And Mayor Sanders, himself, is an ally of the LGBT
25 community, correct?

1 **A.** I would say that he is today, yes.

2 **Q.** And using your definition of political power, gays and
3 lesbians do not have a meaning full degree of political power
4 in San Diego, correct?

5 **A.** That is correct, because gays and lesbians in San Diego --
6 in two ways. Gays and lesbians in San Diego remain
7 constitutionally established as second-class citizens.

8 And, as Mayor Sanders testified, the gay and lesbian
9 group in San Diego is not sufficiently powerful to prompt fear
10 or any sort of compliance from its legislators.

11 **Q.** And turning your attention to tab 15, please, in your
12 binder.

13 **A.** Uh-huh.

14 **Q.** There is a *New York Times* --

15 **MR. THOMPSON:** Oh, and, by the way, Your Honor, I
16 believe I neglected to request permission to move into evidence
17 DIX1330, which is the Human Rights Campaign annual report of
18 2007.

19 **MR. BOUTROUS:** No objection, Your Honor.

20 **THE COURT:** Very well. 1330 is admitted.

21 (Defendants' Exhibit 1330 received in evidence.)

22 **BY MR. THOMPSON:**

23 **Q.** And turning your attention to tab 13 in your binder,
24 Professor, it's DIX2554. This is a *New York Times* article
25 entitled "Gay Candidates Get Support That Causes May Not." And

1 it's dated December 28, 2009.

2 And in the fifth paragraph, it states:

3 "There are currently at least 445 openly gay
4 and lesbian people holding elected office in
5 the United States, up from 257 eight years
6 ago."

7 And are those numbers accurate, to the best of your
8 knowledge?

9 **A.** I have no basis on which to evaluate them. I have no
10 reason to believe that they're inaccurate.

11 **Q.** Didn't you have numbers like that in your opening report?

12 **A.** I did, but my numbers were disaggregated by level of
13 government.

14 **Q.** And turning to the third paragraph from the bottom, it
15 talks about:

16 "Charles Pugh, an openly gay former
17 broadcaster, swept to victory as city council
18 president in Detroit in his first bid for
19 public office."

20 Using your definition of "political power," gays and
21 lesbians do not have a meaningful degree of political power in
22 Detroit, even though the president of the city council is
23 openly gay, correct?

24 **A.** That would be correct, because I would look at the
25 preferences of the remaining members of the city council, the

1 attitudes of the State of Michigan's legislature, the absence
2 of any form of non-discrimination legislation in Michigan, and
3 the absence of protective legislation at the federal level.

4 So residents of the City of Detroit reside not just
5 in Detroit, but in Wayne County, in Michigan, in the United
6 States.

7 **Q.** Now, if we turn to the second page of this article, which
8 is actually the third page behind the tab, we can see that in
9 the seventh paragraph it starts, "In Detroit."

10 **A.** Yes.

11 **Q.** It says:

12 "In Detroit Mr. Pugh's sexuality never became
13 an issue in his race for city council.

14 Quote, I thought I would be attacked during
15 the campaign for being gay, close quote, he
16 said in an interview. I wasn't. It was a
17 pleasant surprise."

18 Isn't it true that in many big cities it's in
19 increasingly irrelevant whether a candidate is gay or lesbian?

20 **A.** I think that would depend on which big city. So I
21 would -- I would respond to this in two ways.

22 First, the candidate did expect to be attacked for
23 his sexuality.

24 And, second, in the previous example you mentioned in
25 the City of Houston, her sexuality was very much at issue. Her

1 opponent used it to try to diminish her support.

2 So I don't think it is the case that being gay or
3 lesbian is a footnote of no interest to voters in many big
4 cities. There are certainly big cities where it is less
5 important than it might previously have been or than in other
6 cities, but I don't think it's fair to say that it is an
7 insignificant element of a candidate's identity today.

8 **MR. THOMPSON:** Your Honor, we would move the
9 admission of DIX-2554.

10 **MR. BOUTROUS:** Your Honor, I'm going to object on
11 hearsay grounds. I have no objection to it coming in for the
12 fact of the article, but not for the truth of the matter
13 asserted.

14 **MR. THOMPSON:** Your Honor, it relates to a
15 legislative fact.

16 **THE COURT:** I think the witness has opened the door
17 to this. 2554 will be admitted.

18 (Defendants' Exhibit 2554 received in evidence.)

19 **MR. THOMPSON:** Thank you, your Honor.

20 **BY MR. THOMPSON:**

21 **Q.** Turning your attention, Professor, to tab 16, this is a
22 story in the *Atlanta Journal Constitution* dated October 10,
23 2009. It's entitled "Gay Votes Can Make A Difference." And
24 it's an interview with Jeff Graham, the executive director of
25 Georgia Equality, one of the largest gay advocacy and lobbying

1 groups in the state.

2 And if you turn your attention to the fourth
3 paragraph from the bottom, he provides the following answer to
4 a question:

5 "I think we have certainly seen in the last
6 20 years that I have lived here there have
7 been a number of close elections and runoff
8 scenarios when both the winners and the
9 losers have conceded that strength of the
10 LGBT vote was a deciding factor in those
11 races. When you have a voting history that
12 goes back 20 years or more, the political
13 establishment begins to realize that it
14 actually is a vote that can make a
15 difference."

16 But using your definition of political power, gays
17 and lesbians don't have a meaningful degree of political power
18 in Atlanta, correct?

19 **A.** That's correct. And I would actually go on to suggest
20 that there are a number of problems with the claims being made
21 here.

22 The first problem is that this claim is being made by
23 an advocate for a gay and lesbian action organization. Not
24 surprisingly, as you can imagine yourself, advocates for
25 organizations want to present the power of their organization

1 in the most positive light, because their job is to raise money
2 and to mobilize forces on behalf of the group.

3 People historically don't give money to the, "Donate
4 to us, we are very unlikely to make a difference."

5 (Laughter.)

6 **A.** So the strategy that he would use -- and, indeed, any
7 advocate would use -- would be to overstate to the extent
8 possible the political influence you have.

9 Now, actually, I know a little bit about Atlanta. So
10 Atlanta, of course, was one of the locations where there were
11 violent attacks on a gay bar by an individual who was
12 subsequently identified as potentially involved in the Olympics
13 bombing, you will all recall.

14 I also know that Georgia is one of the top 10 states
15 that does not have an anti-discrimination provision in its
16 state statute.

17 So I don't think we can look at the certainly
18 well-intended boast of a political advocate and conclude that
19 this is a convincing analysis of the political circumstances in
20 the City of Atlanta's politics.

21 **Q.** Isn't it true that in the most recent runoff for mayor,
22 both candidates were actively seeking the vote of the LGBT
23 community?

24 **A.** That may well be the case. It still doesn't mean that the
25 group is determinative of the outcome or that they have

1 particular important input on matters of city policy.

2 **Q.** Let's look at the sources of political power. I think you
3 identified several.

4 One of them would be money, correct? That's a source
5 of political power in the United States?

6 **A.** Yes.

7 **Q.** And that's one of the ways to cajole a legislator, is to
8 make campaign contributions to him or her, correct?

9 **A.** Or threaten to make contributions to his or her potential
10 opponent.

11 **Q.** Either way, you can get power that way?

12 **A.** Yes.

13 **Q.** And for some groups their biggest political resource is
14 their cash, correct?

15 **A.** Yes, but I think that that varies a little bit by group.
16 So, for example, things like trade associations. When we think
17 of groups representing groups of corporations, they don't
18 really have voters to mobilize. So money is their contribution
19 to the political system.

20 In other cases votes are actually a much bigger deal.
21 So we can think of some demographic groups who turn out to vote
22 in large numbers, even though they don't have a particularly
23 great amount of resources.

24 So it's an uneven balance, and it just depends on the
25 type of group. It varies from group to group.

1 Q. And some groups have a meaningful degree of political
2 power largely because of their financial resources, correct?

3 A. I would -- I would be willing to agree with that, yeah.

4 Q. In assessing the political power of a group, the size of
5 the group is clearly an important factor, correct?

6 A. Clearly.

7 Q. And in terms of other factors that might be as important,
8 one such other factor would be financial resources because they
9 play such a large role in the political system, correct?

10 A. That's correct.

11 Q. And the LGBT community and their allies outraised the Yes
12 On 8 groups, correct?

13 A. In nominal dollars donated to the campaign fund tracked by
14 the FPPC, that's correct.

15 Q. They raised approximately 43 million, the No On 8 groups
16 did, is that correct?

17 A. That's my understanding.

18 Q. And the Yes On 8 groups raised approximately 40 million,
19 is that correct?

20 A. In nominal dollars, yes, that's my understanding.

21 Q. All right. And now let's turn to tab 18, which is
22 DIX-1329. It's the 2008 annual report for the human rights
23 campaign.

24 And I would like to direct your attention to page 14.

25 The page numbers appear at the bottom left-hand part of the

1 page in microscopic font?

2 **A.** Microscopic print.

3 **Q.** Tell me when you are there, sir.

4 **A.** To the extent I can see it, I am there.

5 **Q.** And turning your attention to the right-hand series of
6 numbers under "Revenue and Support," it lists total revenue and
7 support, \$45.97 million for the year 2008; do you see that?

8 **A.** Yes.

9 **Q.** All right. And that's a lot more than the NAACP raised in
10 2008, isn't it?

11 **A.** I have no idea.

12 **MR. THOMPSON:** Your Honor, we would move the
13 admission of DIX-1329.

14 **MR. BOUTROUS:** No objection, your Honor.

15 **THE COURT:** 1329 is admitted.

16 (Defendants' Exhibit 1329 received in evidence.)

17 **BY MR. THOMPSON:**

18 **Q.** Political participation in the form of resource
19 contributions is a luxury item in economic terms, correct?

20 **A.** Yes. So if you have scarce resources and you need to
21 allocate them across food, rent, health insurance, then
22 political contributions for most people would rank lower on the
23 list.

24 **Q.** Than food?

25 **A.** Than food.

1 Q. You would want to look at the disposable income of
2 individuals in a group to know their ability to contribute
3 financially, correct?

4 A. That would be one issue you would look at, that's correct.

5 Q. But you have not undertaken an economic analysis of what
6 the disposable income available to gays and lesbians is in the
7 United States, correct?

8 A. I have not.

9 Q. You do not have an opinion as to what the median income is
10 for gay men in the United States, correct?

11 A. I do not.

12 Q. And you do not have an opinion as to what the median
13 income is for lesbians in the United States, correct?

14 A. No.

15 Q. And you do not have an opinion on whether gays and
16 lesbians have less disposable income than heterosexuals,
17 correct?

18 A. I don't have an opinion on that.

19 Q. But one factor that affects the level of disposable income
20 is the number of dependents in a household, because that --
21 dependents absorb resources, correct?

22 A. That's true.

23 Q. And it's true that on average gay male couples are less
24 likely to have children in their household than heterosexual
25 couples, correct?

1 **A.** That seems likely.

2 **Q.** And, in fact, I'd like to direct your attention to tab 19,
3 which is DIX-1162. This is a report authored by Lee Badgett
4 and others, March, 2009.

5 And directing your attention to page six, top of the
6 page, it states:

7 "About half, 48.7, of married couples have
8 children under 18 years old, compared to
9 27.3 percent of lesbian couples and
10 11.3 percent of gay male couples."

11 And you don't have any reason to doubt those numbers,
12 do you?

13 **A.** I don't know their source, so I can't speak to them in any
14 way.

15 **MR. THOMPSON:** Your Honor, we would move the
16 admission of DIX-1162.

17 **MR. BOUTROUS:** No objection, your Honor.

18 **THE COURT:** Very well. 1162 is admitted.

19 (Defendants' Exhibit 1162 received in evidence.)

20 **BY MR. THOMPSON:**

21 **Q.** But you would agree that the number of gays and lesbians
22 who actually make contributions to political causes is quite
23 high, correct?

24 **A.** I would have to ask, quite high with respect to what? So
25 if you are asking as a percentage of the known population of

1 the group, while I haven't undertaken an analysis of that, my
2 suspicion would be that that's correct. That among gays and
3 lesbians we could observe, a higher proportion of them would
4 give money to politics, for all the reasons we have already
5 discussed here today, the frequency with which their identity
6 is a source of political contestation.

7 The relative size of the contributions and the
8 relative numbers of individuals giving contributions, I'm less
9 confident about. Because gays are such a small portion of the
10 population, a very small group of people has to make an awful
11 lot of donations.

12 **Q.** Now, you would agree though that the internet has made it
13 easier for gays and lesbians to mobilize politically, correct?

14 **A.** I believe that the internet has made it easier for
15 everyone to mobilize politically.

16 Political scientists have seldom observed such a
17 change in political circumstances as we have in the last 20
18 years.

19 **Q.** But isn't it -- the internet particularly useful for
20 groups who wish to remain invisible?

21 **A.** I would think that it certainly makes life a little bit
22 simpler for them, that's true.

23 **Q.** Now, with the \$43 million that the No On 8 groups were
24 able to raise, did they spend a lot of that on TV ads?

25 **A.** I actually don't know the internal workings on the No

1 On 8 campaign. My own perusal of the television suggests that
2 they spent a fair amount of money on television, yes.

3 **Q.** And they were able to get their message out to the voters,
4 to get the voters' attention; is that fair to say?

5 **A.** They were able to get a message out. The reason I'm a
6 little bit caution here is that campaign activities take place
7 in a variety of different contexts. So some of them are an
8 advertising. Some of them are precinct walking. Some of them
9 are get-out-to-vote efforts immediately before and on election
10 day. Some of them are absentee ballot efforts.

11 So when I look at the total amount of effort put
12 forward, it's much harder to say whether or not the campaign
13 feels it was conducted effectively or whether they would do
14 things differently or whatever.

15 I think it is fair to say that many Californians saw
16 a commercial on the subject of Prop 8 from the No campaign.

17 **Q.** Now, let's turn our attention to access.

18 You would agree that it's a good thing for a group in
19 terms of its political power if it has regular access to
20 important political figures, correct?

21 **A.** That would depend on a definition of "access," which I
22 believe we have to be careful in defining.

23 So "access" implies the meaningful opportunity to
24 strongly signal to a decision maker what your preferences are
25 and to have that decision maker responded to that cue.

1 Nevertheless, certainly meeting with an elected
2 official is better for the group than not meeting with the
3 elected official.

4 **Q.** Access to federal officeholders is the most valuable favor
5 that a party is able to give in exchange for large donations,
6 correct?

7 **A.** Hmm, I'm inclined to agree with that, but I'm trying to
8 think if there are other things within the law -- boundaries of
9 the law that a party could agree to provide in exchange for a
10 contribution. So, it seems reasonable.

11 **Q.** All right. And access in itself shows that in a general
12 sense an officeholder favors someone or that someone has
13 influence on the officeholder, correct?

14 **MR. BOUTROUS:** Objection, your Honor. Compound
15 question.

16 **MR. THOMPSON:** All right. I'll break it apart.

17 **BY MR. THOMPSON:**

18 **Q.** Access in itself shows that in a general sense an
19 officeholder favors someone, correct?

20 **A.** No.

21 **Q.** Or, access shows in a general sense that someone has
22 influence on the officeholder, correct?

23 **A.** I'm going to say no again. And the reason I'm resistant
24 to both of those things is that there's a fine tradition in
25 both Washington and Sacramento of providing access to both

1 sides in order to accept their contributions, et cetera.

2 So it's not clear that just access alone suggests
3 that the person favors your viewpoint.

4 **Q.** You can't identify a single issue on which the leaders of
5 the LGBT community have been unable to get a hearing before
6 Nancy Pelosi on, correct, during her speakership?

7 **A.** Of course, I don't know the private communications in
8 Speaker Pelosi's office, so as a factual matter I don't know
9 the answer to the question.

10 If you are asking me do I believe that gays and
11 lesbians are able to meet with Speaker Pelosi, I would assume
12 that that is so. She's a Democratic representative
13 representing the City and County of San Francisco, so it would
14 seem unlikely that she would refuse to meet them.

15 And she has been vocally supportive of a number of
16 gay issues, though. She is now -- she is resisting bringing
17 some things to a vote, but I think that that's a -- that's what
18 I know about that.

19 **Q.** All right. Now, I would like to direct your attention to
20 tab 20 in your binder.

21 **A.** Okay.

22 **Q.** And do you have a chart before you?

23 **A.** I do.

24 **Q.** And you spoke in terms of political power, that one thing
25 you need to assess is the feeling that the general public has

1 towards a group, correct?

2 **A.** Correct.

3 **Q.** And you made reference to a feeling thermometer, correct?

4 **A.** That's correct.

5 **Q.** And if we look at this chart, we can see that in the sixth
6 column it says "GL Mean Temp." And that's the temperature for
7 the gay and lesbian community, correct?

8 **A.** That's correct.

9 **Q.** And in 1984 it stood at 30, is that right?

10 **A.** Because I can't see the wording of the questions, I don't
11 know for sure that it's always the same question. But if you
12 represent to me that it is, then, yes, it appears that the mean
13 thermometer score was 30 in 1984.

14 **Q.** And today it's at 49.4, correct?

15 **A.** That's correct.

16 **Q.** And so that we see that there's been a consistent trend in
17 terms of a more favorable, more warm feeling towards gays and
18 lesbians in the United States over the last 25 years, correct?

19 **A.** Correct, with a footnote; and that is that there is a
20 possibility of a secular trend in the feeling thermometers of
21 all respondents on all groups. So I would want to net that
22 out. Because I don't have all that data at my hands, I
23 can't -- I can't do it out of thin air.

24 But there could be a secular trend in favor of
25 warmness; but it is the case that those numbers have gone up,

1 yes.

2 **THE COURT:** Is that in the form of global warming?

3 (Laughter.)

4 **THE WITNESS:** Among the electorate, your Honor, yes.

5 We like everybody better now.

6 **BY MR. THOMPSON:**

7 **Q.** Now, let's talk about allies. You referenced the
8 importance of allies during your direct testimony, correct?

9 **A.** I did.

10 **Q.** And you would agree that allies can be a source of
11 political power, correct?

12 **A.** Umm, yes, with constraints. So not every ally is in the
13 position to provide the assistance of the group needs at a
14 particular time. So it's going to be particular to the area of
15 contestation.

16 For example, a state legislative ally can't help you
17 in Congress, as a simple example.

18 And, then, the second would be that some allies are
19 more reliable than others, as I have indicated.

20 **Q.** And, in your opinion, an ally is a group or individual who
21 is repeatedly embracing the gay position from the perspective
22 of gays and lesbians, correct?

23 **A.** Umm, I would go a step further and say that an ally is an
24 individual or group who are willing to expend political capital
25 on behalf of that position, not merely embrace it.

1 Q. And I would like to actually -- I think this will be the
2 only time I make you do this -- go back in your binder, for
3 which I apologize, but back to tab 14.

4 And this is a book entitled *Gays And Lesbians In the*
5 *Democratic Process*. And you contributed a chapter to this
6 book, is that right?

7 A. I did.

8 Q. And we can see it on the third page, behind the tab, your
9 chapter is called "Institutions Matter, Local Electoral Laws,
10 Gay and Lesbian Representation and Coalition Building Across
11 Minority Communities," correct?

12 A. That's correct.

13 Q. And I would like to direct your attention to page 236.

14 A. Okay.

15 Q. And the last paragraph on the page starts:

16 "The value of coalition building is clearly
17 not lost on the gay and lesbian leadership,
18 who have worked for years to build
19 partnerships with racial and ethnic groups,
20 friendly religious groups, such as Jews,
21 organized labor, and other organized
22 interests."

23 And that's a true statement, correct?

24 A. Yes.

25 Q. Okay. Now, I would like to direct your attention to tab

1 21 in your binder, which is DIX-1331 --

2 **A.** I'm sorry. Tab number again?

3 **Q.** Tab 21.

4 **A.** Thank you.

5 **Q.** It's DIX-1331, which is the Human Rights Campaign Annual
6 Report for 2009.

7 **A.** I'm there.

8 **Q.** And it starts on the second page of this document in all
9 caps:

10 "FINALLY, with strong allies in the White
11 House and Capitol Hill and across the
12 country."

13 Would you agree that the Obama administration is more
14 favorable to the political interests of gays and lesbians than
15 the Bush administration was?

16 **A.** So that -- that was a nice little switch.

17 So I would agree, yes, that Obama is more favorable
18 than Bush, though I think the degree of difference is far
19 smaller than most progressive voters anticipated.

20 I would not agree with the capitalized notion that
21 finally there are strong allies, et cetera.

22 **Q.** Let's turn to page five of this document, and to the first
23 bullet point which says:

24 "The President launched a national Aids
25 strategy and set key goals to lower the

1 number of new HIV infections, increase the
2 number of people receiving care and reduce
3 racial disparities."

4 And that's evidence that President Obama is an ally
5 of the LGBT community, correct?

6 **A.** It strikes me that that is not a particularly persuasive
7 point, because -- for a number of reasons.

8 The first is that an equally plausible explanation is
9 that the president is an ally of public health.

10 Second, and this is going to sound strange, but
11 actually HIV prevention, particularly in the lesser developed
12 world, was an area of strength for President Bush. In fact,
13 it's one of the more laudable aspects of his administration
14 that groups both gay and straight gave him substantial credit
15 for.

16 So I don't -- I'm not able to evaluate the Bush
17 administration's anti-HIV strategy vis-a-vis the Obama's, but
18 it's not clear on its face that this is necessarily a big step
19 on behalf of gays.

20 **Q.** Do you know what this is talking about? Are you familiar
21 with the initiatives and strategies that are referenced here?

22 **A.** The specifics of them, no, I'm not.

23 **Q.** Okay. And now let's turn to the second bullet point:

24 "We are on our way to eliminating the HIV
25 travel ban. To get here HRC lobbied Congress

1 effectively, resulting in the vote that paved
2 the way. Then when the Department of Health
3 and Human Services issued a proposed
4 regulation, HRC members submitted 17,000 of
5 the 19,000 public comments that HHS received.
6 Soon the process will be complete and the
7 discriminatory ban will be gone."

8 And that's been something that the LGBT community has
9 sought, correct?

10 **A.** That is something that the LGBT community has sought in
11 concert with the scientific community.

12 **Q.** And that's evidence of the political power of the LGBT
13 community, correct?

14 **A.** I would not go quite so far. So the first is that we are
15 talking about a letter writing campaign to an administrative
16 oversight agency, which is not a particularly highly salient
17 undertaking. Kind of flies under the political radar.

18 The second is that there was huge pressure on the
19 part of university medical centers receiving NIH grants to
20 eliminate the HIV travel ban because it put U.S. Aids
21 researchers, who are among the world's leading Aids
22 researchers, in the uncomfortable position of not being able to
23 host the international Aids conference in the United States
24 because individuals with HIV could not actually attend.

25 So there was a lot of different forms of public

1 pressure on this issue prior to the proposed regulation change,
2 which did, in fact, go into effect.

3 **Q.** And turning to the next bullet point, it says:

4 "We advocated for the administration to ban
5 discrimination on the basis of gender
6 identity in the nation's largest work force,
7 the federal government, and they did."

8 And that's something that the LGBT community has
9 sought, correct?

10 **A.** It is something that they sought.

11 **Q.** And it's evidence of the political power of the LGBT
12 community, correct?

13 **A.** It is certainly one outcome that would weigh positively.
14 My understanding was that this was done in the form of a
15 presidential directive, so I'm not sure of the legislative
16 vibrancy of this, if it will survive this administration; but
17 it's certainly a positive consideration.

18 **MR. THOMPSON:** Your Honor, would it be possible to
19 take a short break?

20 **THE COURT:** You mention lunch and breaks and so
21 forth, Mr. Thompson. I think we are all grateful for your
22 suggestions.

23 **MR. THOMPSON:** Thank you, your Honor.

24 **THE COURT:** Why don't we take 10 minutes? Is that
25 enough?

1 **MR. THOMPSON:** Yes. Thank you, your Honor.

2 (Whereupon there was a recess in the proceedings
3 from 3:10 p.m. until 3:25 p.m.)

4 **THE COURT:** Very well, Mr. Thompson. I trust the
5 break helped shorten your cross-examination.

6 **MR. THOMPSON:** Yes, your Honor. Thank you.

7 Now, we would like to move the admission of DIX-1331,
8 which was the document we were just discussing, the Human
9 Rights Campaign Annual Report.

10 **MR. BOUTROUS:** Your Honor, I just -- I want to
11 object. I'm a little concerned that at some point proponents
12 are going to cite these documents as somehow stating truthful
13 facts. They haven't called witnesses on these issues,
14 statements in these documents. They are opinion. They are
15 hearsay.

16 I don't think we have an objection to judicial notice
17 so they are available to the Court to refer to, but I do object
18 to this type of document going into substantive evidence.

19 **THE COURT:** I understand your position. The witness
20 is being asked about these documents.

21 I think in fairness for all parties and the
22 completeness of the record, it's appropriate to admit these.

23 The testimony is what it is. And I realize that
24 these statements are not -- do not necessarily establish the
25 truth of the content, but they certainly provide a basis for of

1 the witness's testimony and the witness's cross-examination by
2 Mr. Thompson, so I think it's appropriate.

3 And however they are characterized, as either
4 admitted or judicial notice, I think is essentially immaterial.

5 **MR. THOMPSON:** Thank you, your Honor.

6 (Defendants' Exhibit 1331 received in evidence)

7 **BY MR. THOMPSON:**

8 **Q.** So we would like to, with the Court's permission, play a
9 short clip from a speech from President Obama. I would like
10 you to watch this clip and react.

11 **THE COURT:** Well, this is the 20th of January, isn't
12 it?

13 (Videotape played in open court.)

14 **BY MR. THOMPSON:**

15 **Q.** Using your definition of a political ally, does President
16 Obama, does he count as a political ally to the gay and lesbian
17 community?

18 **A.** Given my concerns about the unreliability of allies in the
19 illustrations I have used, I think President Obama is, perhaps,
20 the best illustration of an ally who cannot be counted upon, an
21 ally whose rhetoric far exceeds his actions.

22 Surely, you would agree that there's a difference
23 between giving a nice speech and actually accomplishing some
24 sort of policy change.

25 **Q.** You believe, in fact, that President Obama is, at best,

1 lukewarm and maybe even indifferent to gay rights, correct?

2 **A.** I believe that he has some significant reservations about
3 the issue, particularly on same-sex marriage. He articulated
4 repeatedly during the 2008 campaign that he was not in favor of
5 same-sex marriage.

6 Since his inauguration into office, there has been no
7 administrative action on suspending discharges under "Don't
8 ask, Don't tell."

9 His words notwithstanding, the Employment
10 Nondiscrimination Act is not on its way to final passage.

11 He has -- his administration has defended the Defense
12 of Marriage Act in court and continues to do so in multiple
13 lawsuits.

14 When the Prop 8 sister resolution emerged in the
15 State of Maine, he -- Organizing For America, which is the
16 remnants of his campaign from a year ago, sent emails into
17 Maine asking for them to make calls into the New Jersey and
18 Virginia gubernatorial races, but without a single mention of
19 the same-sex ballot initiative that was on the ballot at the
20 very same time. The same was true for the Washington state
21 initiative.

22 So, in fact, most gay activists with whose work I am
23 familiar and the leadership of most gay organizations, with the
24 possible exception of the Human Rights Campaign notably, feel
25 that President Obama has been particularly disappointing as an

1 erstwhile ally.

2 **Q.** Now, he did sign the hate crimes legislation, correct?

3 **A.** He did sign the Defense Authorization Act on which hate
4 crimes was an amendment, yes.

5 **Q.** And then he had a signing ceremony in the rose garden,
6 correct?

7 **A.** He did.

8 **Q.** And in determining whether President Obama was an ally of
9 gays and lesbians, one thing you would look to is whether he
10 has spoken publicly about the adverse treatment of gays and
11 lesbians in society, correct?

12 **A.** That's correct. And on that dimension, President Obama is
13 a very good speechmaker.

14 **Q.** And another factor you would consider in assessing whether
15 President Obama was an ally of gays and lesbians is whether he
16 had introduced legislation on behalf of LGBT political goals,
17 correct?

18 **A.** Well, strictly speaking, of course, the administration
19 doesn't introduce legislation; but, yes, if his administration
20 was working with an author on the Hill to submit a piece of
21 legislation that he pledges upfront to sign, that would be a
22 positive factor to consider.

23 **Q.** And he has pledged to sign the Employment
24 Nondiscrimination Act, correct?

25 **A.** He has. I heard the video.

1 Q. And that's passed the House of Representatives, correct?

2 A. It has.

3 Q. Now, using your definition of ally, Senator Feinstein is
4 only a soft ally of gays and lesbians, correct?

5 A. I think given her -- the record over the course of her
6 political career, that's the way I would describe it.

7 Q. And in considering whether gays and lesbians have reliable
8 allies, you would define a reliable ally as one who, when faced
9 with political threat, when faced with alternative agenda
10 items, is willing to set side alternative items and sale into
11 stiff winds in order to act on behalf of gays and lesbians,
12 correct?

13 A. I think that that would be one aspect I would want to
14 consider.

15 For example, as the opinion polls in support of the
16 Democratic administration have waned over the course of the
17 last 12 months, the speaker -- who, as we recall from the
18 earlier question represents the City and County of
19 San Francisco -- the speaker has indicated that particularly
20 controversial social matters, including gay rights issues, that
21 the House of Representatives would not take them up until the
22 Senate acted first. That's an example of not wanting to sale
23 into stiff winds.

24 Another example might be, for example, the setting
25 aside of any question of the "Don't ask, Don't tell" or Defense

1 of Marriage Act issues until after the economy or healthcare is
2 dealt with, et cetera.

3 So one of the tropes that people would use to not
4 enact protections for gays and lesbians is that there are other
5 priorities or to do so would endanger our coalition behind Bill
6 X or Bill Y.

7 And so this is a fairly constant refrain, that gay
8 and lesbian advocacy leaders hear when they are asking for
9 legislation to be moved forward.

10 **Q.** Now, using your definition of "reliable political ally,"
11 you are not even sure the ACLU would qualify as a reliable
12 ally, correct?

13 **A.** Well, I'm actually willing to concede that the ACLU is a
14 pretty reliable ally, because sailing into stiff winds appears
15 to be what they are willing to do.

16 That's not to say that they have never shrank from an
17 issue, they may have. But I think they are probably more
18 reliable than most other groups.

19 **Q.** But when I asked you during your deposition -- and I would
20 like to direct your attention to, I believe, it's tab three of
21 your binder and page 88.

22 We were talking about the definition of reliability
23 on 88, line six. And then towards end of 88 you mention that
24 there may be some allies who are willing to pay costs to
25 support gay and lesbian causes.

1 And then when we go to 89, I said:

2 **"QUESTION:** Well, now, you said very few.

3 **"ANSWER:** Well, I said there could be
4 individuals in my answer.

5 **"QUESTION:** Okay.

6 **"ANSWER:** But in terms of large organized
7 forces in the society, maybe the American
8 Civil Liberties Union, I don't know. I mean,
9 I'm struggling. I'm sure if I spent all day,
10 I could probably think of an ally or two."

11 And you gave that testimony, correct?

12 **A.** I did, which I believe is consistent with what I just
13 said; that the ACLU is probably an ally, yeah.

14 **Q.** Now, you don't have sufficient information to know whether
15 Speaker Pelosi meets your definition of a reliable ally,
16 correct?

17 **A.** I don't have maybe all the pertinent information. I would
18 see her as more likely than not an ally, but her level of
19 reliability I would condition by her responsibility and desire
20 to protect the Democratic majority and, perhaps, put off
21 controversial votes.

22 **Q.** And that could be a sound strategy even from the
23 perspective of the LGBT community, correct?

24 **A.** Well, that depends. It could be a sound strategy if it
25 creates the opportunity for the majority to live to fight

1 another day.

2 Alternatively, it could be -- and I think there is
3 some evidence to suggest -- that by delaying certain priorities
4 of court constituencies or groups that you have a long-term
5 representational relationship with, that, in fact, on the claim
6 that you do so to live to fight another day, that when the next
7 day comes, you are no longer there and so the -- the
8 legislative priority was sacrificed for no gain.

9 So I think it remains an open question, whether this
10 is a sound strategy or not.

11 **Q.** All right. Now, let's talk about the importance of the
12 media.

13 The media can be important in terms of figuring out
14 the political power of a group, correct? It's relationship to
15 the media?

16 **A.** You would have to be a little bit more specific, I'm
17 afraid, to which media you are speaking.

18 **Q.** Well, television could be important to -- the way in which
19 a group is portrayed on television could be important?

20 **A.** Entertainment television or news?

21 **Q.** News.

22 **A.** Television news?

23 **Q.** Yes.

24 **A.** Yes. I would say that TV news might be relevant.

25 **Q.** Okay. And one of the materials you deemed relevant in

1 this case is a book by John Zaller entitled *The Nature and*
2 *Origins of Mass Opinion*, correct?

3 **A.** That's correct.

4 **Q.** And I would like to direct your attention to tab 23, which
5 has the first few chapters of that book, which is DIX-296.

6 And the thesis of Mr. Zaller is that public opinion
7 responds more directly to lead cues than bubbling up from the
8 masses, correct?

9 **A.** That's a fair version, yeah.

10 **Q.** And you would agree that he is right in the general sense
11 that the stories that the media covers raises the salience of
12 an issue, correct?

13 **A.** Within constraints, yes. There are some issues that,
14 whether the media covers or not, remain present; and then there
15 are some issues that the media might devote a lot of attention
16 to, and even political leads might cure a great deal that the
17 public never buys on to. So it's certainly not a perfect
18 relationship.

19 But, in general, if the media covers a story more
20 frequently and with greater intensity, the public is likely to
21 respond by thinking it more important.

22 **MR. THOMPSON:** Your Honor, we move the admission of
23 DIX-296.

24 **MR. BOUTROUS:** No objection, your Honor.

25 **THE COURT:** Very well. DIX-296 is admitted.

1 (Defendants' Exhibit 296 received in evidence.)

2 **MR. THOMPSON:** Excellent.

3 **BY MR. THOMPSON:**

4 **Q.** And turning to the next tab, Professor. This is an
5 article entitled *Minority Group Interests and Political*
6 *Representation - Gay Elected Officials in the Policy Process.*
7 And it's DIX-1102.

8 And this was an article you considered?

9 **A.** I'm sorry. I -- my next tab is a 2005 report by the HRC.

10 **Q.** Okay. Let me -- and if the binder is missing that
11 information, we can provide that later.

12 **A.** Okay. So you are under tab A.

13 **Q.** Yes, sir.

14 **A.** Okay. I'm with you.

15 **Q.** And this is an article you considered in reaching your
16 opinions in this case, correct?

17 **A.** One of several, yes.

18 **Q.** All right. And I would like to direct your attention to
19 page 575, the second paragraph. And the article states here:

20 "Most important, gay political representation
21 significantly influences the adoption of
22 domestic partner benefits. However, unlike
23 the registration model, it is not the most
24 influential factor. Instead, elite support
25 has the greatest influence."

1 Is that consistent with the point Zaller is making?

2 **A.** It would be consistent, but unless I look at the results
3 directly, I'm going to have a tough time giving you a sort of
4 specific response to the claim.

5 **MR. THOMPSON:** Your Honor, we would move the
6 admission of DIX-1102.

7 **MR. BOUTROUS:** No objection, your Honor.

8 Though I will make a standing objection concerning
9 the hearsay nature of these documents, but I will not make it
10 again.

11 **THE COURT:** Very well. 1102 is admitted.

12 (Defendants' Exhibit 1102 received in evidence.)

13 **MR. THOMPSON:** Thank you, your Honor.

14 **BY MR. THOMPSON:**

15 **Q.** Now, Professor, you would agree that the frequency of
16 media coverage has increased in recent years for issues
17 relating to gays and lesbians, correct?

18 **A.** I would. I'm still grappling with your last question.
19 But, yes, I would agree that media coverage is higher.

20 **Q.** And, therefore, the salience or the visibility of the gay
21 and lesbian community, at least on that dimension, has
22 increased, correct?

23 **A.** That's probably true, yes.

24 **Q.** And I would like to direct your attention to tab 24. This
25 is the Human Rights Campaign 2005 Annual Report. It's

1 DIX-1327.

2 And I would like to direct your attention to page 19.

3 And the pagination appears in the upper right-hand corner of
4 the even pages. We did not paginate it.

5 **A.** I see.

6 **Q.** Are you there, sir?

7 **A.** I'm with you.

8 **Q.** In the second paragraph on page 19 it states.

9 "In 2005 our message of fairness has reached
10 90 percent of Americans with a quote in at
11 least one newspaper every day."

12 And that would be an indication that the gay and
13 lesbian community is able to get its message out through the
14 media on a regular basis, correct?

15 **A.** It would be a claim that the gay and lesbian community can
16 get its message out on a regular basis.

17 **Q.** Do you have any basis to dispute that claim?

18 **A.** Oh, yes.

19 (Laughter.)

20 **Q.** You don't think that they are getting a quote in the paper
21 once a day?

22 **A.** I believe they are getting a quote in the paper once a
23 day.

24 **Q.** Okay. That's what they claim here.

25 **A.** Well, no. Their claim is that 90 percent of Americans

1 have seen the quote.

2 **Q.** It has reached 90 percent of Americans now?

3 **A.** Newspaper readership in the United States is significantly
4 below 50 percent of the population.

5 So newspaper media is certainly -- and, certainly,
6 news stories about gays and lesbians is not likely to yield a
7 90 percent contact rate.

8 Now, does that mean that newspapers serving
9 localities that have 90 percent of the population have
10 published at least one quote about gays and lesbians?

11 Absolutely.

12 But does it mean that 90 percent of Americans have
13 been reached with the HRC message? I think we have political
14 advocates again advertising their importance.

15 **MR. THOMPSON:** Your Honor, we would move the
16 admission of DIX-1327.

17 **THE COURT:** Very well. 1327 is admitted.

18 (Defendants' Exhibit 1327 received in evidence.)

19 **BY MR. THOMPSON:**

20 **Q.** And during the year and a half that you have lived in this
21 area, you can't recall any editorial from the *San Francisco*
22 *Chronicle* that was hostile to the interests of gays and
23 lesbians, correct?

24 **A.** I do not read the *Chronicle* every day, but I would find it
25 unlikely.

1 Q. But you do read the *New York Times*, correct?

2 A. Again, not every day, but I read it fairly frequently,
3 yes.

4 Q. And in the last 10 years you don't recall any instance in
5 which the *New York Times* took a hostile position to the
6 interests of gays and lesbians, correct?

7 A. I don't recall one.

8 Q. You do recall editorials in the *New York Times* advocating
9 for the dissolution of "Don't ask, Don't tell," correct?

10 A. I do.

11 Q. And advocating for the Employment Nondiscrimination Act,
12 correct?

13 A. Yes.

14 Q. And I would like to direct your attention to the next tab,
15 which is DIX-1323. And it's the Human Rights Campaign Annual
16 Report for the year ended March 31, 2000.

17 And turning your attention to page three, which is
18 the fifth page behind the tab, the third paragraph from the
19 bottom, the second sentence states:

20 "Reporters and editorial boards view our
21 advocacy as common sense rather than special
22 interest."

23 Is that a true statement that editorial boards view
24 the positions of the gay and lesbian political community as
25 common sense?

1 **A.** It's a blanket statement. And like most academics, I am
2 deeply uncomfortable with blanket statement.

3 I would be willing to represent that it would be my
4 belief, my belief in the absence of analysis, that the majority
5 of editorial boards, with some regional variation accounted
6 for, probably tend to favor some protections for gays and
7 lesbians.

8 I don't believe that that's uniform across the issue.
9 So you would have more editorial boards, for example, favoring
10 a hate crimes law than a nondiscrimination law, and more
11 favoring a nondiscrimination law than same-sex marriage, for
12 example.

13 I also think that there would be dramatic variation
14 by region. So there would be parts of the country where this
15 would clearly not be true.

16 So I guess I'm -- I'm at a loss for information to
17 evaluate this, but it strikes me as particularly overbroad.

18 **MR. THOMPSON:** Your Honor, we would move of the
19 admission of DIX-1323.

20 **THE COURT:** Very well. 1323 is admitted.

21 (Defendants' Exhibit 1323 received in evidence)

22 **THE COURT:** And remind me, Mr. Thompson, what page
23 were you looking at?

24 **MR. THOMPSON:** I was looking at page three, your
25 Honor.

1 **THE COURT:** Page?

2 **MR. THOMPSON:** Page three. We have Xeroxed the
3 cover, so it's actually the fifth page in the exhibit.

4 **THE COURT:** But it's marked page three?

5 **MR. THOMPSON:** Yes, your Honor.

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

7 **MR. THOMPSON:** Certainly.

8 **BY MR. THOMPSON:**

9 **Q.** And now directing your attention, Professor Segura, to tab
10 26.

11 This is an editorial from the *New York Times* dated
12 September 29, 2008, and it's entitled "Preserving California's
13 Constitution."

14 And in the third paragraph it -- and it's addressing
15 Proposition 8.

16 And in the third paragraph the third sentence says:

17 "It is our fervent hope that Californians
18 will reject this mean-spirited attempt to
19 embed second-class treatment of one group of
20 citizens in the state constitution."

21 Is it fair to say that the *New York Times*
22 emphatically supports the rights of gays and lesbians to marry?

23 **A.** Well, I would certainly conclude from this editorial that
24 they certainly fervently oppose Proposition 8.

25 I would assume, in the absence of an editorial to the

1 contrary, that they would extend that to other states as well.

2 **Q.** And let's turn your attention to tab 33.

3 **A.** I'm there.

4 **Q.** And this is a document that appeared on the *L.A. Times*,
5 one of their blogs.

6 And in the first bullet point under the picture there
7 is a quote from the L.A. times editorial, and it says:

8 "It's the same sentence as in 2000, only
9 marriage between a man and a woman is valid
10 or recognized in California. Yet, the issue
11 that will be put before voters November 4th
12 is radically different. This time the
13 wording would be used to rescind an existing
14 constitutional right to marry. We fervently
15 hope that voters, whatever their personal or
16 religious convictions, will shudder at such a
17 step and vote no on Proposition 8."

18 And is this a reflects that the *L.A. Times*
19 emphatically supported the No On 8 campaign?

20 **A.** It would appear to be a reflection of both the *L.A.*
21 *Times's* support for the No On 8 campaign and the fondness for
22 the word "fervently" in editorials.

23 (Laughter.)

24 **Q.** Now, another factor that is a source of political power is
25 the cohesion and size of a political group, correct?

1 **A.** I think that's true.

2 **Q.** And you believe that four to seven percent of the U.S.
3 population is openly gay or lesbian, correct?

4 **A.** Umm, as you and I discussed during my deposition, there is
5 a broad scholarly disagreement over the size of the gay and
6 lesbian population.

7 And I believe my answer in deposition is the same one
8 I will give now, which is that it is my belief that the answer
9 is somewhere between four and seven percent based on some
10 marketing polling that I have observed, places that are not
11 particularly political, so we tend to get a few more honest
12 answers.

13 I have seen numbers as low as two and as high as ten,
14 both of which I think to be unlikely, were sort of too
15 conservative and too permissive.

16 So I think four to seven is a more accurate estimate,
17 but, again, that's based on reading literally dozens of stabs
18 at this in both the scholarly's and the marketing literature.

19 **Q.** All right. And that doesn't include bisexuals, correct?

20 **A.** No, no.

21 **Q.** With respect to the percentage of the U.S. population that
22 is predominantly bisexual, you've only seen numbers in the
23 neighborhood of two percent, correct?

24 **A.** Two percent or even less. But, again, that's another
25 number that has some definitional problems with it.

1 So I know the Court heard some testimony yesterday on
2 this issue, but is a bisexual someone who has only engaged in
3 sex with alternating partners or do -- are we defining it in --
4 with their sexual behavior in the last year or the last five
5 years?

6 So I think that's a little bit more of a porous
7 category, a little bit harder to define.

8 **Q.** In terms of cohesion, 23 percent of gays and lesbians are
9 estimated to have voted in favor of George W. Bush in 2004,
10 correct?

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

12 **Q.** So, in fact, gays and lesbians are much less politically
13 cohesive than African-Americans, correct?

14 **A.** As a practical matter, it's hard to imagine a single
15 political group that is not less cohesive than
16 African-Americans, who vote Democratic somewhere between 89 and
17 95 percent in most elections.

18 So 77 percent voting Democrat and 23 percent voting
19 Republican would be less cohesive than African-Americans, a
20 significant degree more cohesive than Latinos, and certainly
21 than Anglos.

22 **Q.** A small group can be politically powerful, correct?

23 **A.** It depends on what you mean by "group." Are we talking
24 about a demographic group here? Are we talking about, like, an
25 organization or association?

1 Q. Well, a small demographic group can be politically
2 powerful. The Jewish community has a meaningful degree of
3 political power in the United States, correct?

4 A. I would say the Jewish community has a meaningful degree
5 of political power based on their representation in public
6 office and their resources.

7 But I'm not sure -- I haven't undertaken an analysis
8 of that community, but that would be my conclusion, at least,
9 at the of -- without anything about it a lot.

10 Q. And a small group could be powerful in a closely divided
11 electorate, correct?

12 A. Well, that's always true. So the closer an election, the
13 more likely it is that smaller segments of the population can
14 make a difference. For a group to make a credible claim that
15 they played a role in the outcome of the election, the margin
16 within the group would have to exceed the margin of victory
17 overall.

18 Q. So when then Senator Obama and Senator Clinton were
19 battling it out for the Democratic primary, they both actively
20 sought the support of the gay and lesbian community, correct?

21 A. I think it's fair to say that that's true. I think it's
22 also fair to say that in the very close primary contest, they
23 actively sought the support of every person with a pulse and a
24 voter registration card.

25 Q. But they had special attention to the gay and lesbian

1 community because of the financial resources, correct?

2 **A.** By "special attention," are you suggesting that they paid
3 more attention to gays and lesbians than they did to other
4 Democratic constituencies? Because I actually don't know that
5 to be true.

6 **Q.** Well, to anyone with a pulse. In other words, they
7 weren't indifferent. You just said, Oh, well they wanted
8 everyone with a pulse.

9 Isn't it true that they were more focused on the gay
10 and lesbian community than just anyone with a pulse off the
11 street?

12 **A.** I don't have evidence of that. I mean, I -- I think it
13 would certainly would be fair to say that both then Senator
14 Obama and then Senator Clinton actively courted organized
15 labor, actively courted gays and lesbians, actively courted
16 environmentalists, African-Americans, Latinos, et cetera.

17 It's the term "special" that I'm reacting to, I'm
18 afraid, because the term "special" appears to suggest that they
19 paid more attention to gays and lesbians than to other
20 Democratic constituencies, and I actually just don't know that
21 to be true.

22 **Q.** Are the gay and lesbian community, is that a Democratic
23 constituency?

24 **A.** I think by any measure it's a majority Democratic
25 constituency, yes.

1 Q. All right. Now, persuasion can also be a source of
2 political power, correct?

3 A. That's a more complex question. So Dahl speaks about
4 persuasion and he identifies persuasion as one of the weakest
5 forms of political power.

6 Persuasion has multiple components to it. So it is
7 more than merely a group saying, Please, pass a piece of
8 legislation for us, or, It's the right thing to do.

9 Persuasion involves -- particularly for this
10 instance -- the need to identify an external deeply-held norm
11 in the society to which you can appeal.

12 So, for example, this society has norms of equality
13 or norms of fairness. And in order for persuasion to be used,
14 what a group would have to do is say, you know, We all believe
15 in equality. We all believe in fairness. Those norms should
16 apply to us. And if you apply those norms to us, then you
17 should change your vote and be persuaded of the rightness of
18 our position.

19 So persuasion actually relies not only on the
20 oratorical skills of the group, but, also, the degree to which
21 the audience holds the deeply-internalized norms about what the
22 society thinks and is willing to assign the -- include the
23 subject group in those norms.

24 It's a much more tenuous undertaking and for that
25 purpose, I think, that's why Dahl sees it as the weakest form

1 of power.

2 **Q.** But you would agree a group might cajole a legislator by
3 appealing to a societal norm of justice or fairness, correct?

4 **A.** I would if believe that a group would certainly make the
5 effort and may actually yield some number of changed cards,
6 yes.

7 **Q.** And the abolitionists in the 19th century were able to
8 make claims on norms of fairness, correct?

9 **A.** They were, but I wouldn't look at that as the principal
10 source of power for the abolitionists.

11 **Q.** But you would agree that among the strategies that the
12 black civil rights movement used was an intellectual or
13 idea-based appeal to the internalized national norm of
14 fairness, correct?

15 **A.** I believe that that was a strategy, but it would hardly be
16 the most important or even the most frequently used.

17 If we peruse the history of the black civil rights
18 movement, African-American activists fighting for their civil
19 rights engaged in a whole host of strategies, including
20 boycotts of businesses, boycotts of the Montgomery bus line,
21 sit-down strikes at southern lunch counters, freedom rides
22 where northerners -- northern blacks and northern whites --
23 boarded buses and road into the south to defy the segregation
24 of southern facilities; a strategy that took them into the
25 courts, a strategy that took them into the television sets.

1 Serendipity, frankly, played a role. One of the
2 reasons we have the Voting Rights Act is that the attack by
3 Alabama officials on African-American activists at the Edmund
4 Pettus Bridge happened to be televised live by CBS and spill
5 into people's living rooms.

6 So there are many more strategies and tactics used by
7 the black civil rights movement. Certainly, the idea of
8 justice played an important role. It was not the only role.

9 **Q.** And gays and lesbians make appeals to the norm of fairness
10 in pursuing their political agenda, correct?

11 **A.** Yes, they do.

12 **Q.** And such appeals to fairness may, in fact, persuade some
13 number of people, correct?

14 **A.** They may, in fact, persuade some number of people, yes.

15 **Q.** Now, in terms of sources of political power, another would
16 be tactics. The tactics that a group uses can have
17 ramifications for the amount of power they have, correct?

18 **A.** Yes, with the following qualification. Sometimes
19 tactic -- you are suggesting that tactics shape how much power
20 a group has, and I would think that normally the causal arrow
21 is in the reverse; that how much power a group has really
22 shapes the tactics that they choose.

23 So I wouldn't put a causal relationship in the way
24 that you are suggesting.

25 **Q.** Are you saying that tactics are irrelevant to the

1 political power of a group?

2 **A.** I did not. I said that there was a non-recursive
3 relationship.

4 **Q.** Well, you've read press reports suggesting that the
5 No On 8 people themselves felt like they did not do a
6 particularly good job on reaching out to blacks and Latinos,
7 correct?

8 **A.** I have read reports suggesting that they felt like they
9 had maybe not done the best outreach there, yes.

10 **Q.** And you have no reason to doubt those reports, correct?

11 **A.** I don't know enough about the internal organization of the
12 Prop 8 campaign, but I have no reason to question it.

13 **Q.** All right. Now, let's talk about how violence pertains to
14 the political power of a group.

15 In the Democratic process, violence is usually
16 negatively perceived, correct?

17 **A.** That is usually the case, yes.

18 **Q.** And within a Democratic process, violence historically
19 backfires, correct?

20 **A.** Yes, depending on the willingness of external authorities
21 to become involved.

22 So there have been moments, frankly, when violence
23 was effectively used, for example, by segregationists around
24 the turn of the century, the Klan and others, to disenfranchise
25 large numbers of people.

1 So there have been unfortunate moments in our history
2 when political forces have used violence to actually achieve
3 their goals.

4 As a general question, I think I would certainly not
5 favor it and I think it's a fundamentally anti-Democratic thing
6 to do.

7 **Q.** Sympathy is a tool to help secure political outcomes by
8 seeking to activate internalized norms of fairness and equity,
9 correct?

10 **A.** Again, a qualified yes. And the reason is that certainly
11 the audience, in this case the electorate, being sympathetic to
12 your goals or to your personal circumstances is better than
13 their being hostile.

14 But the way you say sympathy as a tactic suggests
15 that there is sort of a premeditation that a particular
16 political force goes out and maybe, I don't know, cries
17 "Whoa is me" on the corner.

18 Sympathy as a tactic is something I'm having a little
19 bit of trouble wrapping my mind around.

20 **Q.** Well, if a group is trying to use an appeal to an
21 internalized norm of fairness or equity, the moment it engages
22 in violence, much of that appeal dissipates; "yes" or "no"?

23 **A.** Well, again, these are matters of degrees. So it was
24 certainly of the case during the black civil rights movement,
25 that there was a very strong emphasis on non-violence in order

1 to retain the positive support of white northerners, for
2 example.

3 So in general, if the group is enjoying sympathy,
4 then violence could ameliorate that sympathy to some degree. It
5 would depend on how much violence and who it was directed at
6 and the circumstances under which it arose and whatnot.

7 **Q.** Well, I would like to direct your attention to your
8 deposition in this case, and to page 190, line 13. This should
9 appear behind tab three in your binder.

10 **A.** Yes.

11 **Q.** Okay. And so if we look at page 190, line 13, you
12 said:

13 **"ANSWER:** In the Democratic process violence
14 is usually negatively received; that in some
15 respects" -- if we go back to your question
16 about ideas -- "if a group is trying to use
17 an appeal to an internalized norm of fairness
18 or equity, the moment it engages in violence,
19 much of that appeal dissipates."

20 And you gave that testimony, correct?

21 **A.** I did.

22 **Q.** Okay. Now --

23 **THE COURT:** How are you doing on time, Mr. Thompson?

24 **MR. THOMPSON:** Well, your Honor, I appreciate
25 Professor Segura's fulsome answers. I'm not getting "yes" or

1 "no" answers, so I'm running behind schedule and I'm afraid
2 there is no possible way that I could finish this evening.

3 **THE COURT:** Well, can you get in another half hour?

4 **MR. THOMPSON:** I'm happy to keep going, your Honor.
5 Absolutely.

6 **BY MR. THOMPSON:**

7 **Q.** Now, so one of the political resources that a group may
8 have is goodwill, correct?

9 **A.** Correct.

10 **Q.** All right. And if we are looking at sources or barriers
11 to political power, you would also want to look to see if a
12 group had been disenfranchised, correct?

13 **A.** Yes.

14 **Q.** All right. And you are not aware of any specific form of
15 intimidation aimed at prohibiting gays and lesbians from
16 voting, correct?

17 **A.** With the caveat that there may have been some number of
18 gays and lesbians who were kept out of the franchise as a
19 consequence of felony charges associated with gay harassment in
20 the 50's and 60's. It is possible under those circumstances
21 that some number of gay and lesbian voters lost their right to
22 vote as a consequence of anti-gay enforcement policies in the
23 states.

24 With that caveat, in the recent sense, there may have
25 been an isolated incidence of intimidation with which I'm not

1 familiar, but I don't know of a concerted effort to drive down
2 the gay electorate.

3 **Q.** You can't point to any such instance, let's say, in the
4 last 30 years of any government official anywhere in the United
5 States targeting gays and lesbians to disenfranchise them so
6 they can't vote, correct?

7 **A.** I don't have an example off the top of my head, so, no, I
8 cannot recall any.

9 **Q.** All right. Now, let's talk -- we have talked about the
10 sources of political power. Let's talk about some of the
11 indicia of political power.

12 And would you agree that one reflection of political
13 power is a group's ability to convince Congress to allocate
14 funds to issues that are important to the group?

15 **A.** Again, with the footnote that I would want to see evidence
16 that the group was bringing resources and pressure to bear in
17 order to get Congress to allocate funds it otherwise wouldn't
18 have, yes. That would be a positive outcome that I would want
19 to look at.

20 **Q.** And in assessing the political power of a group, another
21 factor you would look at would be the presence of statutory
22 protections for their equality, correct?

23 **A.** Yes.

24 **Q.** And you would also want to look at whether they had the
25 ability to elect candidates of their choice, correct?

1 **A.** That would be a measure, yes.

2 **Q.** All right. And with respect to the gay and lesbian
3 community, you have not assumed that only a gay or lesbian
4 could be a candidate of choice for the gay and lesbian
5 community, correct?

6 **A.** No, I am not.

7 **Q.** And the voting rights literature has always focused on the
8 notion of first choice without regard to the demographic
9 characteristics of the candidate, correct?

10 **A.** That's correct.

11 **Q.** And in the California legislature there are four openly
12 gay officials, correct?

13 **A.** To the best of my knowledge, that number is correct.

14 **Q.** And that's out of 120, correct?

15 **A.** Yes, that's correct.

16 **Q.** And so that's 3.3 percent, if I'm doing my math right?

17 **A.** I'm sorry. I can't do the math that quick in my head, but
18 if you represent that, I will take that on --

19 **Q.** On redirect Mr. Boutrous can correct me.

20 Now, let's talk about political power in California.
21 And is it true that Equality California is one of the leading
22 gay rights groups in the State of California?

23 **A.** I, actually, can't really answer that because what do you
24 mean by "leading gay rights groups"? There are a number of
25 groups active.

1 I would assume that Equality California is among the
2 largest, if not the largest; but I don't have the basis -- I
3 don't know the budget of every group in the state.

4 **Q.** Equality California raised more money for the No On 8
5 campaign than any other group, is that right?

6 **A.** That sounds correct, yes.

7 **Q.** Okay. Now, let's turn to tab 35, which is the 2009
8 legislative scorecard for Equality California.

9 And directing your attention to the first page of
10 text it says:

11 "Despite a tough legislative session and the
12 worst budget crisis in California history,
13 this year has been one of Equality
14 California's best yet in Sacramento. We
15 passed a record 11 pieces of Equality
16 California-sponsored legislation that will
17 improve the lives of LGBT Californians."

18 Is it true that last year there were 11 pieces of
19 legislation passed that were sought by the LGBT community?

20 **A.** With the caveat that some of that legislation was, in
21 fact, non-binding resolutions that were senses of the
22 legislature, then I have no reason to dispute their number.

23 **Q.** And so this was a good legislative session for the LGBT
24 community, correct?

25 **A.** I think that's a different question. So what constitutes

1 as good legislative session is whether or not high priority
2 items were, in fact, acted upon in a positive sense and were
3 ultimately signed into law.

4 So, again, I would have to know what the rate of bill
5 passage was in all other years, what the number of bills passed
6 in all other years was.

7 I take on -- on faith that their report, that they
8 feel pretty good about it; that they are happy with it.

9 **Q.** All right. Now, let's look at their scorecard that they
10 give to different legislators.

11 If we look at the Senate scorecard -- and you just
12 flip the page -- it has ratings of 100 percent. And I'll
13 represent to you that 21 out of 40, a majority of the
14 California Senate, has a 100 percent approval rating from
15 Equality California.

16 Is it fair to assume that any state senator who
17 receives a 100 percent rating from Equality California is an
18 ally of the LGBT community?

19 **A.** That would depend on which items were used to score.

20 So, for example, we might find in a year where there
21 were several sort of procedural issues that came up, you could
22 get 100 percent from a particular representative; and in a
23 subsequent year, in which maybe there was a much more
24 contentious issue that came up, you would get less than
25 100 percent.

1 So it's important to always keep in mind that the
2 scorecard is relative to what the agenda was in the legislature
3 that year. Some agendas are more vexing than others.

4 **Q.** Can you point to any of these legislators who received
5 100 percent rating and provide evidence that any of them are
6 not allies of the LGBT community?

7 **A.** Again, I don't have the legislature and all of their
8 activities committed to memory. I couldn't possibly.

9 **Q.** Well, I'm just asking for one. Can you point to one piece
10 of evidence that one of these individuals with a 100 percent
11 rating is not an ally of the LGBT community?

12 **A.** I cannot. I can point to the fact that there is an awful
13 lot of zeros on the page as well; that the minority party,
14 should they gain control of the Senate, would reverse many of
15 the items that you've just identified.

16 **Q.** All right. Now, let's turn to the assembly scorecard.
17 And, again, I will represent to you that 41 out of the 80 --
18 again a majority -- have a perfect 100 percent score.

19 Can you point to any evidence that any of these
20 individuals who received a 100 percent rating were not allies
21 of the LGBT community?

22 **A.** Once again, no. I do not have an exhaustive command of
23 the behavior of each legislator.

24 **Q.** Okay. Now, let's look at some other officials in the
25 State of California. It's reasonable to assume that Barbara

1 Boxer was a candidate-of-choice for gays and lesbians, correct?

2 **A.** In a general election sense, I think the answer to that is
3 yes. I don't remember the last time she had a meaningful
4 primary challenge; maybe not since '92, when she was first
5 elected.

6 **Q.** Right. But in her recent elections, she has been a
7 candidate-of-choice for the gay and lesbian community, correct?

8 **A.** Yes, yes.

9 **Q.** And Senator Dianne Feinstein's recent elections for U.S.
10 Senate, she has been a candidate-of-choice for the gay and
11 lesbian community, correct?

12 **A.** Given the choices that they have been provided, yes.

13 **Q.** Right. I understand.

14 And Attorney General Brown is the candidate-of-choice
15 to be the next governor of California among gays and lesbians,
16 correct?

17 **A.** Well, as we previously discussed, approximately 77 percent
18 of self-identified gays and lesbians identify as Democrats.
19 And the last time I checked, he's the only Democrat in the
20 field.

21 So I would assume that approximately 77 percent have
22 a predisposition to support him.

23 **Q.** Can you identify any general election for state-wide
24 office in California in the last 10 years where the LGBT
25 community supported the Republican candidate rather than the

1 Democratic candidate?

2 **A.** I cannot.

3 **Q.** And can you identify any Democrat running for state-wide
4 office in California in the last 10 years who won the
5 Democratic primary over the opposition of the LGBT community?

6 **A.** That I'm going to -- I'm afraid I have to plead ignorance
7 on. I lived external to the state from 2001 until 2008, so I
8 wasn't privy to primary politics here.

9 **Q.** Okay. So Senator Boxer is an ally of the gay and lesbian
10 community, correct?

11 **A.** I think that's a fair assessment.

12 **Q.** And let's talk about labor unions. Labor unions were part
13 of the coalition, the Democratic coalition in the State of
14 California, correct?

15 **A.** That's correct.

16 **Q.** And you would agree that there certainly have been a
17 number of moments where labor unions supported the gay and
18 lesbian political position on matters of concern to the
19 community, correct?

20 **A.** I believe a distinction I would want to make is that labor
21 union leaders have supported a variety of issues of concern to
22 the community.

23 **Q.** You can't think of any instance in the last decade where
24 labor unions have opposed the gay or lesbian community,
25 correct?

1 **A.** I cannot think of an instance where labor union leaders
2 have opposed the gay and lesbian community.

3 The reason I'm differentiating these things is
4 there's a difference between a coalition built at the elite
5 level and the mass behavior of voters. So while you could
6 probably show me an endorsement of No On 8 from a particular
7 union, I don't actually know how the rank and file of that
8 union voted in November of 2008.

9 **Q.** And I would like to direct your attention to tab 41. This
10 is a press release produced to us by Equality California. It's
11 dated October 6, 2008. It's DIX-2502.

12 And it says in the first paragraph:

13 "The Unite Here International Union on
14 Saturday made a \$100,000" -- presumably
15 contribution -- "to Equality California's No
16 on Proposition 8 campaign committee and
17 announced its opposition to Prop 8, which
18 eliminates the right of same-sex couples to
19 marry in California."

20 And then turning to the third paragraph it
21 says:

22 "'Endorsing the No On 8 campaign is
23 consistent with the long-held positions of
24 this union,' said Cleve Jones."

25 Do you have any reason to doubt that Mr. Jones's

1 statement that supporting the rights of the gay and lesbian
2 community was consistent with Unite Here, the international
3 union?

4 **A.** I don't. And I'm actually not surprised to see Unite Here
5 endorsing the No On 8 campaign.

6 Unite Here represents both needle trades and hotel
7 and restaurant employees. And gays and lesbians are a somewhat
8 larger percentage of the work force, particularly in the hotel
9 and restaurant employees union, than they are in many other
10 trade unions. So this is not surprising.

11 **Q.** Okay. And then if we turn to the last paragraph, there's
12 a statement by Geoff Kors, and he is the executive director of
13 Equality California, is that right?

14 **A.** That's correct.

15 **Q.** And he states in the second to last sentence of this press
16 release:

17 "This contribution reflects the longstanding
18 relationship the LGBT community has had with
19 our union partners."

20 And that's a fair statement, isn't it?

21 **A.** I presume it's a fair statement of his belief.

22 **Q.** Well it's an accurate statement, is it not?

23 **A.** Once again, I don't know that that's true. I think that
24 it's fair to say that union leadership has been supportive of
25 gay and lesbian causes in the state in recent decades.

1 And Mr. Kors is commenting on that, but you are
2 asking me to say whether or not there is a longstanding
3 relationship between the community and the union's membership,
4 I don't -- I don't really know that.

5 **MR. THOMPSON:** Your Honor, we would move the
6 admission of DIX-2502.

7 **THE COURT:** Very well -- wait a minute, DIX --

8 **MR. THOMPSON:** 2502, your Honor.

9 **THE COURT:** Very well. DIX-2502?

10 **MR. THOMPSON:** Yes, your Honor.

11 (Defendants' Exhibit 2501 received in evidence.)

12 **BY MR. THOMPSON:**

13 **Q.** Now, turning your attention to the next tab, Professor
14 Segura, this is a printout of the union contributions that we
15 pulled off of the California Secretary of State's website.

16 **A.** Uh-huh.

17 **Q.** If we did our math right, there was \$1.7 million worth of
18 contributions by unions to the No On 8 campaign.

19 Do you know of a single union that contributed money
20 to the Yes On 8 campaign?

21 **A.** I do not.

22 **Q.** And does it surprise you that all of the unions that gave
23 were giving to the No On 8 campaign?

24 **A.** When -- you didn't ask me. I don't know if any union gave
25 to the Yes On 8 campaign. I haven't come across that. So it's

1 possible that one has.

2 **Q.** All right.

3 **A.** If I take as a given that all the union contributions went
4 to No On 8, it does not surprise me, given the longstanding
5 relationship between union leadership on the one hand and the
6 gay and lesbian movement on the other.

7 **Q.** All right. Well, now, let's turn your attention to the
8 next tab in your binder. This is a story dated October 26,
9 2008 from the *Sacramento Bee*.

10 And if we look at the last line on the page, the last
11 sentence talks about influential Latinos, including the Los
12 Angeles mayor. And can you help me with the pronunciation,
13 Professor, Antonio?

14 **A.** Villaraigosa.

15 **Q.** That's what I meant to say.

16 "...and leaders of the United
17 Farmworkers Union are spreading the word
18 that Proposition 8 is anti-civil rights."

19 Isn't it true that unions did not confine their
20 support to giving money, but their leadership was also out
21 there actively working to defeat Proposition 8?

22 **A.** That's a blanket statement. I don't know of the actual
23 activities of all the union leaders involved in the State of
24 California. I couldn't speak to that.

25 Were there some union leaders who were active? Yes.

1 Q. Active in opposing Proposition 8?

2 A. That's correct.

3 Q. And you can't identify any union leaders who were actively
4 supporting Proposition 8?

5 A. No, I cannot.

6 Q. If we look at tech companies in California, you would
7 agree that many of the Silicon Valley technology companies
8 express pro-gay positions, correct?

9 A. I think it's fair to say that the Silicon Valley industry
10 has intended to be more pro-civil rights on many dimensions,
11 and this being one of them. I think that's a fair statement.

12 Q. All right. And large corporations in California have a
13 meaningful degree of political power, correct?

14 A. They do, with respect to the issues that concern them.

15 So, for example, we might find that oil companies are
16 particularly influential on environmental regulation, energy,
17 pricing or some form of emissions control and things such as
18 that.

19 Oil companies are not particularly influential on
20 things like kindergarten policy or classroom size, for example.

21 So we don't identify a group as being powerful and
22 then they are powerful in all circumstances across all issues.
23 They are powerful with respect to the issues that concern them.

24 I think it would be fair to say that Silicon Valley
25 firms and large corporations are powerful here, as they are

1 everywhere in the United States, in terms of having lots of
2 lobbyists and making lots of campaign contributions and things
3 such as that.

4 **Q.** And you were not aware of circumstances in which Silicon
5 Valley technology companies have worked against the interests
6 of gays and lesbians, correct?

7 **A.** Again, I don't have an exhaustive list of their political
8 behavior over time. I don't have an example to suggest that
9 they haven't been.

10 **Q.** Okay. Now, let's -- I would like to direct your attention
11 to tab 44, which is the 2006 annual report of the Human Rights
12 Campaign, and the --

13 **A.** I'm beginning to think you are on their mailing list,
14 Mr. Thompson.

15 **Q.** My new favorite website.

16 (Laughter.)

17 **Q.** It's DIX-1328, and it's page 13. I would like to direct
18 your attention to the last bullet point.

19 And tell me when you are there sir.

20 **A.** I'm there.

21 **Q.** It says:

22 "Big businesses, like Microsoft, backed state
23 legislation that would protect GLBT workers.

24 Plus, more and more businesses are supporting

25 fair-minded legislators working to pass

1 important bills for same-sex couples, as Nike
2 did when it backed a civil union's bill in
3 the Oregon legislature in 2006."

4 Do you have any reason to doubt these statements,
5 that Microsoft and Nike and other large corporations actively
6 are working for the rights of the LGBT community?

7 **A.** I would clarify the statement. So there would be a number
8 of objections I would offer.

9 The first is that, again, this is the advocacy
10 organization speaking on how wonderfully effective they are,
11 which is, of course, in their interests in order to maintain
12 their membership and their contribution base.

13 The second is that the statement itself sort of
14 illustrates its internal problem. By saying more and more
15 businesses are supporting fair-minded legislators, what it's
16 suggesting is that there are many businesses that do not.
17 Otherwise, we couldn't have any change. If they are suggesting
18 change, we couldn't have a uniform level of support.

19 The third is that it's not clear to me that each of
20 these organizations are contributing to those legislators
21 because they support same-sex interests. We would want to
22 investigate that.

23 So those would be the things that I would sort of
24 throw in as a caveat.

25 As a general rule, I would not object to the

1 statement that the trend in major businesses has moved from
2 opposition to neutrality to support in a number of instances.
3 I don't have an estimation of what the distribution of that is.

4 **MR. THOMPSON:** Your Honor, we have come to a
5 convenient stopping point. I hate to be the one who looks like
6 a slacker here, always suggesting that we take breaks, but --

7 **THE COURT:** I don't think anyone would make that
8 suggestion.

9 (Laughter.)

10 **MR. THOMPSON:** But if it's --

11 **THE COURT:** Let me ask one question and then you can
12 follow-up, if you like, and then Mr. Boutrous, also. One
13 question or, perhaps, one or two follow-on.

14 Does losing elections or failing to obtain
15 legislation denote political powerlessness to require
16 extraordinary protection against majoritarian political
17 processes?

18 **THE WITNESS:** Losing an individual election, in my
19 view, would not because in the Democratic process someone
20 losses all contests.

21 The initiative process, however, is a little bit
22 different because it is the only circumstance where we put
23 individual rights up to a popular vote.

24 So we have 150 or more instances in a decade and a
25 half where anti-discrimination protections are voted on by the

1 population and overturned, even though the legislature or its
2 city council or county board had granted them.

3 We have uniform passage of constitutional amendments
4 to exclude one group of citizens from a civil institution. And
5 that's extraordinary, in my view.

6 Now, does -- would each individual act by itself be
7 determinative of whether or not there should be judicial
8 intervention? I would say, just as I said to Mr. Thompson,
9 that an outcome by itself is a piece of information, but we
10 would want to know the context in which it passed.

11 So if we look at the passage of a particular bill in
12 the Assembly, if we have the passage of a bill where the
13 majority party votes for it and the minority party votes
14 against it, then we might reasonably expect that should that
15 majority change, we could see a reversal on that. We could
16 contrast that with an outcome which is bipartisan, for example.

17 We can see examples where a legislature passes a bill
18 and the public then files an initiative to overturn it.

19 So I would want to look at the range of events rather
20 than a single event. And in my view when you look at the range
21 of events that have occurred in terms of the, you know, public
22 voting directly on questions of gay and lesbian rights, that
23 their loss rates suggests that longstanding prejudice against
24 gays and lesbians is shaping what their political opportunities
25 are.

1 **THE COURT:** Follow-up, Mr. Thompson?

2 **MR. THOMPSON:** No follow-up, your Honor.

3 **THE COURT:** All right. Very well. Then why don't we
4 break today at this point?

5 How much longer do you have with Professor Segura?

6 **MR. THOMPSON:** I think maybe, you know, an hour and a
7 half more. So it depends on the length of the answers, of
8 course, to some extent.

9 **THE COURT:** Well, perhaps you can do as you have done
10 before and spend some time this evening and hone those
11 questions.

12 **MR. THOMPSON:** I will endeavor to do so, your Honor.

13 **THE COURT:** So we can move along.

14 And with that, who do we expect as our witnesses
15 tomorrow?

16 Mr. Boies?

17 **MR. BOIES:** Your Honor, we are working on that.

18 After this witness completes, we basically, for the completion
19 of our case, have probably two witnesses; Professor Hewitt and
20 Mr. Tam.

21 Professor Hewitt, who was planning to be our next
22 witness, has been ill today and so if he can make it tomorrow,
23 we are going to put him on. Otherwise, we are going to go
24 with -- I may be mispronouncing, it's Herek.

25 **THE COURT:** Herek, yes.

1 **MR. BOIES:** Herek. I'm pronouncing his name wrong.
2 Professor Herek is the one that is ill. If he is available, we
3 would put him on following this witness. Other than that, we
4 would put Mr. Tam on.

5 But those are the two witnesses that we have, and
6 then we have a number of documents to offer before we rest.

7 **THE COURT:** Okay. And after those two witnesses
8 testify, do you plan to present any other live witnesses?

9 **MR. BOIES:** We do not. Those are our two live
10 witnesses that we plan at the present time.

11 There is a possibility that we still may need to call
12 Mr. Prentice to authenticate some materials, or one of the
13 other people to authenticate materials.

14 But the only other live witnesses we would be calling
15 would be just for the purposes of authentication of documents,
16 which we hope we are going to work out without the necessity of
17 calling them.

18 **THE COURT:** I understand that the magistrate judge
19 has, I believe, resolved the matter that was discussed before
20 the break this morning involving some of the documents.

21 Can counsel inform me what that situation is?

22 **MR. BOIES:** I cannot, your Honor, but somebody --

23 **THE COURT:** Mr. McGill, I think you were involved in
24 that proceeding, were you, Mr. McGill?

25 **MR. MCGILL:** Yes, your Honor, I was.

1 The motion to amend the core group order was -- as
2 your Honor indicated, was granted in part and denied in part.
3 And the defendant-intervenors have produced, and we are
4 currently reviewing all of the documents that they were
5 withholding pursuant to that motion to amend that they had
6 made.

7 **THE COURT:** Is it the plaintiffs' intention to
8 introduce some of those documents in their case in chief?

9 **MR. BOIES:** Obviously, your Honor, we are reviewing
10 the documents to see, but it is our intention to introduce some
11 of those, if we can resolve the authentication issues before we
12 rest.

13 **THE COURT:** All right. Well, then, it's -- is it
14 unduly optimistic to think that the plaintiff may rest
15 tomorrow?

16 **MR. BOIES:** Your Honor, I think it would be
17 optimistic. I think it is possible, but I think it would be
18 optimistic.

19 I think it is certain we will rest before the end of
20 the day on Friday, but I think that with -- with the documents
21 that we're still getting and sort of working on parallel
22 tracks, I think it will be challenging to finish tomorrow, but
23 we still think that's a possibility.

24 **THE COURT:** All right. Well, then, that means that
25 under a very optimistic scenario, the defendants may be called

1 upon to begin their case tomorrow; and if not, in all
2 probability on Friday?

3 **MR. THOMPSON:** Yes, your Honor. We'll have Professor
4 Ken Miller ready to go, your Honor. We would expect Friday
5 morning, so.

6 **THE COURT:** Very well. All right.
7 Any housekeeping matters we need to attend to?

8 **MR. BOUTROUS:** Your Honor, just one issue to update
9 the Court on.

10 The magistrate did deny the motion to quash -- deny
11 the motion to quash that was filed by Pastor Garlow and Pastor
12 McPherson. So that was the other issue that he was addressing.

13 **THE COURT:** All right. Well, also, unless that's
14 brought here, that should be the end of that matter.

15 **MR. BOUTROUS:** Thank you, your Honor.

16 **THE COURT:** Very well, counsel. I will see you
17 bright and early tomorrow at 8:30.

18 (Whereupon at 4:34 p.m. further proceedings
19 in the above-entitled cause was adjourned
20 until Thursday, January 21, 2010 at 8:30 a.m.)

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I N D E X

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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, **Kristin M. Perry, et al. vs. Arnold Schwarzenegger, in his official capacity as Governor of California, et al.**, were reported by us, certified shorthand reporters, and were thereafter transcribed under our direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR
U.S. Court Reporter

Wednesday, January 20, 2010