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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 &)
Strategic Planning for the)
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.) Tuesday
) January 26, 2010

TRANSCRIPT OF PROCEEDINGS

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Official Reporters - U.S. District Court

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PROCEEDINGS

JANUARY 26, 2010

8:37 A.M.

THE COURT: Very well. Good morning, counsel.

(Counsel greet the Court.)

THE COURT: Ready to continue your cross-examination of Dr. Miller?

MR. BOIES: I am, Your Honor.

KENNETH MILLER,

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

THE COURT: Very well. Let me remind the witness, you are still under oath.

THE WITNESS: Yes, Your Honor.

THE COURT: You understand the oath you took yesterday applies to this testimony, as well?

THE WITNESS: Yes, Your Honor.

THE COURT: Very well. Proceed, Mr. Boies.

CROSS EXAMINATION RESUMED

BY MR. BOIES:

Q. Good morning, Professor Miller.

A. Good morning, Mr. Boies.

MR. BOIES: As a housekeeping matter, Your Honor, I would offer, at this time, Plaintiffs' Exhibit 794A, which was the index of materials relied on by the witness; that he

1 circled those that he identified as his own, did not circle
2 those that were provided by counsel, and then put question
3 marks about those who he didn't know which was which.

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

5 **THE COURT:** Very well. Let me just see if I
6 understand.

7 The circled ones are the ones that he found?

8 **MR. THOMPSON:** Yes.

9 **THE COURT:** The question marks, he doesn't remember.
10 And the balance were furnished by counsel.

11 **MR. BOIES:** Yes.

12 **THE COURT:** Very well. Thank you.

13 That exhibit will be admitted. It's not marked as --
14 I'll ask the clerk to so mark it.

15 (Plaintiffs' Exhibit 794A received in evidence.)

16 **THE CLERK:** I have the original here, Your Honor.

17 **THE COURT:** Ah, all right.

18 **BY MR. BOIES:**

19 **Q.** Now, at the break, Professor Miller, we were talking about
20 polls. And you said that you might have seen some polls, but
21 you didn't recall. And I had asked you to look at tab 78.

22 Do you recall that?

23 **A.** Uhm, yes. I don't think we actually looked at tab 78.

24 **Q.** I don't think we actually got there.

25 **A.** Okay.

1 Q. But I had asked you to look at it. And I'd ask you to
2 look at it now.

3 A. Okay. I have it here.

4 Q. I'm sorry, say again.

5 A. I have it in the tab here.

6 Q. Now, this is the exit polls that were taken following
7 Proposition 8. Have you seen this before?

8 A. I believe I have seen this, as well as a couple of other
9 exit polls.

10 MR. BOIES: Your Honor, I would offer Plaintiffs'
11 Exhibit 2853.

12 MR. THOMPSON: No objection, Your Honor.

13 THE COURT: That number again, sir?

14 MR. BOIES: 2853.

15 THE COURT: Thank you.

16 (Plaintiffs' Exhibit 2853 received in evidence.)

17 BY MR. BOIES:

18 Q. Now, from looking at the exit polls that you looked at,
19 was it clear to you that people who attended church more often
20 were highly more likely to vote yes on Proposition 8 than other
21 people?

22 A. I'm looking at the exhibit here.

23 Q. My question actually had to do with what your state of
24 mind was. We'll go to the exhibit.

25 A. Okay. I think it's fair, based on a number of surveys

1 that I've seen. I can't remember whether the *Los Angeles Times*
2 poll -- this poll, post-election analysis by Patrick Egan and
3 Ken Sherrill, all informed my view about this.

4 And I think it is fair to say that those who are more
5 frequent attenders of religious services were more in favor of
6 Proposition 8 than other people by a considerable amount.

7 **Q.** And if you turn to page 8, where it talks about "Vote by
8 church attendance" in the middle; do you see that?

9 **A.** Yes.

10 **Q.** And it says that:

11 "The 32 percent of the population that
12 attended church weekly voted yes on
13 Proposition 8 84 percent of the time."

14 Do you see that?

15 **A.** I do see that, yes.

16 **Q.** Is that consistent with your understanding?

17 **A.** I don't know if it would be 84, but it would be a high
18 percentage. That's consistent.

19 **Q.** And everybody else voted no more than they voted yes,
20 correct?

21 **A.** It's broken into three categories. The occasional
22 attenders voted no by a narrow margin. And the people who
23 never attended church, in this poll, was by a large margin.

24 **Q.** Well, now, when you say the people that attended
25 occasionally voted no by a narrow margin, they voted no

1 54 percent of the time, correct?

2 **A.** 54 to 46, is what it says here.

3 **Q.** Yes. And that was a margin that was greater than the
4 final margin, in terms of the actual vote, correct?

5 **A.** The final vote was about 52 to 48.

6 **Q.** So the answer to my question is yes?

7 **A.** Narrowly, yes, yes, that's true.

8 **MR. BOIES:** Now, could we put up the defendants'
9 demonstrative 25.

10 **BY MR. BOIES:**

11 **Q.** While we're doing that, Professor Miller --

12 **A.** Yes.

13 **Q.** -- one of the strong allies of the gay and lesbian
14 community that you identified were labor unions, correct?

15 **A.** That's correct.

16 (Document displayed.)

17 **Q.** Now, did you investigate how members of labor unions
18 actually voted in the Proposition 8 election?

19 **A.** Uhm, I don't recall if I've looked at exit polls that
20 broke it down by union membership. I don't recall what the
21 vote was.

22 **Q.** Well, let's look at page 12, and see if that refreshes
23 your recollection.

24 **A.** All right.

25 **Q.** And do you see the third item down, that breaks people

1 down based on whether they have a union member in the
2 household?

3 **A.** Yes.

4 **Q.** And of the people who had a union member in the household,
5 56 percent voted yes, correct?

6 **A.** According to this poll, that's correct.

7 **Q.** Do you have any reason to doubt that?

8 **A.** I don't have any reason to doubt that. I haven't looked
9 at the methodology of this poll, but I don't have any reason to
10 doubt it.

11 **Q.** And is it consistent with your understanding that a
12 majority of the people with a union member in the household
13 voted in favor of Proposition 8?

14 **A.** This would be evidence to suggest that's the case.

15 **Q.** Do you know of any evidence to suggest that's not the
16 case?

17 **A.** No, I haven't really investigated it closely.

18 **Q.** Uhm, now, let me ask you to look at your demonstrative 25.
19 And this was a list of professional associations that favored
20 gay and lesbian marriage, correct?

21 **A.** Uhm, I can't remember whether I said it was marriage or
22 LGBT rights, but --

23 **Q.** Well, let me ask you, do these professional associations
24 favor gay and lesbian marriage?

25 **A.** At least some associations within these categories did,

1 yes.

2 **Q.** When you were going through this long list of churches and
3 labor unions and professional associations that you said were
4 in favor of gays and lesbians, were you meaning to say that
5 they were in favor of gay and lesbian marriage, or that they
6 were simply in favor of certain gay and lesbian rights?

7 **A.** Uhm, I think most of them that I looked at came from
8 support for the Leno bills in the California legislature, which
9 would have created gender-neutral marriage in California, as
10 well as amicus briefs in *Strauss v. Horton*, or *In Re Marriage*
11 *Cases*, which would have established same-sex marriage in
12 California. So those would have all been in the category of
13 supporters of same-sex marriage.

14 **Q.** And with respect to these associations, I'm not sure I
15 have your testimony.

16 **A.** Okay.

17 **Q.** What is your testimony about these --

18 **A.** I'm confident that there were groups in each of these
19 categories that have supported same-sex marriage.

20 **Q.** Okay. Well, let's go through those categories. First,
21 psychologists. Have you investigated why psychologists and
22 psychologist associations favor same-sex marriage?

23 **A.** Uhm, I don't believe I've read any position statements by
24 them on this. I've just seen they're -- they're being
25 registered as supporters of the legislation or the litigation.

1 Q. So as I understand it, you have seen them be in favor of
2 it, but you haven't investigated why they are in favor; is that
3 fair?

4 A. For psychologists, I have not, no.

5 Q. Let's take psychiatrists. Have you investigated why
6 psychiatrists are in favor and why psychiatrist associations
7 are in favor of same-sex marriage?

8 A. No, I have not.

9 Q. Let's take something closer to home. University
10 professors. Have you investigated why university professors
11 and university professor associations are in favor of same-sex
12 marriage?

13 A. Uhm, I would -- there's -- I think there's an actual
14 support by the California State Faculty association. I haven't
15 read that.

16 I can say, based on my own experience as a university
17 professor and somebody in that arena, that for the most part I
18 think it would go to the norm of fairness that would be an
19 important consideration for many university professors.

20 Q. Now, legal organizations, have you investigated why legal
21 organizations support same-sex marriage?

22 A. I don't know if I've -- if I've read any position papers.
23 But, again, I would say it would be, probably, for the same
24 reason, a commitment to the norm of fairness and equality.

25 Q. Let me ask you to look at tab 103.

1 Now, this is a Gallup News Service poll, dated
2 February 20, 2007. And it's Defendants' Exhibit 271. Have you
3 reviewed this document?

4 **A.** I believe this is one of the polls that I reviewed, but I
5 can't recall, actually.

6 **MR. BOIES:** Your Honor, I would offer Defendants'
7 Exhibit 271.

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

9 **THE COURT:** Very well. 271 is admitted.

10 (Plaintiffs' Exhibit 271 received in evidence.)

11 **BY MR. BOIES:**

12 **Q.** Now, this poll, on the first and second page, talks about
13 a question that was asked during the last presidential
14 election, correct, sir?

15 **A.** I'm just reading the question now. Okay. I have the
16 question here, yes.

17 **Q.** And people were asked whether if their party nominated a
18 well-qualified person for president, would they vote for that
19 person if that person had certain characteristics, correct?

20 **A.** Yes.

21 **Q.** And respondents, 95 percent of them said that if a
22 qualified Catholic was nominated they would vote for them,
23 correct?

24 **A.** That's what the poll says, yes.

25 **Q.** And do you have any reason to doubt those results?

1 A. No.

2 Q. And the poll says that if a African American was
3 nominated, who was well-qualified, 94 percent would vote for
4 him or her, correct?

5 A. Yes, I see that figure.

6 Q. And 92 percent would vote for a qualified Jewish
7 candidate, and 88 percent would vote for a qualified woman
8 candidate. Correct?

9 A. I see those figures, yes, correct.

10 Q. And 87 percent would vote for a qualified Hispanic
11 candidate, correct?

12 A. I see that, yes.

13 Q. And 72 percent would vote for a qualified Mormon
14 candidate, correct?

15 A. Uhm, yes, I see that.

16 Q. 67 percent would vote for a qualified candidate who had
17 been married for the third time, correct?

18 (Laughter)

19 A. That's what the poll says.

20 (Laughter)

21 Q. 57 percent would vote for somebody who was 72 years of
22 age, if he was well-qualified, correct?

23 A. Yes.

24 Q. But only 55 percent would vote for a well-qualified person
25 who was a homosexual, correct, sir?

1 A. Uhm, yes. It's very close to the 72-year-old person.

2 Q. Yes. And 40 points below a Catholic, right?

3 A. According to this poll, yes.

4 Q. And 39 percent below a black or African American, correct?

5 A. Yes. And 10 percent above an atheist.

6 Q. Yes. So does that tell you something about the extent to
7 which there's discrimination and stereotyping and prejudice
8 against homosexuals in this country? Yes or no, sir?

9 A. It's a data point. It's a data point.

10 Q. Is that a yes?

11 A. It tells me something. It's one data point I would want
12 to investigate further, certainly.

13 Q. You don't have any reason to doubt the results of these,
14 do you?

15 A. I haven't looked at the methodology, but I don't have any
16 reason to doubt the findings.

17 Q. And in your investigation of whether there was prejudice
18 against gays and lesbians, and whether gays and lesbians had
19 political power, did you investigate polls like this?

20 A. I did look at some polls, yes.

21 Q. Let me turn back to the subject of initiatives, and ask
22 you to look at tab 84. And you said that one of the things
23 that you had looked at were materials from the Human Rights
24 Campaign. Am I correct about that?

25 A. That's correct.

1 Q. And this is Plaintiffs' Exhibit 2859. Is that correct?

2 A. Yes.

3 Q. And did you look at this document from the Human Rights
4 Campaign?

5 A. Let me take a look. I may have. I don't recall.

6 MR. BOIES: Your Honor, I would offer Plaintiffs'
7 Exhibit 2859.

8 MR. THOMPSON: No objection, Your Honor.

9 THE COURT: Very well. 2859 is admitted.

10 (Plaintiffs' Exhibit 2859 received in evidence.)

11 BY MR. BOIES:

12 Q. Let me ask you to look at page 5, first paragraph. It
13 says there:

14 "A fundamental American value holds that
15 people who do their jobs, pay their taxes,
16 and contribute to their communities should
17 not be singled out for unfair discrimination.
18 But federal law fails to extend this basic
19 fairness to untold millions of Americans
20 across this country who happen to be lesbian
21 or gay. They are fired from their jobs,
22 refused work, paid less, and otherwise
23 discriminated against in the workplace, with
24 no protection under federal law."

25 Do you see that, sir?

1 **A.** Yes, I do.

2 **Q.** Do you have any reason to disagree with that?

3 **A.** Let me take another look at it, please.

4 (Witness reading.)

5 Well, the last sentence beginning with "they," I have
6 no idea what they mean with respect -- the author means with
7 respect to how many.

8 The prior sentence says that untold millions across
9 this country, who happen to be lesbian or gay, are not covered
10 by federal law for employment discrimination. That's currently
11 the case. At least until the ENDA law is passed by Congress,
12 if so. But there's no indication from this paragraph as to how
13 many are fired from their job on the basis of their sexual
14 orientation.

15 **Q.** Okay. Let's break that up, sir.

16 **A.** Okay.

17 **Q.** First, you do agree that there are some gays and lesbians
18 who are fired from their jobs, refused work, paid less, and
19 otherwise discriminated against in the workplace because of
20 their sexual orientation? You would agree with that, correct?

21 **A.** I have no reason to disagree with that. I expect that's
22 the case, yes.

23 **Q.** Well, not only do you expect that is the case, but in
24 terms of your investigation of gay and lesbian discrimination
25 and political power, you have found out that that's the case,

1 correct?

2 **A.** Well, I'm aware that there are lawsuits,
3 antidiscrimination suits, in many states. And so, on that
4 basis, I can say that it is the case that there is
5 discrimination on the basis of sexual orientation in the
6 workplace.

7 **Q.** And have you investigated how many gays and lesbians are
8 fired from their jobs, refused work, paid less, and otherwise
9 discriminated against in the workplace simply because they are
10 gay or lesbian? Have you investigated that?

11 **A.** The total number, no, I have not.

12 **Q.** The approximate number, have you looked at that?

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

14 **Q.** Have you tried to find out whether that number is large or
15 small?

16 **A.** I assume it's a substantial number. I haven't looked at
17 the specific numbers.

18 **Q.** Okay. Let me ask you to turn to the next page. The first
19 paragraph says:

20 "Anti-gay discrimination in the American
21 workplace knows few bounds. As the 130-plus
22 cases presented here show, anti-gay
23 discrimination occurs in every region of the
24 country, in large cities and small towns, on
25 factory floors and in restaurant dining

1 rooms."

2 Do you see that?

3 **A.** I see that, yes.

4 **Q.** And the first sentence of the next paragraph:

5 "Anti-gay discrimination often means enduring

6 daily harassment, including name calling,

7 humiliation and physical threats from

8 co-workers and bosses alike."

9 Do you see that?

10 **A.** I do.

11 **Q.** And based on the work that you've done, investigating
12 discrimination against gays and lesbians and their political
13 power, did you find that anti-gay discrimination often means
14 enduring daily harassment, including name calling, humiliation
15 and physical threats from co-workers and bosses alike?

16 **A.** I have no reason to doubt that.

17 **Q.** Okay. Let me ask you next to look at tab 30.

18 **A.** Okay.

19 **Q.** This is Plaintiffs' Exhibit 874. And it's a publication
20 of the California Safe Schools Coalition.

21 Have seen this document before?

22 **A.** I may have. I don't recall it, actually.

23 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
24 Exhibit 874.

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

1 **THE COURT:** Very well. 874 is in.

2 (Plaintiffs' Exhibit 874 received in evidence.)

3 **BY MR. BOIES:**

4 **Q.** Are you familiar with the California Safe Schools
5 Coalition, sir?

6 **A.** I actually don't recall learning anything about that
7 coalition.

8 **Q.** Are you familiar with the 4H Center for Youth Development
9 at the University of California Davis?

10 **A.** Again, I don't recall that organization.

11 **Q.** This says it's a summary fact sheet from a report by the
12 California Safe Schools Coalition and the 4H Center for Youth
13 Development at the University of California Davis. Do you see
14 that?

15 **A.** Can you direct me to where that is. I'm sorry.

16 **Q.** Right at the top.

17 **A.** 34, tab 34?

18 **Q.** Tab 30.

19 **A.** Oh, I'm sorry.

20 **Q.** Do you have tab 30?

21 **A.** I do. So I didn't have that in front of me before.

22 **Q.** Okay. And this is a publication from the California Safe
23 Schools Coalition, correct?

24 **A.** Correct.

25 **Q.** And I know that you said that you don't remember whether

1 or not you have seen this before, but let me direct your
2 attention, on the first page, under "Key Findings."

3 **A.** Yes.

4 **Q.** And the first one says:

5 "Harassment and bullying based on actual or
6 perceived sexual orientation are pervasive."

7 Do you see that?

8 **A.** I see that sentence, yeah.

9 **Q.** And the next sentence says:

10 "7.5 percent of California students reported
11 being harassed on the basis of actual or
12 perceived sexual orientation. That
13 translates to over 200,000 middle school and
14 high school students harassed every year."

15 Do you see that?

16 **A.** I do.

17 **Q.** Do you have any reason to disagree with that?

18 **A.** I don't have any basis for knowing one way or the other.

19 **Q.** Did you investigate that --

20 **A.** Uhm --

21 **Q.** -- as part of what you did?

22 **A.** In terms of harassment in schools?

23 **Q.** Yes.

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

25 **Q.** The next sentence says:

1 "Harassment based on actual or perceived
2 sexual orientation has dangerous consequences
3 for students."

4 Do you see that?

5 **A.** I do.

6 **Q.** Do you have any reason to disagree with that?

7 **A.** No.

8 **Q.** Okay. Let me now turn to tab 89. And you will recall
9 that this is Plaintiffs' Exhibit 2864, which was an amicus
10 brief submitted by Professors Eskridge and Cain, who you have
11 previously identified.

12 **A.** Yes.

13 **Q.** And I would like to direct your attention to page 17. And
14 I want to direct your attention to the material at the very top
15 of the page 17. Take a moment, though, to familiarize yourself
16 with the context.

17 **A.** This will take just a moment.

18 **Q.** When you've finished, let me know.

19 **A.** Okay. I have read the paragraph.

20 **Q.** Okay. And the portion that I'm interested in is at the
21 top of page 17, where Professors Eskridge and Cain say:

22 "Many prejudice voters favor any measure that
23 harms or excludes lesbians, gay men,
24 bisexuals, or transgender persons. And even
25 moderate voters are reluctant, because of the

1 anti-gay stereotypes, for example, quote,
2 predatory homosexuals, closed quote, to,
3 quote, recruit, closed quote, vulnerable
4 children and destroy traditional families
5 that the state long built into its public
6 education and state policy."

7 Do you see that?

8 **A.** I do.

9 **Q.** Do you have any reason to doubt that?

10 **A.** That's a compound sentence, so I would like to break it
11 down.

12 **Q.** Okay. Well, let's take it piece by piece.

13 First, do you believe that there are anti-gay
14 stereotypes that relate to gays being, quote, predatory
15 homosexuals who, quote, recruit vulnerable children?

16 **A.** I know at least at some time there has been these
17 stereotypes. I don't know the extent to which. So I believe
18 that those stereotypes do exist, yes.

19 **Q.** And have you investigated the extent to which those
20 stereotypes exist?

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

22 **Q.** And is there also an anti-gay stereotype that homosexuals
23 will destroy traditional families, in your view, sir?

24 **A.** Well, I -- yeah --

25 **Q.** I'm just asking for your view.

1 A. I understand. This is a little bit different than the
2 first one, it seems to me.

3 Q. Simple question. Do you --

4 A. Well --

5 Q. -- believe --

6 A. Right.

7 Q. Based on the investigation that you have done, do you
8 believe --

9 A. I believe there's a view that homosexuals may certainly
10 undermine traditional families.

11 Q. Okay. Now, do you believe that those anti-gay stereotypes
12 that you just identified affect some voters, and affected some
13 voters who voted in favor of Proposition 8?

14 A. Let me go back. I didn't say -- I don't think I said the
15 second one was a stereotype. I think the -- I said the second
16 one was there's a view that homosexuals will undermine -- if
17 certain events occur with respect to the recognition of
18 same-sex marriage, that that would undermine traditional
19 families.

20 Q. Do you believe, sir, that there's a stereotype --
21 leaving -- leaving same-sex marriage aside, okay.

22 A. Well, I just don't want to conflate --

23 (Simultaneous colloquy.)

24 Q. Listen to the question, please, sir.

25 A. All right.

1 Q. Do you believe that -- leaving same-sex marriage aside --
2 there is a stereotype, using "stereotype" in the way that
3 you've used that term, okay --

4 A. Right.

5 Q. -- that homosexuals undermine traditional families?

6 A. I just don't want to conflate the two.

7 Q. Nobody is asking you to conflate the two. I'm asking a
8 simple question.

9 A. About same-sex marriage?

10 Q. No, not about same-sex marriage. I said "leaving same-sex
11 marriage aside." Okay. Leaving same-sex marriage aside.

12 Do you believe that there's an anti-gay stereotype
13 that homosexuals undermine traditional families, even if we
14 didn't have a same-sex marriage issue? Based on your
15 investigation, do you believe that?

16 A. I don't know.

17 Q. You don't know?

18 A. I don't know.

19 Q. Okay. Let's deal with the anti-gay stereotypes that you
20 do know, stereotypes that there are predatory homosexuals who
21 recruit vulnerable children.

22 A. Yes.

23 Q. Do you think that led somebody, some people, some number
24 of people, to vote for Proposition 8?

25 A. Possibly so.

1 Q. Possibly so, sir?

2 A. Again, when we talk about the polls on Proposition 8 --

3 Q. I'm not asking for the polls. I'm asking for your opinion
4 as an expert. Do you understand that?

5 A. Yeah.

6 Q. Okay. You came in here saying that you were an expert,
7 and that you had done a study of gay and lesbian political
8 power, and discrimination against gays and lesbians, and
9 whether that was occurring. Correct?

10 A. Yes.

11 Q. Now, in connection with that, did you reach a conclusion
12 as to whether anti-gay stereotypes, including the anti-gay
13 stereotypes that there were predatory homosexuals recruiting
14 vulnerable children, affected some of the voters who voted in
15 favor of Proposition 8?

16 A. My view is that at least some people voted for
17 Proposition 8 on the basis of anti-gay stereotypes and
18 prejudice.

19 Q. Okay. Now, what proportion of the people who voted for
20 Proposition 8 did so based on anti-gay stereotypes and
21 prejudice?

22 A. That's what I cannot tell you. And I have seen no poll
23 that would give me that information.

24 Q. Have you done any investigation that would permit you to
25 make any kind of approximation of that?

1 A. No, and I don't know anyone who has.

2 Q. Okay. Let me ask you, now, to turn to tab 82. And this
3 is the chapter in the book *Dangerous Democracy*, that you and
4 Professor Cain wrote.

5 A. Yes.

6 Q. And let me ask you to look, first, at page 50.

7 And under the heading "Minority Rights" --

8 A. Yes.

9 Q. -- you write:

10 "One also can expect the initiative process
11 to produce different outcomes than the
12 legislative process will, in the areas of
13 protecting minority rights and promoting
14 minority interests."

15 Do you see that?

16 A. Yes, I do.

17 Q. And then you identify several reasons why that is so,
18 correct?

19 A. Take a minute to read this.

20 (Reading) Okay.

21 Q. Now, if you would turn to page 52. And I'm going to ask
22 you about the first full paragraph there.

23 A. Yes.

24 Q. And this refers to a study that you did of what you
25 referred to as three high-use initiative states, Oregon,

1 Colorado, and California, correct?

2 **A.** Yes.

3 **Q.** And this was a study that covered the prior 40 years,
4 correct?

5 **A.** Yes, this was a 1999 study I did.

6 **Q.** And it covered the 40 years preceding 1999, correct?

7 **A.** It was 1960 to '99, something like that, yes.

8 **Q.** 39 years?

9 **A.** 39 years.

10 **Q.** Okay. You describe it as covering the past four decades,
11 correct?

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

13 **Q.** And let me direct your attention to the middle of that
14 paragraph, where you say: "The problem, however." Do you see
15 that?

16 **A.** Yes.

17 **Q.** (As read)

18 "The problem, however" -- you write-- "is
19 that initiatives that directly and
20 differentially affect minorities can easily
21 tap into a strain of anti-minority sentiment
22 in the electorate. The initiatives from the
23 three states in this category" --

24 **UNIDENTIFIED MEMBER OF THE AUDIENCE:** Before I leave,
25 return the family to Jesus (inaudible).

1 **THE COURT:** Carry on, Mr. Boies.

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

3 **BY MR. BOIES:**

4 **Q.** You write:

5 "The problem, however, is that initiatives
6 that directly and differentially affect
7 minorities, can easily tap into a strain of
8 anti-minority sentiment in the electorate."

9 Do you see that?

10 **A.** Yes, I do.

11 **Q.** You then go on to say:

12 "The initiatives from the three states in
13 this category sought to ban state efforts to
14 prevent, quote, private, closed quote, racial
15 discrimination in housing, restrict busing to
16 desegregate public schools, restrict state
17 efforts to protect the rights of homosexuals,
18 establish English as the state's official
19 language, restrict illegal immigration, ban
20 state affirmative action for women and
21 minorities, and restrict bilingual
22 education."

23 And was that an accurate description of the
24 initiatives that you had studied?

25 **A.** Yes. I also said, though, that:

1 "These initiatives should not be too easily
2 caricatured as majority efforts to tyrannize
3 minorities."

4 **Q.** Well, let's just look at that. What you said, you did
5 have -- that was not a complete sentence, was it, that you --

6 (Simultaneous colloquy.)

7 **A.** ... some posed that danger, right.

8 **Q.** Yes, exactly.

9 **A.** Right.

10 **Q.** You said:

11 "These initiatives should not be too easily
12 caricatured as majority efforts to tyrannize
13 minorities; although, many of them at least
14 presented that danger."

15 Correct, sir?

16 **A.** That's what the sentence says, yes.

17 **Q.** And after that you wrote what we just described, correct?

18 "The problem, however" --

19 (Simultaneous colloquy.)

20 **Q.** (As read)

21 "... differentially affect minorities can
22 easily tap into a strain of anti-minority
23 sentiment in the electorate."

24 You wrote that, correct?

25 **A.** There's an intervening sentence.

1 Q. Yes, there is. You wrote, "The problem, however, is that
2 initiatives," et cetera, correct? And then you give some
3 examples of that. Am I correct?

4 A. Before that, I wrote:

5 "Some of the measures, e.g. shifting from a
6 policy of bilingual education, English
7 emersion, arguably represented bona fide, if
8 controversial, efforts to promote the
9 interests of minorities, and enjoyed some
10 support in affected minority communities."

11 Q. Yes. And immediately after that, what you say is that
12 some of the measures represented that. And then you went on to
13 say, "The problem however ..." And you were talking about the
14 problem with these initiatives, correct, sir?

15 A. Yes, I'm wrestling with this question in this paragraph,
16 yes.

17 Q. Well, it was your paragraph, correct?

18 A. It was. Well, I was a coauthor. I can't claim it all
19 myself.

20 Q. No, but you don't reject this; do you, sir?

21 A. I do now.

22 Q. You do now, yes. Testifying as an expert for the
23 defendant, you do now.

24 A. No. In my book that I published last year, I have a
25 different analysis of this issue.

1 Q. In your book, you never said this was wrong, did you, sir?
2 The book you published in 2009, you never said this was wrong,
3 did you?

4 A. It's a totally different analysis of this issue.

5 Q. You've never said this was wrong. Yes or no, did you ever
6 say this was wrong?

7 A. Did I ever say that this prior paragraph was wrong in my
8 book?

9 Q. Yes.

10 A. No, I gave a different analysis.

11 Q. Did you ever say it was wrong? That's a yes or no
12 question.

13 A. Not in those words, no.

14 Q. Did you ever say it was inaccurate?

15 A. Not in those words.

16 Q. Okay. Now, I'm just asking now for your present view,
17 okay. You were describing in this paragraph the four-decade
18 study of initiatives in three high-use initiative states.

19 Do you believe that your description here is
20 inaccurate, as far as that study was concerned?

21 A. I think I would cast it somewhat differently.

22 Q. I'm sure you would. But that's not my question. Okay.

23 You were purporting here --

24 A. Yes.

25 Q. -- to describe the results of a survey that you did,

1 correct?

2 **A.** Yes, that's correct.

3 **Q.** Do you believe that you described the results of the
4 survey that you did accurately?

5 **A.** I think incompletely.

6 **Q.** Incompletely.

7 Well, let's -- let's take it one step at a time.
8 When you say, "The problem is that initiatives directly and
9 differentially" or "can directly and differentially affect
10 minorities," do you believe that that is true?

11 **A.** Yes, I do.

12 **Q.** Okay. And do you believe that initiatives that directly
13 and differentially affect minorities can easily tap into a
14 strain of anti-minority sentiment in the electorate? Do you
15 believe that?

16 **A.** I think on occasion that can occur.

17 **Q.** Okay. And do you believe that that has occurred?

18 **A.** I do.

19 **Q.** Okay. And is it the case that you still believe that the
20 initiatives that you've studied in this category -- let me ask
21 you, when you say the initiatives from the three states in this
22 category, you're talking about the category of initiatives that
23 directly and differentially affect minorities and that tap into
24 a strain of anti-minority sentiment in the electorate, right?

25 **A.** Yes.

1 Q. And you give examples of initiatives that directly and
2 differentially affect minorities that tap into a strain of
3 anti-minority sentiment, correct, sir?

4 A. Yes, that's correct.

5 Q. And the initiative examples that you give of that kind
6 include initiatives to restrict state efforts to protect the
7 rights of homosexuals, correct?

8 A. Among several others, yes.

9 Q. Yes, among several others. I didn't in any way mean to
10 imply that was the only minority that was suffering here.

11 You then go on to say:

12 "By contrast, no voter-approved initiatives
13 in those states during that period" of 40
14 years "expressly expanded the rights of
15 minorities."

16 Do you see that?

17 A. Yes, I do.

18 Q. Was that an accurate statement, sir?

19 A. I don't have any reason to disagree with that, at this
20 point, no.

21 Q. Okay. Let me ask you to look at page 42. And let me ask
22 you to look at the very last sentence there, where you write:

23 "Initiative government leads to a higher
24 level of policy responsiveness to the median
25 statewide voters. But it produces biases

1 against individual and minority rights;
2 precisely what the checks and balances system
3 was meant to protect."

4 Do you see that?

5 **A.** Yes, I do.

6 **Q.** When you refer there to the "median statewide voters,"
7 what are you referring to?

8 **A.** This is a political science term. If you look at the
9 electorate and you look at the opinion, the public opinion of
10 the electorate on a distribution, the median is the --
11 basically, the opinion in the center of that curve.

12 **Q.** Let's -- let's look next at tab 35. And this is your
13 *Santa Clara Law Review* article, correct?

14 **A.** I'm getting there.

15 **THE COURT:** Is this already in evidence?

16 **MR. BOIES:** It is, Your Honor.

17 **THE COURT:** Yes.

18 **THE WITNESS:** Yes, it is.

19 **BY MR. BOIES:**

20 **Q.** And I'd like to ask you about some passages here that
21 relate to the same subject that we were talking about, which is
22 the relationship of initiatives to undermining protections for
23 minorities.

24 And I'd like to begin on page 8. In the first full
25 paragraph, the next to the last sentence is what I'm primarily

1 interested in. But, for context, the immediately-preceding
2 sentence says:

3 "First, the process of Populist-oriented
4 initiative lawmaking is not necessarily,
5 quote, more democratic, closed quote, than
6 the representative system, if one conceives
7 of, quote, democracy, closed quote, as not
8 just, quote, majority rule, closed quote, but
9 instead a process that includes a range of
10 democratic norms."

11 You then go on to say:

12 "Second, the substance of Populist-oriented
13 initiative lawmaking tends to undermine
14 representative government and impose
15 majoritarian values at the expense of
16 minority rights."

17 Do you see that?

18 **A.** I see that.

19 **Q.** What did you mean in that sentence by "majoritarian
20 values"?

21 **A.** I assume what I meant was the viewpoint of the majority of
22 the voters participating in the election.

23 **Q.** Let me ask you to look, next, at page 12 of this article.
24 At the bottom of the page.

25 **A.** Yes.

1 Q. Where you write, quote:

2 "All of these consequences of the Populist
3 triumph -- the threats to minority rights,
4 the pressure on the courts and the
5 undermining of representative government --
6 are disturbing to commentators from a range
7 of political persuasions who admire the
8 progressive conception of state government."

9 And when you referred to "commentators from a range
10 of political persuasions," did you have any particular
11 commentators in mind?

12 A. Let me think. Certainly, most critics of the initiative
13 process today come from the left. Early on, in the progressive
14 era, most critics of the initiative process came from the
15 right. For example, William Howard Taft was an early critic of
16 the initiative process.

17 And this is what I've called the Madisonian kind of
18 critique of the initiative process, and this was the framework
19 I was using during this period.

20 Q. Indeed, if you turn to page 33 of your article --

21 A. Let's see.

22 Q. -- at the bottom of the page, this is at footnote 65, you
23 write, quote:

24 "Direct democracy's threat to minority rights
25 is, of course, one of the primary reasons

1 Madison and most of the other Founders
2 favored a representative system replete with
3 checks and balances. See generally James
4 Madison, Alexander Hamilton & John Jay -- the
5 Federalist Papers."

6 And that's what you were referring to a moment ago,
7 when you talked about the Madisonian analysis that you were
8 pursuing at this time; is that correct?

9 **A.** Usually focused on the Federalist Papers. And that's the
10 Madisonian analysis I was using as a critique to pure or direct
11 democracy, and the disadvantages of that system during that
12 period of my -- when I was in graduate school, yes.

13 **Q.** Are you familiar with the Federalist Society?

14 **A.** Yes, I am.

15 **Q.** And would you consider the Federalist Society, in your
16 terms, a left organization?

17 **A.** No.

18 **Q.** Okay. You'd consider it a right organization, correct, in
19 the left/right spectrum?

20 **A.** I don't know if I'm the real expert on that in the
21 courtroom, but I would say probably so.

22 **Q.** Okay. Now, let me ask you to look at page 11 of this
23 article. And I'm interested in the third sentence of the first
24 full paragraph there. But just so that you have the context,
25 I'll read the first two sentences. You write:

1 "With respect to the second substantive
2 concern, minority rights, it is clear that
3 the direct initiative can be and has been
4 used to disadvantage minorities. The checks
5 and balances system of representative
6 government is designed to harmonize minority
7 rule with protection of minority rights."

8 **A.** I think you meant majority rule with minority rights.

9 **Q.** I did. And let me just read that, to be clear. And then
10 let me take them one sentence at a time. First you write:

11 "With respect to the second substantive
12 concern, minority rights, it is clear that
13 the direct initiative can be and has been
14 used to disadvantage minorities."

15 That's what you wrote, correct?

16 **A.** That's correct.

17 **Q.** And you believe that today, correct, sir?

18 **A.** I do.

19 **Q.** And then you next write:

20 "The checks and balances system of
21 representative government is designed to
22 harmonize majority rule with protection of
23 minority rights."

24 And you wrote that at the time, correct?

25 **A.** I did.

1 Q. And you believe that today, correct?

2 A. Yes, I do.

3 Q. You then write:

4 "In contrast, the direct initiative system by
5 bypassing checks and balances, is weighted
6 heavily towards majority rule at the expense
7 of certain minorities. Racial minorities,
8 illegal immigrants, homosexuals, and criminal
9 defendants have been exposed to the
10 electorate's momentary passions as
11 Californians have adopted a large number of
12 initiatives that represent Populist backlash
13 against representative governments' efforts
14 to protect or promote the interests of racial
15 or other minorities."

16 Do you see that?

17 A. I do.

18 Q. And after your reference to homosexuals in that statement,
19 you have a footnote 68, correct?

20 A. Yes, I do.

21 Q. Now, if you turn to page 34, you'll see footnote 68. And
22 you say:

23 "The recent example is Proposition 22 of
24 2000."

25 Do you see that?

1 A. Yes, I do.

2 Q. Now, was Proposition 22 of 2000 -- were you saying here
3 that Proposition 22 of 2000 was an example of the direct
4 initiative system bypassing checks and balances at the expense
5 of certain minorities? Is that what you were saying here, sir?

6 A. That's what the footnote indicates.

7 Q. Okay. Now, let me ask you to look at your deposition.

8 A. The footnote is factually incorrect, however. It says
9 that "Proposition 22 constitutionalizes the state ban on
10 same-sex marriages," which it did not.

11 So I would say that the footnote is both factually
12 and analytically incorrect.

13 Q. Well, let me just be sure I understand what you're saying.
14 Obviously, Proposition 22 was a statutory --

15 A. That's correct.

16 Q. -- not a constitutional thing. And you got that wrong,
17 you're saying?

18 A. I did.

19 Q. Okay. But, nevertheless, regardless of whether you got it
20 wrong whether it was a statute or a constitutional amendment,
21 what you were saying here is that Proposition 22 was an example
22 of the direct initiative system bypassing checks and balances
23 at the expense of certain minorities, in this case the
24 homosexual minority. That's what you were saying here,
25 correct, sir?

1 A. That's what I wrote at the time. I no longer believe
2 that.

3 Q. You no longer believe that. Well, sir, let's see about
4 that. Look at your deposition, page 162. It's at tab 1. Page
5 162, lines 22 to 25.

6 A. Almost there.

7 Q. Now, first, your deposition was taken in December of 2009,
8 correct?

9 A. Yes.

10 Q. Okay. And this was after you wrote your book, correct,
11 sir?

12 A. Yes.

13 Q. Your most recent book, the one that you're referring to?

14 A. Yes.

15 Q. And you were asked:

16 "QUESTION: Do you agree that the direct
17 initiative can be and has been used to
18 disadvantage minorities?

19 "ANSWER: I believe that's a fair
20 interpretation of the history of the
21 initiative process."

22 Did you give that testimony under oath on December 9,
23 2009?

24 A. Yes. And I would say the same thing today.

25 Q. Thank you.

1 Now, let me ask you to turn to tab 80. And this is a
2 article that you wrote in the *Seattle University Law Review*,
3 that is Plaintiffs' Exhibit 2855, correct, sir?

4 **A.** Tab 8?

5 **Q.** Tab 80, eight zero.

6 **A.** Eight zero. Sorry. Okay. I have the article.

7 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
8 Exhibit 2855.

9 **MR. THOMPSON:** 2856?

10 **MR. BOIES:** 2855.

11 **MR. THOMPSON:** Oh, okay. No objection.

12 **THE COURT:** Very well. 2855 is in.

13 (Plaintiffs' Exhibit 2855 received in evidence.)

14 **BY MR. BOIES:**

15 **Q.** Let me ask you to look at the bottom of page 6. And here
16 you write:

17 "At times, government efforts to assist
18 minorities has stirred resentment, which in
19 turn has fueled counter-efforts to
20 reestablish and reinforce majoritarian
21 interests. At the state level, the
22 initiative process has provided a convenient
23 vehicle for repealing or preempting
24 representative government's efforts to assist
25 minorities. In some states, such as

1 California and Colorado, voters have approved
2 a steady stream of such initiatives in recent
3 decades, nearly all of which have been
4 challenged in court."

5 Do you see that?

6 **A.** Yes, I do.

7 **Q.** And was that based, in part, on the four-decade study of
8 initiatives in Oregon, Colorado, and California, that you have
9 referred to previously?

10 **A.** Yes.

11 **Q.** In the next paragraph -- I'm primarily interested in the
12 third sentence, but, if you wish, I can read the first two
13 sentences for context. The third sentence says:

14 "In the American system, courts have long
15 assumed responsibility for protecting racial
16 and certain other 'discreet and insular'
17 minorities, especially when prejudice against
18 them 'tends seriously to curtail the
19 operation of those political processes
20 ordinarily to be relied on to protect
21 minorities.'"

22 Do you see that?

23 **A.** Yes.

24 **Q.** And then you go on to say:

25 "When an initiative affects a minority thus

1 protected, it is predictable that after the
2 election the measure's opponents will
3 petition the courts to strike it down. This
4 conflict between the initiative system's
5 tendency to produce measures directed at
6 protected minorities, and the courts'
7 commitment to strictly scrutinize such
8 measures, naturally generates litigation."
9 Do you see that?

10 **A.** Yes, I do.

11 **Q.** Now, when you referred to "the operation of those
12 political processes ordinarily to be relied on to protect
13 minorities" -- do you see that?

14 **A.** Let me take a look, again.

15 **Q.** It's in the sentence where you say --

16 **A.** Yeah.

17 **Q.** (As read)

18 "In the American system, courts have long
19 assumed responsibility for protecting racial
20 and certain other discreet and insular
21 minorities, especially when prejudice against
22 them tends seriously to curtail the operation
23 of those political processes ordinarily to be
24 relied on to protect those minorities."

25 Do you see that? First question --

1 A. Yes.

2 Q. Do you see where we're --

3 A. Yes, I do.

4 Q. Now, my question is, when you refer to "those political
5 processes ordinarily to be relied on to protect minorities,"
6 what political processes are you referring to?

7 A. My understanding of this quote, coming from, as I
8 recall --

9 Q. This quote that you wrote?

10 A. Yeah. I'm quoting somebody else, though, which is Justice
11 Stone --

12 Q. Well, you have --

13 A. -- I believe.

14 Q. -- included a quote from Justice Stone within your
15 sentence, correct?

16 A. Right. That's correct.

17 Q. Now, what is your understanding of those political
18 processes ordinarily to be relied on to protect minorities?

19 A. I think he's referring to the democratic processes.

20 Q. Which democratic processes?

21 A. Legislatures. That's -- I think that's what he's
22 referring to, is the legislative process.

23 Q. Okay. Now, let me ask you to look at tab 35, page 12.

24 And was it accurate, in 2001, to say that:

25 "In California, over the past four

1 decades" --

2 **A.** I'm sorry. Can you direct me to where you're -- I find
3 the sentence, yeah.

4 **Q.** (As read)

5 "In California, over the past four decades,
6 approximately two-thirds of all
7 voter-approved initiatives have been
8 challenged in court, and of those, nearly
9 half have been invalidated in part or in
10 their entirety."

11 Was that an accurate statement, sir?

12 **A.** Many of those didn't involve minority-rights issues, but
13 that's an accurate statement.

14 **Q.** Well, let's go on to what you write here. You say:

15 "In California and other states, challenge
16 and invalidation rates vary by subject
17 matter."

18 Correct?

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

20 **Q.** Which is the point you just made, that some of these
21 related to minority rights, and some didn't.

22 You then go on to say:

23 "Populist-oriented initiatives that affect
24 unpopular minorities or undermine
25 representative government are frequently

1 challenged and sometimes invalidated."

2 Correct?

3 **A.** That's correct.

4 **Q.** And then you say:

5 "By contrast, initiatives that seek to
6 protect the environment (a fairly common
7 initiative type) rarely face trouble in the
8 courts."

9 Correct?

10 **A.** Correct.

11 **Q.** Now, let me ask you to look at tab 80. This is your
12 *Seattle Law Review* article, again Plaintiffs' Exhibit 2855.
13 And I would like you to look at page 7.

14 **A.** Too many binders here. Okay. We are at tab 80?

15 **Q.** Tab 80, page 7. And this is a passage we've already
16 looked at, but I want to ask you another question in the
17 context of what I've just been examining.

18 The very last sentence, above the heading "Criminal
19 Justice Initiatives," you write:

20 "This conflict between the initiatives
21 system's tendency to produce measures
22 directed at protected minorities, and the
23 courts' commitment to strictly scrutinize
24 such measures, naturally generates
25 litigation."

1 Do you see that?

2 **A.** Yes.

3 **Q.** And had you made a study of the extent to which
4 initiatives directed at protected minorities had, in fact, been
5 litigated?

6 **A.** Yes.

7 **Q.** And based on that study, you believed that that statement
8 was correct, true?

9 **A.** Yes, yes.

10 **Q.** And you believe that statement is correct today, correct?

11 **A.** Frequent litigation, yes. In terms of "directed at," I'm
12 not sure that I would use that terminology. But affecting,
13 certainly.

14 **Q.** Now, let me ask you to look at tab 82. And this is
15 Plaintiffs' Exhibit 2857. It is your chapter in the book
16 *Dangerous Democracy*.

17 And for present purposes, I want to start at page 53.

18 And it's the sentences right above your heading "Initiative
19 Politics and the Courts."

20 And you ask a question there. You ask, quote:

21 "What prevents initiatives from unfairly
22 undermining individual rights and altering
23 the constitutional structure of government?"

24 Do you see that?

25 **A.** Yes.

1 Q. And you answer: "The courts," correct?

2 A. I do.

3 Q. And would that still be your view?

4 A. I believe that the courts have an important role in
5 checking the initiative system. And my view has broadened
6 beyond this, but that statement, I believe, is true.

7 Q. And, indeed, when you have a initiative that's a
8 constitutional amendment, only the courts can prevent that
9 initiative from unfairly undermining individual rights,
10 correct?

11 A. Unless it's repealed.

12 Q. Yes.

13 While we're on page 53, going down under the heading
14 "Judicial Review and the Counter-Majoritarian Difficulty," the
15 third sentence, you say:

16 "In exercising judicial review, the courts'
17 responsibility is to check majority actions
18 that run counter to constitutional principles
19 (including individual rights, especially
20 those of unpopular minorities)."

21 Do you see that?

22 A. Yes.

23 Q. And as a political scientist, you would agree with that
24 statement today, correct, sir?

25 A. Yeah. I think there's a difference between protecting

1 rights and expanding rights, which is where I get into my --
2 you now have the shift in the analysis.

3 But if there's an established right, and it's being
4 violated by the initiative process, then I think the courts
5 have a responsibility for checking that.

6 **Q.** Right. And when Proposition 8 was passed, gays and
7 lesbians had had the right in California to marry, correct,
8 sir?

9 That's a yes or no question. Or you could say, "I
10 don't know."

11 (Laughter)

12 But it's yes, no, or, I don't know.

13 **A.** It was a contested question. There was a pending ballot
14 initiative before the Court --

15 **Q.** At the time that Proposition 8 was passed, in the months
16 of July, and August, September, and October, 2008, did gays and
17 lesbians have the right to marry in California, in your
18 opinion, Dr. Miller?

19 Yes, no, or, I don't know?

20 **A.** The court had issued a decision, and they had a right to
21 marry, yes.

22 **Q.** So the answer to my question is: Yes?

23 **A.** Yes. The court had, through that decision, created a
24 right.

25 **Q.** Now, just as a matter of understanding your terminology,

1 the difference between protecting rights and expanding
2 rights --

3 **A.** Yes.

4 **Q.** -- did Brown against Board of Education protect a right or
5 expand a right, in your view?

6 **A.** I believe the Fourteenth Amendment was --

7 **Q.** My question, sir, is not what your analysis is. Because
8 we could go all day on some of this. My simple question: In
9 your view as a political scientist, did Brown against Board of
10 Education protect a right or expand a right, as you use those
11 terms?

12 **A.** I believe it was correctly interpreting the Fourteenth
13 Amendment and protecting the right established in the
14 Fourteenth Amendment.

15 **Q.** Okay. So you believe that Brown against Board of
16 Education was not expanding a right; it was protecting a right
17 guaranteed by the Fourteenth Amendment, correct?

18 **A.** That's my view.

19 **Q.** Okay. Now, let me ask you to look, next, at page 55. And
20 I'm going to ask you about the paragraph at the bottom of the
21 page. And --

22 **A.** Did you say 55?

23 **Q.** Tab 82.

24 **A.** Oh, I'm sorry.

25 **Q.** The one we're looking at, page 55.

1 **A.** One second.

2 **Q.** And the third sentence there says, quote:

3 "If the role of the courts in exercising
4 judicial review is to act as a filter" --

5 **A.** I'm sorry, Mr. Boies. I'm not sure where we are at. This
6 is page 55?

7 **Q.** Page 55.

8 **A.** Line --

9 **Q.** The bottom of the page, the last paragraph, the paragraph
10 that begins, "The Populist view."

11 **A.** Okay. I have it.

12 **Q.** It says:

13 "The Populist view that judges should be
14 extra deferential to initiatives has much
15 intuitive appeal. However, as Julian Eule
16 noted, if one accepts the underlying
17 rationale for judicial review, this is in
18 fact 180 degrees off the mark."

19 Do you see that?

20 **A.** I do.

21 **Q.** You then go on to write:

22 "If the role of the courts in exercising
23 judicial review is to act as a filter to
24 protect constitutional principles and
25 minority rights against majoritarian attack,

1 then the courts need to be more vigilant, not
2 less, when reviewing initiatives."

3 Do you see that?

4 **A.** I do.

5 **Q.** And you then go on to give some reasons for that, correct?

6 **A.** Yes.

7 **Q.** And one of the reasons, number one, you say:

8 "... in a representative system, the courts
9 are but one of the many institutional checks
10 on majority rule, whereas in the initiative
11 process, the courts are the only
12 institutional filter, the check of first and
13 last resort."

14 Do you see that?

15 **A.** Yes.

16 **Q.** You then go on to say:

17 "As we have argued, it is easier for
18 violations of minority rights or other
19 constitutional norms to emerge from an
20 otherwise unfiltered majoritarian process
21 than one in which there are multiple checks
22 and balances."

23 Do you see that?

24 **A.** Yes.

25 **Q.** Now, you believed that at the time, correct, sir?

1 A. Okay. This is compound now. We've got --

2 Q. All I'm asking you is whether you believed it when you
3 wrote it.

4 A. Which part, the paragraph, or the subparagraph 1?

5 Q. All of it, sir.

6 (Laughter)

7 Did you believe all of this paragraph at the time you
8 wrote it?

9 A. Uhm, to an extent. This was a coauthored article.

10 Q. I understand. But you didn't disagree with this, did you,
11 at the time?

12 A. I was exploring this idea. I had read this article by
13 Julian Eule. I wasn't quite sure whether there was merit to
14 it. The court should use extra -- you've asked me about the
15 paragraph saying that the Court should be more vigilant, not
16 less, in reviewing initiatives.

17 That's a view of some in the academy. Others have
18 the opposite view, that courts should be more deferential to
19 initiatives.

20 And I was exploring the view that they should be
21 more -- more exacting in their review.

22 Q. Sure. This is a little bit different than a situation
23 where you say you saw the light and changed your mind. Here
24 I'm just asking about what you believed at the time you wrote
25 this.

1 You don't say here that you're exploring the issue,
2 do you?

3 **A.** No, I don't.

4 **Q.** No. And you don't say, "Maybe this is right, and maybe
5 this is wrong; I don't know." You say this pretty positively,
6 don't you?

7 **A.** I probably should have phrased it differently because I
8 don't think I strongly held this view at any time.

9 I think the better view is that the Court should
10 exercise the same -- in terms of -- we can talk about sub 1 and
11 those issues. But in terms of judicial review of initiatives,
12 I think the better view is that initiatives should be treated
13 the same as enactments of the legislature.

14 **Q.** Well, let's look at number 1.

15 **A.** Okay.

16 **Q.** The first sentence.

17 "... in a representative system, the courts
18 are but one of many institutional checks on
19 majority rule ..."

20 You would agree with that today, correct?

21 **A.** Yes, I do.

22 **Q.** And then:

23 "... whereas in the initiative process, the
24 courts are the only institutional filter, the
25 check of first and last resort."

1 And in California, at least, you would agree with
2 that statement today, correct?

3 **A.** Yes. I don't --

4 **Q.** Okay. If the answer is "yes," we don't have to go into
5 more.

6 **A.** Well, in terms of actually defeating the initiative
7 institutionally, I mean, there are filters in terms of the
8 attorney general's ballot and summary. And there are other
9 institutional actors that have a role --

10 **Q.** Yes, but --

11 (Simultaneous colloquy.)

12 **Q.** -- once the initiative is passed, once the initiative is
13 passed, the only filter is the courts, correct, in California
14 at least?

15 **A.** Unless the initiative, by its own terms, allows for
16 legislative amendment or repeal.

17 **Q.** And Proposition 8 didn't do that, did it?

18 **A.** Did not.

19 **Q.** Okay. You then say in this article:

20 "It is easier for violation of minority
21 rights or other constitutional norms to
22 emerge from an otherwise unfiltered
23 majoritarian process than one in which there
24 are multiple checks and balances."

25 Do you see that?

1 A. Yes.

2 Q. Now, first, that is something that you did believe at this
3 time. And you wrote it repeatedly, in article after article,
4 at this time, correct, sir?

5 A. At that time, I believed that, yes.

6 Q. Okay.

7 A. In terms of the standard of judicial review --

8 Q. Excuse me, what?

9 A. In terms of the standard of judicial review in the
10 preceding paragraph --

11 Q. Wait a minute. Wait a minute, sir. Wait a minute.

12 You say here:

13 "It is easier for violation of minority
14 rights or other constitutional norms to
15 emerge from an otherwise unfiltered
16 majoritarian process than one in which there
17 are multiple checks and balances."

18 That's what you wrote here, correct?

19 A. I'm not contesting that.

20 Q. And you wrote the substance of that repeatedly, and we've
21 shown you a number of examples --

22 A. Yes.

23 Q. -- of that, correct?

24 A. Yes.

25 Q. And you clearly believed that, correct?

1 **A.** Yes.

2 **Q.** Okay. Let me ask you to look at Plaintiffs' Exhibit 2856.

3 **THE COURT:** That's tab --

4 **MR. BOIES:** I'm sorry, that's at tab 81. 81.

5 **BY MR. BOIES:**

6 **Q.** And, in particular, I want you to look at page 10. And
7 this is an article "Anatomy of a Backlash," written by you,
8 correct, sir?

9 **A.** This is a conference paper. It was never published.

10 **Q.** This was prepared for delivery at the 2005 Annual Meeting
11 of the American Political Science Association, correct?

12 **A.** Yes. I've already testified about that.

13 **Q.** In fact, this was one of the articles you testified about
14 on direct examination, correct?

15 **A.** Yes.

16 **Q.** This was one of the articles that you were listing when
17 you were being qualified as an expert, correct?

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

19 **Q.** And on page 10, you say -- and this is 11 lines from the
20 bottom of the page. It's the sentence that begins, "Once this
21 majority."

22 **A.** Yes.

23 **Q.** And the majority that you're referring to there is the
24 majority that passes a initiative, correct?

25 **A.** Yes.

1 Q. You say, quote:

2 "Once this majority embeds its preference in
3 the state constitution, neither the state
4 legislature nor the state court can undue the
5 provision. As a consequence, the federal
6 courts provide the only institutional check
7 on the new constitutional provision."

8 Correct?

9 A. That's correct.

10 Q. And you believed that when you delivered this paper in
11 2005, correct?

12 A. Yes.

13 Q. And you believe that today, correct?

14 A. It depends on the institutional rules of the state.

15 Q. Sir, the state you're talking about here -- the state
16 we're talking about throughout this trial is California,
17 correct?

18 A. Right. So when we --

19 Q. And you know --

20 A. -- say the --

21 (Simultaneous colloquy.)

22 Q. And you know that in California, once an initiative is
23 passed, okay --

24 A. Yeah.

25 Q. -- as you write here, the federal courts provide the only

1 institutional check on the new state constitutional provision?

2 **A.** The legislature could put something back on the ballot, or
3 the people could, to repeal it.

4 **Q.** But, again, it has to go back to the same majoritarian
5 group that passed it in the first place, correct?

6 **A.** I'd reject that. It's a different majority in every
7 election. It's a different electorate in every election.

8 **Q.** Do the prejudices and stereotypes of that electorate
9 change, in your view?

10 **A.** Yes. If you compare all the evidence over time, there's
11 much less stereotyping and prejudice against many minority
12 groups.

13 **Q.** And that's true for, in your view, all minority groups,
14 correct?

15 **A.** I believe so. I think in particular -- if you want to
16 look at this Proposition 22 in --

17 **Q.** Do you remember what my question was?

18 **A.** Yes.

19 **Q.** What was my question?

20 **A.** Maybe you should re-ask the question.

21 **Q.** Is it true of all minority groups?

22 **A.** That --

23 **Q.** That, in your view --

24 **A.** Stereotyping and prejudice --

25 **Q.** Is being reduced.

1 **A.** I'd have to look more closely at that. But, in general, I
2 think we have less stereotyping and prejudice in the
3 United States than we used to.

4 **Q.** But you recognize there are still stereotyping and
5 prejudice against gays and lesbians today, correct?

6 **A.** I do.

7 **Q.** And --

8 **A.** I believe it's less than in the past.

9 **Q.** But you don't have any idea how many or what percentage of
10 the voters in favor of Proposition 8 were motivated by
11 stereotypes and prejudice, correct?

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

13 **Q.** Let me turn to the subject of hate crimes legislation.

14 You identified the federal hate crimes law, which you
15 described as the Matthew Shepard law, as the example that you
16 could come up with of a federal law that demonstrated gay and
17 lesbian political power.

18 **A.** That was one indice of it.

19 **Q.** Oh. Were there other federal laws that were passed that,
20 in your view, demonstrate gay and lesbian political power?

21 **A.** That's the one I examined. I can't think of any other.

22 There have been executive orders --

23 **Q.** Sir, do you understand the question? The question was
24 about laws that were passed, that you think demonstrate gay and
25 lesbian political power.

1 A. That's one I offered in my report. And I don't have --

2 Q. The only one, correct?

3 A. In terms of federal legislation coming out of Congress.

4 Q. All federal legislation comes out of Congress, correct?

5 A. Yes. There is also federal regulations.

6 Q. But all federal legislation comes out of congress?

7 A. That's correct.

8 Q. And this is the only federal legislation that has been
9 passed that you believe demonstrates the political power of
10 gays and lesbians, correct?

11 A. That was the only one I identified.

12 Q. And it's the only one you know, correct?

13 A. That's correct.

14 Q. Now, do you know what the formal name of that legislation
15 was?

16 A. The Matthew Shepard Bill.

17 Q. Actually, would it refresh your recollection if I told you
18 it was the Matthew Shepard and James Byrd Bill?

19 A. That's correct.

20 Q. And you know who James Byrd was, don't you?

21 A. He was a victim of hate crime.

22 Q. And he was an African American, right?

23 A. Yes, he was.

24 Q. And this Matthew Shepard and James Byrd legislation was
25 supported not only by gays and lesbians, but by the African

1 American community and a wide variety of other minorities,
2 correct?

3 **A.** African Americans were already protected under hate crimes
4 legislation, though.

5 **Q.** This legislation was supported by not only gays and
6 lesbians, but by the African American community as well,
7 correct, sir?

8 **A.** There was a coalition that supported this, that's correct.

9 **Q.** And, indeed, this legislation was something that was
10 valuable not only to gays and lesbians, but to every citizen in
11 this country, correct?

12 **A.** I -- I don't know what you mean by that.

13 **Q.** Don't you feel, as an individual citizen, that prohibiting
14 hate crimes benefits you?

15 **A.** Yes, I do.

16 **Q.** So this was legislation that benefited every citizen in
17 this country, correct?

18 **A.** It particularly benefited those groups that are targeted
19 for hate crimes.

20 **Q.** Yes, but it's also something that you believe and the vast
21 majority of Americans believe benefits everybody, correct?

22 **A.** In terms of good public policy?

23 **Q.** Yes.

24 **A.** Many Americans believe it's a good thing to be able to
25 protect victims of hate crime, yes. And I -- I agree with

1 that.

2 **Q.** And, incidentally, you're familiar with Megan's Law; are
3 you not?

4 **A.** Yes, I am.

5 **Q.** And Megan's Law was something that was adopted because
6 Megan, who was a young girl, was kidnapped, raped, and killed,
7 correct?

8 **A.** That's correct.

9 **Q.** And Megan's Law enjoyed wide popular support, correct?

10 **A.** I believe that's true, yes.

11 **Q.** And you wouldn't view the passage of Megan's Law as
12 demonstrating the political power of children, would you? Or
13 would you? Maybe you would.

14 (Laughter)

15 **A.** I don't know. I mean, I think there was a lot of concern
16 about children. And to the extent that that's manifest in
17 political mobilization and support for children's rights
18 advocates, I mean, I would have to look -- I haven't actually
19 examined it very closely.

20 **Q.** So you think this Megan's Law might have been the result
21 of political power of little girls who were raped and killed?

22 **A.** No, I think sympathetic allies.

23 **Q.** Sympathetic allies. That was exactly my -- actually, the
24 point I was trying to make.

25 When you have things like hate crimes, that is

1 something that virtually all Americans believe ought to be
2 adopted, correct? We ought to prohibit that. That's a
3 widely-held view in this country?

4 **A.** It's a widely-held view. When you get into the details,
5 there can be reasons for concern.

6 **Q.** Whether or not there are reasons for concern, you would
7 agree that it is a very widely-held view that we ought to
8 prohibit hate crimes, regardless of what the minority is?

9 **A.** Fighting is often about the details of what the
10 legislation says. But there's a widely-held view that we
11 should criminalize hate crimes.

12 **Q.** Now, have you looked at hate crimes in your investigation?

13 **A.** I haven't looked at it in depth, but I am familiar with
14 some statistics about hate crimes, yes?

15 **Q.** And where do those statistics comes from.

16 **A.** There's FBI statistics. I think I also looked at some
17 from Los Angeles County.

18 **Q.** Well, let me show you some documents and see if this is
19 what you looked at. Let me ask you -- and to move things
20 along, let me ask you to look at tabs 12, 13, 14, and 15, which
21 are respectively Plaintiffs' Exhibits 491, 492, 493, and 494.

22 And these are the Hate Crime Statistics from the
23 Uniform Crime Report of the United States Department of
24 Justice, for the years 2005, 2006, 2007, and 2008.

25 **A.** I'm sorry, can you tell me the tabs again.

1 Q. Tab 12 through 15.

2 A. Okay. Thank you.

3 Q. And were these statistics that you looked at?

4 A. I believe I've reviewed these, yes.

5 Q. And did you discern from this that the second largest
6 minority that was targeted by hate crimes were gays and
7 lesbians?

8 A. I need to refresh my memory by looking at the chart.

9 Q. Let me begin with Exhibit 494, which is behind tab 15,
10 which are the Hate Crime Statistics for 2008, that were
11 published November 23, 2009.

12 A. Okay.

13 Q. And what minority was most subject to violent hate crimes,
14 if you know?

15 A. Was most?

16 Q. Yeah -- let me -- let me ask you independent of these
17 exhibits.

18 A. Yeah.

19 Q. Do you have an opinion as to what minority is most subject
20 to violent hate crimes?

21 A. I would guess that gays and lesbians are high. Racial
22 minorities. And there's -- I think, those would be the two.

23 Q. Now, have you investigated that as part of your analysis?

24 A. Not closely, no. I've reviewed some of these reports.

25 Q. Now, adjusting for percent of the population, do you have

1 a judgment as to what minority is most subject to hate crimes,
2 generally?

3 **A.** I would have to take a closer look at it.

4 **Q.** And you've not done that?

5 **A.** Not in terms of per capita of the population.

6 It's also, again, as I said, difficult to know what
7 the -- the actual number of gays and lesbians in the population
8 is.

9 **Q.** Do you have an estimate of that?

10 **A.** I've only derived that from other people's estimates.

11 **Q.** Do you have an opinion on that?

12 **A.** Not -- not a very well-formed one. But it's somewhere in
13 the neighborhood of, maybe, 5 percent. But it could go either
14 direction.

15 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
16 Exhibits 491, 492, 493, and 494.

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

18 **THE COURT:** Very well. Those exhibits will be
19 admitted.

20 (Plaintiffs' Exhibits 491, 492, 493 and 494 received
21 in evidence.)

22 **BY MR. BOIES:**

23 **Q.** Now, you also said you thought you'd looked at some
24 statistics for California or Los Angeles. Do you recall that?

25 **A.** Yes.

1 Q. Let me ask you to look at Exhibit 675, which is behind tab
2 100, and Exhibit 834, which is behind tab 92.

3 And these relate to hate crimes in California and Los
4 Angeles County, correct?

5 A. Yes.

6 THE COURT: Let's see. We're dealing with --

7 MR. BOIES: Exhibit 675, which is behind tab 100,
8 which is "Hate Crime in California 2007."

9 THE COURT: Tab 100?

10 MR. BOIES: Tab 100.

11 MR. THOMPSON: It's not in my binder.

12 MR. BOIES: Maybe perhaps -- is it 102 of your
13 binder?

14 MR. THOMPSON: 2007?

15 MR. BOIES: Yes.

16 MR. THOMPSON: Yes, sir.

17 MR. BOIES: I apologize.

18 THE COURT: Tab 102?

19 MR. BOIES: Tab 102.

20 THE COURT: 102.

21 MR. BOIES: 102.

22 THE COURT: 102 is 675.

23 MR. BOIES: "Hate Crime in California 2007."

24 THE COURT: Right. And tab 92?

25 MR. BOIES: Tab 92 should be "Hate Crime Report

1 2008," from Los Angeles County Commission on Human Relations.

2 **THE COURT:** I believe that it is 834.

3 **MR. BOIES:** I would offer Exhibits 675 and 834.

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

5 **THE COURT:** Very well. They are admitted.

6 (Plaintiffs' Exhibits 675 and 834 received in
7 evidence.)

8 **BY MR. BOIES:**

9 **Q.** Were these documents that you reviewed?

10 **A.** I believe I reviewed these, yes.

11 **Q.** Now, you described yesterday all the powerful, in your
12 words, political allies that gays and lesbians had in
13 California. Do you recall that?

14 **A.** Yes.

15 **Q.** And, nevertheless, you acknowledge that Proposition 8
16 passed, correct?

17 **A.** I acknowledged that it passed.

18 **Q.** And the reason it passed was because of religion, correct,
19 sir?

20 **A.** I don't know if I would agree with that.

21 **Q.** You don't?

22 **A.** No.

23 **Q.** Okay. First, let's go to your demonstrative number 22.

24 And in this demonstrative that's going to be coming
25 up, you talked about the religions that supported gay and

1 lesbian rights; do you recall that generally?

2 **A.** I recall that generally, yes.

3 (Document displayed)

4 **Q.** And you didn't have a chart that described the religions
5 that opposed gay and lesbian rights, did you?

6 **A.** That's correct. This is a rebuttal report.

7 **Q.** And on tab -- or demonstrative 22. You talk about the
8 California Council of Churches?

9 **A.** Yes.

10 **Q.** And you say it represents denominations with more than
11 1.5 million members, correct?

12 **A.** Yes.

13 **Q.** And then you list denominations, correct?

14 **A.** Yeah. This is not an exhaustive list of their membership,
15 but this is some of them.

16 **Q.** Now, it's also not a list of churches that support gay
17 marriage, is it.

18 **A.** Well, the organization --

19 **Q.** Sir --

20 **A.** (Continuing) -- to which the churches belong --

21 **Q.** Sir, can I ask you to listen to the question?

22 **A.** Yes.

23 **Q.** Do the churches that are listed here support gay marriage?

24 **A.** Some of them do.

25 **Q.** And?

1 **A.** And all of them belong to an organization that promotes
2 it.

3 **Q.** And? Some of them don't, correct, sir?

4 **A.** Well, they are still part of this organization, which is
5 advocating on behalf of same-sex marriage. So it's hard to say
6 that they don't support same-sex marriage.

7 **Q.** Professor Miller, do churches put out statements about
8 what their position is with respect to same-sex marriage?

9 **A.** The national or international organizations do, yes.

10 **Q.** And did you look at those?

11 **A.** I did, through the Pew report, yes.

12 **Q.** And by looking at those, could you tell that some of the
13 churches listed here do not support same-sex marriage, or not?

14 **A.** Some of the national, international organizations do not
15 -- on this list do not; but, obviously, the local units of
16 these organizations belong to the California Council of
17 Churches, which opposed Proposition 8.

18 **Q.** Do you belong to organizations that have views different
19 than yours, that publish views different than yours?

20 **A.** Yes.

21 **Q.** Okay. And so the mere fact that you are a member of an
22 organization that has a view, doesn't mean that you have that
23 view, correct?

24 **A.** That's correct.

25 **Q.** So the mere fact that these churches are members of the

1 California Council of Churches, doesn't mean that they have the
2 same view on same-sex marriage as the California Council of
3 Churches, correct?

4 **A.** My view is that many --

5 **Q.** No, no. Please, just listen to the question. Do you
6 remember the question?

7 **A.** Why don't you restate it, please.

8 **Q.** The mere fact that these churches are members of the
9 California Council of Churches, does not mean that they share
10 the opinion of the California Council of Churches on same-sex
11 marriage, correct?

12 **A.** The problem is the definition of "church," because local
13 units of these churches may well support same-sex marriage even
14 though the national or international hierarchy does not.

15 **Q.** Sir, that may or may not be so, as you just said.
16 However, my question is: The California Council of Churches
17 has a position on same-sex marriage?

18 **A.** It supports it.

19 **Q.** The mere fact that these churches and denominations that
20 you list here are members of the Council of Churches does not
21 mean that they support gay marriage, correct?

22 Because you can be a member of an organization and
23 not necessarily agree with every position that that
24 organization takes, correct?

25 **A.** If you strongly disagree, you would probably leave the

1 organization; but I would agree that -- in at least some form
2 with your statement, yes.

3 **Q.** Incidentally, you say there are 1.5 million members of
4 denominations that belong to the Council of Churches. How many
5 members of the Catholic church are there in California?

6 **A.** I don't know if I can recall off the top of my head.
7 It's, I believe, the largest denomination in the State of
8 California.

9 **Q.** The largest denomination. And does it have 30 percent of
10 the electorate?

11 **A.** That sounds about right, that 30 percent of the electorate
12 identifies -- well, I'm not sure if it's the electorate. I
13 think it's more the population.

14 **Q.** Thirty percent of the population?

15 **A.** Which is a different thing.

16 **Q.** Well, and, actually, you probably ought to use population,
17 because this is 1.5 million members. It's not members of the
18 electorate. It's members of the churches.

19 So if we take a comparable number for Catholics,
20 what's the comparable number?

21 **A.** I'd have to check. I don't know --

22 **Q.** Approximately, sir?

23 **A.** A third of 36 million.

24 **Q.** Twelve million?

25 **A.** Twelve million maybe.

1 Q. So 1.5 million members of the California Council of
2 Churches, 12 million members of the Catholic church, correct?

3 A. Yes. And I should say for both of these, these numbers
4 are contested, because there is difficulty in estimating church
5 membership. Different denominations measure by different
6 means, either by church attendance or the by individual's
7 self-identification.

8 And so with that caveat, I think it's fair to say
9 there are more Catholics in California than members of these
10 organizations.

11 Q. You say it's contested. Do you have an opinion as to
12 whether or not approximately 30 percent of California's
13 population identify as Roman Catholics?

14 A. I think "identify" -- I don't know how closely they are
15 connected to the church, whether they attend worship services
16 or -- but I think about a third identify as Catholic.

17 Q. And what is the next largest religious group in
18 California?

19 A. Category?

20 Q. Yes.

21 A. This is, again, based on, I believe, Pew research studies.
22 They identify Evangelicals as the second largest group. And
23 Evangelicals is a broad category. It's not hierarchy like the
24 Roman Catholic church.

25 Q. And what percentage of Californians identify as

1 Evangelicals?

2 **A.** I think in these studies, again, where the figures are not
3 totally clear --

4 **Q.** No, no. I'm asking for your opinion.

5 **A.** My opinion --

6 **Q.** In your opinion.

7 **A.** With the caveats I have given about the difficulty of
8 measurement, I would say about 20 percent.

9 **Q.** That's your best judgment?

10 **A.** That's my best judgment.

11 **Q.** Okay. So you've got 30 percent Catholic and 20 percent
12 Evangelical, correct?

13 **A.** In the population.

14 **Q.** And that would -- if you take your 36 million for the
15 population of California, that's 18 million people, right?

16 **A.** More or less.

17 **Q.** Now, you know what the position is of the Catholic church
18 with respect to same-sex marriage and homosexuality, correct?

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

20 **Q.** Now, the Catholic church condemns homosexual acts as a
21 serious depravity, correct?

22 **A.** I don't know if I have seen that specific statement. I
23 know they disapprove --

24 **Q.** Let me ask you to look at Plaintiffs' Exhibit 770 behind
25 tab 22.

1 (Witness complied.)

2 Q. Second page, last paragraph.

3 MR. BOIES: Your Honor, I would offer Plaintiffs'
4 Exhibit 770.

5 MR. THOMPSON: No objection, your Honor.

6 THE COURT: 770 is admitted.

7 (Plaintiffs' Exhibit 770 received in evidence.)

8 BY MR. BOIES:

9 Q. You see at the bottom it says:

10 "Sacred scripture condemns homosexual acts
11 'as a serious depravity.'"

12 (Brief pause.)

13 Q. Professor Miller, do you see that?

14 A. I'm trying to see the context of the quote.

15 Q. When you have the context of that quote, let me know.

16 A. Okay.

17 My understanding of the Catholic church's position is
18 that there's a balance between moral disapproval of homosexual
19 activities and desire to respect the dignity of the individual,
20 which is on the next page.

21 Q. We are talking here about homosexual acts, correct?

22 A. Yes. I just wanted to clarify --

23 Q. Homosexual acts, the Catholic church takes the position
24 that those are a serious depravity, correct?

25 A. The church -- it says:

1 "Sacred scripture condemns homosexual acts as
2 'a serious depravity.'"

3 **Q.** Do you have any doubt that that's the position of the
4 Catholic church?

5 **A.** No.

6 **Q.** Did you know that before I just showed you this?

7 **A.** I knew that the Catholic church morally disapproved of
8 homosexual acts, yes.

9 **Q.** Now, you said that Evangelicals were a collection of
10 churches, correct?

11 **A.** Yes.

12 **Q.** What's the largest church in California after the Catholic
13 church?

14 **A.** I'm not sure -- you mean, Evangelicals generally, or?

15 **Q.** Evangelicals will include more than one church, correct?

16 **A.** Yes.

17 **Q.** They are more than one church. They are described within
18 the umbrella of Evangelicals.

19 **A.** Many of them are independent churches that don't have a
20 Ecclesiastical hierarchy of any kind.

21 **Q.** There are churches that are Evangelical that do have a
22 hierarchy, correct?

23 **A.** Again, this is a difficult area of definition because
24 within some of these traditional -- I'm trying to explain why
25 it's difficult for me to answer that question.

1 Q. Let me try to ask a question that maybe you can answer.

2 A. Okay.

3 Q. Is it true that the Southern Baptist Convention is the
4 largest single church in California after the Roman Catholic
5 Church?

6 A. I actually don't know that. I believe that's true in the
7 United States, but I'm not sure about in California.

8 Q. Have you investigated that?

9 A. I may have looked at it, but I don't recall.

10 Q. Now, you know what the view of the Southern Baptist
11 Convention is with respect to homosexual behavior, correct?

12 A. Yes.

13 Q. And that is that it's an abomination and shameful,
14 correct?

15 A. I knew that they morally disapproved. I didn't know about
16 those terms.

17 Q. Let me ask you to look at Plaintiffs' Exhibit 771, which
18 is behind tab 23.

19 MR. BOIES: And which I would offer.

20 MR. THOMPSON: No objection, your Honor.

21 THE COURT: 771 one is admitted.

22 (Plaintiffs' Exhibit 771 received in evidence.)

23 BY MR. BOIES:

24 Q. And the third paragraph where it says:

25 "The Bible clearly teaches that homosexual

1 behavior is an abomination and shameful
2 before God."

3 Do you see that?

4 **A.** I see that sentence, yes.

5 **Q.** Now, did you investigate the position of religions other
6 than Evangelicals and Roman Catholics and the California
7 Council of Churches with respect to Proposition 8?

8 **A.** Yes, I did.

9 **Q.** And what religious groups did you investigate?

10 **A.** I believe I looked at Jewish traditions, various -- the
11 Jewish traditions and their positions on that, which were
12 divided.

13 **Q.** Which was divided?

14 **A.** Right.

15 **Q.** And --

16 **A.** The majority of the Jewish community supported Proposition
17 8 very strongly -- I'm sorry. I'm sorry. I have that
18 reversed. I'm getting a little tired.

19 The -- their position is that they favor same-sex
20 marriage, the Jewish community in general, and the majority
21 opposed Proposition 8.

22 **Q.** Now, did you investigate what the view of Orthodox Judaism
23 was?

24 **A.** Yes.

25 **Q.** And --

1 **A.** As well as reform and conservative Judaism.

2 **Q.** And what was the view of Orthodox Judaism?

3 **A.** Orthodox Judaism opposed -- opposes same-sex marriage.

4 **Q.** And, in fact, Orthodox Judaism believes that:

5 "Homosexual acts, like adulterous and
6 incestuous behavior, are condemned in the law
7 of Moses. Those who do these things, both
8 men and women, are according to God's law of
9 the Old Covenant to be put to death."

10 Correct? That's the law of the Orthodox branch of
11 Judaism?

12 **A.** I don't recall that quote.

13 **Q.** Look at tab 70, Plaintiffs' Exhibit 2844.

14 **MR. BOIES:** Which I would offer.

15 **MR. THOMPSON:** No objection, your Honor.

16 **THE COURT:** Very well. 2844 is admitted.

17 (Plaintiffs' Exhibit 2844 received in evidence.)

18 **BY MR. BOIES:**

19 **Q.** Do you see the second paragraph on the first page where it
20 says what I previously read?

21 (Brief pause.)

22 **THE COURT:** This is Orthodox Judaism?

23 **THE WITNESS:** I believe this is Greek Orthodox --

24 **THE COURT:** This looks like Orthodox church --

25 **MR. BOIES:** Maybe it is the Greek, your Honor. I

1 think you are right. I have my exhibits backwards.

2 But that's a good question.

3 **BY MR. BOIES:**

4 **Q.** Did you investigate the view of Orthodox Christianity?

5 **A.** Yes, I did.

6 **Q.** And is this the view of Orthodox Christianity?

7 **A.** I believe I did.

8 **Q.** Is this the view of Orthodox Christianity?

9 **A.** I don't recall.

10 **Q.** Well, let me try to be sure I understand what you are
11 saying.

12 You investigated the views of Orthodox Christianity,
13 correct?

14 **A.** Yes, yes.

15 **Q.** And Orthodox Christianity is actually quite a large
16 religion in California, correct?

17 **A.** It could be -- well, there's diversity within Orthodox
18 Christianity, different national groups. There's Greek and
19 Russian Orthodox.

20 I actually don't remember. There are various views
21 on this issue.

22 **Q.** Are you aware of any Orthodox Christianity group that
23 promotes or favors same-sex marriage?

24 **A.** As I recall from that list, from the California Council of
25 Churches, there were Orthodox churches listed in that

1 coalition.

2 **Q.** Those were individual churches, correct?

3 **A.** I don't believe so. I think it was --

4 **Q.** Okay. Let's go back to demonstrative 22.

5 (Document displayed)

6 **Q.** And you have listed the Greek Orthodox church as a member
7 of the California Council of Churches, but you are not
8 suggesting that the Greek Orthodox church favors same-sex
9 marriage, are you, sir?

10 Or are you? I guess I don't know. Are you or are
11 you not?

12 **A.** Again, they are part of a coalition --

13 **Q.** I understand they are part of a coalition or part of the
14 California Council of Churches.

15 My question is a very simple one: Does the Greek
16 Orthodox church favor same-sex marriage? "Yes," "no," "I don't
17 know."

18 **A.** I don't know what the global Greek Orthodox church's view
19 on this is.

20 **Q.** Do you believe that there is a Greek Orthodox church in
21 California that is separate from what you refer to as the
22 global Greek Orthodox church?

23 **A.** Again, I don't know why --

24 **Q.** Again, "yes," "no," "I don't know."

25 **A.** I believe there's local units of the Greek Orthodox

1 church, including one that would join the California Council of
2 Churches.

3 **Q.** And does that local unit, as you describe it, favor
4 same-sex marriage? "Yes," "no," "I don't recall, or "I don't
5 know," or "I never knew."

6 **A.** To the extent they are part of this coalition, they are.
7 In terms of whether they would -- as a matter of doctrine and
8 practice, I don't know.

9 **Q.** And you keep referring to the California Council of
10 Churches as a coalition. By that do you mean that they have
11 gotten together for the purpose of supporting same-sex
12 marriage?

13 **A.** I believe that's a major part of their legislative agenda
14 over the past couple of years, yes.

15 **Q.** Of the California Council of Churches?

16 **A.** Yes.

17 **Q.** The California Council of Churches does a lot of different
18 things, right?

19 **A.** I would assume so. I'm not intimately familiar with their
20 work.

21 **MR. BOIES:** Your Honor, let me try to speed this
22 along.

23 Let me offer Plaintiff's Exhibits 2840, which are at
24 tab 66; 2839, which are -- is at tab 65; 2842, which is at tab
25 68. Those are all various statements by various religious

1 groups.

2 **MR. THOMPSON:** No objection, your Honor.

3 **THE COURT:** What was the last one?

4 **MR. BOIES:** 2842, which is at tab 68.

5 **THE COURT:** All right. There being no objection
6 2840, 39 and 42 are admitted.

7 (Plaintiffs' Exhibits 2840, 2839 and 2842 received in
8 evidence.)

9 **BY MR. BOIES:**

10 **Q.** As part of your work, did you investigate the extent to
11 which the groups favoring Proposition 8, the religious groups
12 favoring Proposition 8, contributed far more in money and
13 manpower than the groups opposing Proposition 8? Did you
14 investigate that?

15 **A.** I wasn't able to determine in a quantitative way the
16 monetary and organizational contributions of the progressive
17 churches to the No On 8 campaign. I didn't have any access to
18 the No On 8 campaign's internal documents to know about that.

19 I know a little bit more about the religious
20 contributions, religious organizations' contributions to the
21 Yes On 8 campaign.

22 **Q.** And that's -- that's because you did have access to the
23 Yes on Proposition 8 campaign, correct?

24 **A.** Yeah. I don't know the extent to the -- of the documents.
25 I have seen some that would allow me to form some judgments on

1 this, but I can't make a comparative judgment.

2 **Q.** Well, let me ask you to look at Plaintiffs' Exhibit 2552,
3 which is behind tab 96.

4 (Witness complied.)

5 **THE COURT:** 2552?

6 **MR. BOIES:** 2552.

7 **BY MR. BOIES:**

8 **Q.** Is this one of the document that you had available to you?

9 **A.** Yeah, I believe so. I have seen this document, yes.

10 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
11 Exhibit 2552.

12 **MR. THOMPSON:** No objection, your Honor.

13 **THE COURT:** 2552 is admitted.

14 (Plaintiffs' Exhibit 2552 received in evidence.)

15 **BY MR. BOIES:**

16 **Q.** And if you go to the second page, the second paragraph
17 that begins, "Grass roots signatures."

18 Do you see that?

19 **A.** Yes.

20 **Q.** And this is an email from Mr. Prentice, correct?

21 **A.** It appears to be so, yes.

22 **Q.** And this says:

23 "The response from churches is larger than
24 ever before experienced in California. More
25 than 2,000 pastors have been addressed at

1 events and 300 churches have offered their
2 staff and facilities as distribution centers
3 for petitions."

4 Do you see that?

5 **A.** I do.

6 **Q.** And that's talking about the pastors and churches that are
7 supporting Proposition 8, correct?

8 **A.** It seems to be, yes.

9 **Q.** And that's the way you interpreted it when you reviewed
10 this document, correct?

11 **A.** Yes.

12 **Q.** Let me ask you to look next at exhibit -- Plaintiffs'
13 Exhibit 2561 behind tab 95.

14 (Witness complied.)

15 **Q.** Is this one of the documents that you reviewed?

16 **A.** Yes.

17 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
18 Exhibit 2561.

19 **MR. THOMPSON:** Subject to our standing objections,
20 your Honor, no objection.

21 **THE COURT:** Very well. 2561 is admitted.

22 (Plaintiffs' Exhibit 2561 received in evidence.)

23 **BY MR. BOIES:**

24 **Q.** And the last sentence of the first paragraph -- well, let
25 me begin earlier than that.

1 This is also an email from Mr. Prentice, correct?

2 **A.** Yes.

3 **Q.** And it says:

4 "As you probably know, the LDS Church is sold
5 out for the Marriage Amendment. The giving
6 from the state's Mormons is topping
7 \$6 million right now with no signs of slowing
8 down."

9 Do you see that?

10 **A.** Yes.

11 **Q.** And this is dated August 25, 2008, correct?

12 **A.** Correct.

13 **Q.** And then the last sentence in that paragraph says:

14 "You may know that the Mormons have been out
15 walking neighborhoods the last two Saturdays
16 with about 20,000 total volunteers."

17 **A.** I see that sentence, yes.

18 **Q.** And you didn't have any reason to disagree with that
19 sentence, did you?

20 **A.** Yeah. I don't have any personal knowledge, but I don't
21 have any reason to disagree with that.

22 **THE COURT:** Apparently, it takes massaging to get
23 Evangelicals to action, according to this.

24 (Laughter.)

25 **MR. BOIES:** In that case, it may not be that

1 different from the rest of us.

2 **BY MR. BOIES:**

3 **Q.** Now, you said that you could not make a comparative
4 analysis as to whether the contributions of religious groups
5 opposed to Proposition 8 were greater or lesser than the
6 contributions of religious groups favoring Proposition 8; is
7 that correct?

8 **A.** Well, I can't make a quantitative, sort of ratio
9 comparison. I think it would be fair to say that the
10 contribution of religious organizations in favor of Proposition
11 8 was larger than the, at least, financial contributions --
12 perhaps also organizational contributions -- to the No On 8
13 campaign. But, again, I haven't seen the internal document of
14 the No On 8 campaign.

15 **Q.** Let me see if I understand what you're saying.

16 Are you saying that it's your opinion that religious
17 groups that favored Proposition 8 devoted substantially more
18 time, money, volunteers than the religious groups opposed to
19 Proposition 8?

20 **MR. THOMPSON:** Objection. Compound.

21 **THE COURT:** Objection overruled.

22 **A.** Again, this is based mainly on media reports --

23 **BY MR. BOIES:**

24 **Q.** I'm asking for your opinion. If you don't have an
25 opinion, if you haven't looked at enough that would allow you,

1 as an expert, to have an opinion, you can say so.

2 Do you have an opinion on that?

3 **A.** So with the caveats about my inability to get some
4 information on the other side, I do have an opinion, which is
5 to say that in my view there was a larger contribution of money
6 and organizational resources from religious groups to the Yes
7 On 8 campaign than on the No On 8 campaign.

8 **Q.** Do you have an opinion as to whether, in fact, the
9 religious groups that favored Proposition 8 supplied most of
10 the institutional support for Proposition 8?

11 **A.** By "institutional support" that would be, umm --

12 **Q.** Is "institutional support" a phrase that you use as a
13 political scientist, sir?

14 **A.** Yeah, I just want to make sure that we are --

15 **Q.** Well, let's first -- you use that term, right?

16 **A.** Yes.

17 **Q.** And what do you mean by it when you use it?

18 **A.** So in an initiative campaign it could be --

19 **Q.** What is it? Not what it could be. When you use that
20 term, what do you mean by it?

21 **A.** Well, it depends on the campaign. Different campaigns are
22 run differently.

23 **Q.** Let's talk about Proposition 8, just to pick one out of
24 the air.

25 (Laughter.)

1 A. Okay. Fair enough.

2 Q. In Proposition 8 what did you mean by "institutional
3 support"?

4 A. So there would be fundraising. There would be
5 organization of the -- sort of get out the vote, mobilizing
6 voters. There would be professional campaign staff. There
7 would be probably attorneys involved in the campaign.

8 So this is what in the political science literature
9 is sometimes called the initiative, sort of, I guess,
10 institutional structures, support structures.

11 Q. Okay. And you believe that churches and religious
12 organizations provided most of the institutional support for
13 Proposition 8, correct?

14 A. I don't know whether a lot of those people I just listed
15 were churches and religious organizations. They were
16 certainly --

17 Q. Let me ask you to look at tab 25, Plaintiffs' Exhibit 796.

18 A. Tab 25?

19 Q. Tab 25, Exhibit 796.

20 A. Okay, I have got it.

21 Q. Okay. Turn to page 55, please.

22 (Witness complied.)

23 Q. Second paragraph you say.

24 "Churches and religious organizations
25 supplied most of Proposition 8's

1 institutional support with Catholics,
2 Evangelicals and Mormons leading the way."

3 Correct?

4 **A.** Correct.

5 **Q.** And this is the article that you wrote in the French
6 journal that you referred to as your peer-reviewed article,
7 correct?

8 **A.** Correct.

9 **MR. BOIES:** And I would offer Plaintiffs' Exhibit
10 796.

11 **MR. THOMPSON:** No objection, your Honor.

12 **THE COURT:** 796 is admitted.

13 (Plaintiffs' Exhibit 796 received in evidence.)

14 **BY MR. BOIES:**

15 **Q.** And this was published in, 2009, correct?

16 **A.** Yes.

17 **Q.** And you then go on to say:

18 "California's Roman Catholic bishops and many
19 Evangelical pastors, including in black
20 churches, encouraged parishioners to support
21 the initiative through financial
22 contributions and volunteer efforts."

23 Do you see that?

24 **A.** Yes.

25 **Q.** And you believe that all that is true, correct, sir?

1 **A.** Yes. When I wrote this, I was relying on press reports
2 and that was my understanding, and nothing that I have learned
3 since then contradicts that.

4 **Q.** Okay. You then go on to say that:

5 "Leaders of the Mormon church organized a
6 massive effort to support the initiative."

7 Do you see that?

8 **A.** Yes.

9 **Q.** And you go on to say:

10 "While Mormons are only about two percent of
11 California's population, members of the
12 church, both from California and from other
13 states, provided critical financial
14 contributions and volunteer support."

15 Do you see that?

16 **A.** Yes, I do.

17 **Q.** And you believed that at the time, correct, and still do?

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

19 **Q.** And even though you may not be an expert on the No On 8
20 campaign, do you know enough about it to have an opinion as to
21 whether the primary institutional support for the No On 8
22 campaign were churches and religious organizations?

23 **A.** In terms of primary, I would say probably not. They were
24 certainly part of the coalition, but the coalition was
25 different on the No side than on the Yes side.

1 Q. What part of the support for the No On 8 campaign was
2 provided by churches and religious organizations, sir?

3 A. Certainly grassroots organizing.

4 Q. How much? What percentage?

5 A. What percentage? I don't know --

6 Q. Approximately?

7 A. I have no idea, because I haven't seen that information.

8 Q. Now, you do know that religion was critical in determining
9 voter attitudes towards Proposition 8, correct?

10 A. I believe religion was a factor for some voters certainly.

11 Q. Well, it was more than just a factor. It was critical in
12 determining voter attitudes towards Proposition 8, correct?

13 A. I think it was a critical factor for some voters, yes.

14 Q. Well, sir, let me ask you to look at the next page in the
15 article that you wrote in 2009.

16 A. Yes.

17 Q. The last paragraph on page 56. You say:

18 "Egan and Cheryl noted that several factors
19 contributed to the support for Proposition 8,
20 including age, party identification, ideology
21 and religion."

22 Do you see that?

23 A. Yes, I do.

24 Q. You then go on to write:

25 "In particular, these researchers confirmed

1 that religion was critical in determining
2 voter attitudes towards Proposition 8."

3 Do you see that?

4 **A.** Yes.

5 **Q.** And you believed that at the time, correct, sir?

6 **A.** I think what I probably meant to say was some voter
7 attitudes, given that list that I just put above there about
8 party identification, age, ideology and religiosity being four
9 factors. And I believe that religion was a critical factor for
10 at least some voters, yes.

11 **Q.** You don't say "at least some voters" here, do you, sir?

12 **A.** No, I don't.

13 **Q.** And --

14 **A.** But I don't think I ever believed that it was a critical
15 factor for all voters. And it was a critical factor for some
16 clearly.

17 **Q.** And did you believe that it was a critical factor in
18 determining the election?

19 **A.** That, again, I don't know.

20 **Q.** That, again, you don't know.

21 Well, let me ask you to look back at page 47 of this
22 article. And for context, I want you to look at the sentences
23 right at the top of the page, you know, where you say that:

24 "Many observers were mystified as to how
25 California, who was in the forefront of

1 same-sex marriage and civil rights for gays
2 and lesbians and who gave Obama such an
3 overwhelming majority and had so many
4 Democrats could have voted for Proposition
5 8."

6 Do you see that?

7 **A.** Yes.

8 **Q.** And this is the dilemma or conflict that we talked about
9 earlier, of having all of these so-called powerful forces and
10 allies that you say that gays and lesbians have in California
11 and, yet, confronting that with the passage of Proposition 8.
12 We talked about that before.

13 Now, you then answer that question, correct? You
14 answer why and how this apparent contradiction can be
15 explained, correct?

16 **A.** I do.

17 **Q.** And you say.

18 "The apparent contradiction can be explained
19 by examining the religious characteristics of
20 California's Democratic voters."

21 Correct, sir?

22 **A.** I still agree with that, yes.

23 **Q.** And you still agree with that?

24 **A.** Yes. Among a number of factors --

25 **Q.** Oh, oh, you don't say "among a number of factors" here, do

1 you, sir?

2 **A.** I do later --

3 **Q.** Well, right here, you say:

4 "The apparent contradiction can be explained
5 by examining the religious characteristics of
6 California's Democratic voters."

7 That's what you say here, right?

8 (Brief pause.)

9 **Q.** Dr. Miller?

10 **A.** Let me find the quote.

11 **Q.** It's on page 47.

12 **A.** Uh-huh.

13 **Q.** Remember at the top of the page --

14 **A.** Yes.

15 **Q.** (Continuing) -- we went through the contradiction. And
16 then you say -- and it's a one-sentence paragraph. Do you see
17 it? One-sentence paragraph.

18 **A.** Got it.

19 **Q.** (As read)

20 "The apparent contradiction can be explained
21 By examining the religious characteristics of
22 California's Democratic voters."

23 Do you see that?

24 **A.** Yes, I do.

25 **Q.** Okay. And you believed that then and you believe it now,

1 correct?

2 **A.** Yes, I do. Religious characteristics was an important
3 factor in the election.

4 **Q.** Now, sir, you didn't say "an important factor" here, did
5 you? I ask you, please, look at this language. Because I'm
6 asking you: When you wrote this language, you clearly believed
7 what you were writing in, 2009, correct?

8 **A.** Yes, I did.

9 **Q.** Now, since 2009, have you changed your mind?

10 **A.** I think this was an important -- a critically important
11 factor was the religious characteristics of Democratic voters.

12 **Q.** Okay.

13 **A.** I think there were other factors in the election as well.

14 **Q.** Were there other critical factors?

15 **A.** I think there were a number of factors that --

16 **Q.** Were there other critical factors. You used the word
17 "critical" factor.

18 **A.** Again, we haven't seen polling on why people voted for
19 Proposition 8.

20 **Q.** All I'm asking for is your opinion. You have come in here
21 as an expert, okay?

22 **A.** Yes.

23 **Q.** And you wrote in, 2009, just last year, that:

24 "The apparent contradiction that we have been
25 talking about can be explained by examining

1 the religious characteristics of California's
2 Democratic voters."

3 Now, you then said that you thought religious
4 characteristics were a critical factor in determining how
5 people voted. You said that just a moment ago. Do you
6 remember that?

7 **A.** Yes, I do.

8 **Q.** Now, what I'm asking you, in your opinion, were there any
9 other critical factors in determining how people voted?

10 **A.** Yes.

11 **Q.** Okay. Would you list those critical factors?

12 **A.** Again, this is without the benefit of polling data because
13 we had --

14 **Q.** No, no, no. All I'm asking is your opinion. Your opinion
15 based on all the investigation that you have done, because you
16 have come in here as an expert to give your opinion, right?

17 **A.** Yes.

18 **Q.** Okay. Now, based on all the investigation that you have
19 done, what is your opinion as to what the other critical
20 factors -- not just factors, but what critical factors are?

21 **A.** So I believe that religiosity is a critical factor.

22 **Q.** Yes. And, indeed, that's what you say here --

23 **A.** Yes, I do.

24 **Q.** (Continuing) -- right?

25 And you don't list any other factor at all here, do

1 you?

2 **A.** No. That wasn't -- but I did later on in the article.

3 **Q.** Well, did you list any other factors later in the article
4 that you call critical factors?

5 **A.** I believe I -- among other things, I listed --

6 **Q.** Sir, can I just get you to answer the question. I
7 promised your counsel I was going to be through by now and I'm
8 now over my time. If you could just focus on my questions.

9 Did you list any other factors --

10 **A.** I didn't list any others that were critical, but I, again,
11 haven't done an investigation as to whether those other factors
12 were critical. I think some were certainly important.

13 **Q.** In fact, in the article you say that:

14 "Opportunity to establish gay marriage was
15 lost in large part because California's
16 Democratic coalition divided along religious
17 lines."

18 Correct?

19 **A.** Can you point me to that part of the article?

20 **Q.** First of all -- I will. It's pages 57 and 58. What I'm
21 really asking is, that's your view?

22 **A.** It would help me to be able to see it, so. 57, 58?

23 **Q.** Yeah. And I don't have any objection to you looking at
24 it, but do you understand that I'm asking for your opinion?

25 **A.** Yes.

1 Q. And is it your opinion that the opportunity to establish
2 same-sex marriage in California was lost in large part because
3 the state's Democratic coalition divided along religious lines?

4 A. I think that the analysis of the article is that there
5 was --

6 Q. Please, Mister -- Dr. Miller.

7 MR. THOMPSON: Your Honor, we have -- the witness has
8 been cross examined for about two and a half hours. He
9 indicated about an hour ago he's a little tired. I would
10 request that he be given a 10 minute break.

11 THE COURT: Well, there is something about pots and
12 kettles, talking about long cross-examinations, Mr. Thompson.

13 (Laughter.)

14 THE COURT: But it might be helpful to take a break.
15 It might clear the air. We will take 10 minutes and resume at
16 10 minutes after the hour.

17 (Whereupon there was a recess in the proceedings
18 from 10:57 a.m. until 11:10 a.m.)

19 THE COURT: Mr. Boies, you may continue your
20 examination of the witness.

21 MR. BOIES: Thank you, your Honor.

22 As a housekeeping matter, I would offer -- and this
23 is without objection -- Plaintiffs' Exhibit 1397, one three
24 nine seven, which is behind tab 31, and Plaintiffs' Exhibit
25 2856, which is behind tab 81.

1 **THE COURT:** 81?

2 **MR. BOIES:** That's the tab number.

3 **THE COURT:** Very well. Then those exhibits are
4 admitted.

5 (Plaintiffs' Exhibits 1397 and 2856 received in
6 evidence.)

7 **MR. BOIES:** And one other housekeeping matter.

8 **BY MR. BOIES:**

9 **Q.** Professor Miller, you have Plaintiffs' Exhibit 794-A
10 there, which is the index of materials you considered.

11 **A.** Yes.

12 **Q.** And I just have two questions on this.

13 The first question is: You went through and you
14 circled those items that you could recall having researched and
15 obtained yourself, as opposed to what you were given by
16 counsel, correct?

17 **A.** These are the ones I was certain about, yes.

18 **Q.** And you circled, by my count, about 23 percent of the
19 materials listed here, correct?

20 **A.** I haven't done a percentage. I don't know.

21 **Q.** Well, would you agree it was less than a quarter?

22 **A.** Again, I don't know. It's -- I would say it's less than
23 half and I don't know how much less than half.

24 **Q.** Now --

25 **A.** And there were many that were -- maybe I should explain

1 the question marks, if you want an explanation on that.

2 **Q.** Go ahead. Explain it.

3 **A.** Okay. These involve reports about religious
4 organizations, and I did a lot of my own research on this. I
5 also received some materials from counsel about religious
6 organizations and their positions on Proposition 8.

7 It's difficult for me to sort out from this very long
8 list of materials which ones I independently found and which
9 ones counsel provided, but I think my report used mainly the
10 ones that I had independently investigated, and I certainly
11 looked at everything that I put in my report before I put it
12 there.

13 **Q.** And these were the materials that you in your report
14 indicated that you had considered and relied on, correct?

15 **A.** Yes.

16 **Q.** Now, I do want to follow up what you just said about the
17 question marks that you attached to a number of the documents
18 that relate to religious organizations?

19 **A.** Yes.

20 **Q.** You are aware that Dr. Nathanson put in a report, correct?

21 **A.** Yes.

22 **Q.** You did not see that report prior to preparing your
23 report, correct?

24 **A.** That's correct.

25 **Q.** And you did not talk to Dr. Nathanson or anybody

1 representing him prior to the time you put in your report,
2 correct?

3 **A.** That's correct. Well, anyone representing him, I don't
4 know.

5 **Q.** Anybody other than your counsel?

6 **A.** Correct.

7 **Q.** Right. So that if you received any of the Nathanson's
8 materials, you would have received them from counsel, correct?

9 **A.** Yes.

10 **Q.** And I would represent to you that between 140 and 150 of
11 the question marks that you put down are on items that appeared
12 on Dr. Nathanson's list of materials in the report that he
13 submitted prior to the time that you submitted your report.

14 **A.** I wouldn't know one way or the other.

15 **Q.** And I take it you would agree with me that if these items
16 appeared on Dr. Nathanson's list, you got them from your
17 counsel. It's not just a pure coincidence that the two of you
18 came up with exactly the same list of documents, correct?

19 **A.** I wouldn't know what to say about where the documents came
20 from, except that I know that I got the documents -- some of
21 them, not all of them -- with a question mark from counsel.

22 **Q.** All right. Let me go back to the question that I had when
23 we broke.

24 I think I was asking you whether it was your opinion
25 that the opportunity to establish gay and lesbian marriage in

1 California was lost in large part because of the state's
2 democratic coalition divided along religious lines.

3 Do you have an opinion on that, sir? I'm not asking
4 you what you wrote in one article or another.

5 **A.** Right, right.

6 **Q.** I'm simply asking as you sit here now as an expert
7 proffered by the defendants, do you have an opinion on that?

8 **A.** Yes, I do.

9 **Q.** And what is that opinion?

10 **A.** I believe that that sentence is substantially correct. I
11 would probably want to explain it and put it in context, but I
12 don't -- I don't disagree with the main idea in the sentence.

13 **Q.** And just to be clear, when you are talking about the
14 sentence, you are talking about the statement that the
15 opportunity to establish gay and lesbian marriage in California
16 was lost in large part because the state's Democratic coalition
17 divided along religious lines.

18 Correct, sir?

19 (Brief pause.)

20 **Q.** Sir?

21 **A.** The sentence doesn't say that. It says, "The opportunity"

22 --

23 **Q.** I didn't say the sentence said that. What I have tried to
24 say is regardless of what you have written --

25 **A.** Right, okay.

1 Q. Okay? Regardless of what you have written, as you sit
2 here now, do you agree that the opportunity to establish
3 same-sex marriage in California was lost in large part because
4 the state's democratic coalition divided along religious lines?

5 Do you agree with that?

6 A. I think in large part that's a fair statement, yes.

7 Q. Okay. And let me ask you to look at page 57, first full
8 paragraph, the last five lines. You write:

9 "The evidence indicates that through the
10 teaching and mobilization of churches or by
11 other means many of the state's blacks and
12 Latinos viewed the marriage controversy in
13 terms of religion rather than civil rights
14 and, thus, believed that they could without
15 contradiction support civil rights, identify
16 as a Democratic, vote for Barack Obama, and
17 vote for Proposition 8."

18 Do you see that?

19 A. Yes, I do.

20 Q. And you wrote that, correct?

21 A. Yes, I did.

22 Q. Now, when you say "the evidence indicates," what evidence
23 were you referring to?

24 A. So this would be a couple of things. One is the exit poll
25 data and post election surveys indicating that a substantial

1 share of African-Americans and Latinos supported Proposition 8.

2 And then additional information, basically based on
3 press reports, of mobilization in the black and Latino
4 communities on behalf of Proposition 8, some but not all of
5 which was based in churches.

6 So that's the evidence in sum.

7 **Q.** Now, as a political scientist --

8 **A.** Yes.

9 **Q.** (Continuing) -- are you aware of any principle that
10 suggests that a religions majority should not be able to use
11 the law to impose their principles on a religious minority?

12 **MR. THOMPSON:** Objection to the form.

13 **THE COURT:** Objection overruled.

14 **A.** It's a pretty broad statement.

15 **BY MR. BOIES:**

16 **Q.** From time to time throughout history -- and you're aware
17 of this I presume from your political science background --
18 there have been conflicts between a majority religion and a
19 minority religion with the majority religion attempting to
20 impose through law restrictions on the minority religion,
21 correct?

22 **A.** There have been times in history, world history, where
23 that's been the case, yes.

24 **Q.** And as a matter of political science, is there a generally
25 held view that that is an undesirable way to organize a civil

1 society?

2 **A.** More a majority to impose its religious --

3 **Q.** Principles?

4 **A.** (Continuing) -- principles.

5 **Q.** On a minority?

6 **A.** I think in a general sense that would be an accepted
7 principle.

8 **Q.** That that's undesirable?

9 **A.** That would be a principle that many political scientists
10 would agree with, a general principle, yes.

11 **Q.** I just want to be sure I understand what you mean by the
12 general principle.

13 You are saying that the general principle that a
14 religious majority should not be able to use law to impose
15 their views on others is a generally accepted principle of
16 political science?

17 **A.** There might be exceptions to that.

18 **Q.** What?

19 **A.** There might be exceptions, but I think that's a general
20 principle.

21 **Q.** As you sit here now, are you aware of any exceptions to
22 the general principle that it is undesirable for a religious
23 majority to use law to impose its views on a minority?

24 **A.** I guess if you look at American history, there have been
25 times where a religious coalition built in support of a

1 project --

2 Q. No, no. I'm not asking about a religious coalition. I'm
3 asking --

4 A. A religious majority, okay. Maybe in favor of abolition.

5 Q. And the religious majority there -- what was the
6 minority -- first of all, the abolitionists weren't a majority,
7 right?

8 A. I'm not sure. They were a part of the coalition that
9 ended slavery, right.

10 Q. The abolitionists were actually quite a small minority as
11 a matter of history, right? "Yes, "no," "I don't know."

12 A. Well, activist abolitionists, yes.

13 Q. Second, who was the minority that the abolitionists were
14 imposing their view on?

15 A. Slaveholders.

16 Q. Slaveholders. And in your view were slaveholders a
17 minority that needed protection?

18 A. No. They may have had views about -- which I believe are
19 distorted views, about the religious justification for slavery.
20 That would be a religious minority.

21 Q. And I'm just trying to understand what you just said.

22 You're saying that slaveholders may have had a
23 religious basis for their view and, therefore, it was
24 inappropriate to impose a different view on them?

25 **MR. THOMPSON:** Your Honor, I'm going to object to

1 this whole line of questioning. It's well beyond the scope of
2 direct. I didn't get into anything from the nineteenth
3 century.

4 **THE COURT:** Well, counsel is attempting to inquire
5 about Proposition 8, and he's responding to the witness's
6 comments.

7 If the witness were to directly respond to the
8 questions, there would not be the need to go into these
9 matters, Mr. Thompson.

10 (Laughter.)

11 **MR. THOMPSON:** Your Honor, he asked about world
12 history, was the first line in this question.

13 **THE COURT:** The objection is overruled. This is
14 cross-examination, Mr. Thompson.

15 **BY MR. BOIES:**

16 **Q.** Professor Miller, focusing on today and focusing on
17 California and the United States, as a professor of political
18 science who is said to be an expert in political science in
19 California and the United States, do you believe that it is
20 generally accepted that it is not appropriate for a majority
21 religion or majority religion coalition to impose their views
22 on a minority?

23 **A.** I need to change the --

24 **Q.** Please answer this question.

25 **A.** I think there might be circumstances where political

1 science generally would be quite disposed to agree with a
2 religiously-based argument that might be held by a majority,
3 but, again, I think the principle you are driving at is that
4 would political science in general believe it is inappropriate
5 or undesirable for a religious majority to impose on a
6 religious minority its views. And I think probably a majority
7 of political scientists would agree with that.

8 **MR. BOIES:** Your Honor, I have no more questions.

9 **THE COURT:** Mr. Thompson, redirect?

10 **MR. THOMPSON:** Thank you, your Honor.

11 **THE COURT:** Before you do that, I should ask counsel
12 for the Attorney General if she wishes to inquire of this
13 witness regarding his views on the responsibility of the
14 Attorney General?

15 **MS. PACHTER:** I would be happy to, your Honor.

16 **THE COURT:** Very well.

17 **CROSS EXAMINATION**

18 **BY MS. PACHTER:**

19 **Q.** Good morning, Dr. Miller.

20 Earlier I believe you testified in response to one of
21 Mr. Boies' questions that the role of the Attorney General in
22 the title and summary process somehow ameliorated, served to
23 ameliorate the otherwise anti-Democratic tendencies of the
24 institution in California.

25 And I was wondering if you could tell me what the

1 basis was for that opinion?

2 **A.** The basis for the opinion is -- we're talking about
3 institutional checks on direct Democracy, and one of the stages
4 of the initiative process is that the Attorney General writes a
5 title and summary. So the proponents don't get to write their
6 own title and summary in California.

7 And so to the extent that the Attorney General is
8 able to craft a title of the initiative, then that provides an
9 institutional input into the initiative process, so it's less
10 pure majoritarian than if that stage did not occur.

11 **Q.** How does it provide that check on the process?

12 **A.** Well, again, it's not the proponents writing the title and
13 summary. It's an outside independent elected official who does
14 that.

15 **Q.** Is it your understanding that the Attorney General can do
16 anything other than provide a neutral title and summary?

17 **A.** Well, that was certainly contested in this last -- in the
18 Proposition 8 election.

19 **Q.** What was contested in the Proposition 8 election?

20 **A.** The title that Attorney General Brown provided for
21 Proposition 8 was contested by the parties on both sides. Some
22 thought that it was unfairly characterizing the initiative, and
23 others believed it was fairly characterizing the initiative.

24 **Q.** I understand that, but your understanding of the law in
25 California, Dr. Miller, is it that the Attorney General must

1 provide a neutral title and summary, or is it your
2 understanding that the Attorney General can provide a title and
3 summary that casts an opinion about the measure that's being
4 submitted to the voters?

5 **A.** Okay, here is my understanding. I believe that that law
6 tells the Attorney General to provide a neutral opinion.

7 I believe most students of California politics would
8 say that there is within the Attorney General's office some
9 discretion on how to characterize initiatives. And these are
10 often considered very important because voters get to see this
11 title and summary as an important cue to them.

12 **Q.** And one of the things that opponents or somebody who
13 challenges the Attorney General's title and summary can do is
14 to go to court and argue that the title and summary was not
15 neutral under California law, isn't that right?

16 **A.** That's correct.

17 **Q.** Thank you.

18 **THE COURT:** Can the Attorney General do more than
19 provide a neutral title and summary?

20 Do you know?

21 **THE WITNESS:** Do I know?

22 **THE COURT:** Do you know whether the Attorney General
23 can do something in addition to providing a neutral title and
24 summary for the initiative?

25 **THE WITNESS:** My -- it's different in different

1 states. I can't recall any in --

2 **THE COURT:** We are talking about California.

3 **THE WITNESS:** Right. In California, I'm not aware of
4 any time where the Attorney General has done more --

5 **THE COURT:** No, that's not the question.

6 **THE WITNESS:** Yes. I guess the answer is I don't
7 know.

8 **THE COURT:** The question is: Can the Attorney
9 General do something more than simply providing a neutral title
10 and summary?

11 **THE WITNESS:** The Attorney General can publicly
12 oppose the initiative or support it. In terms of institutional
13 challenges, I'm not aware of any.

14 **THE COURT:** You don't know, is that it?

15 **THE WITNESS:** That's right.

16 **THE COURT:** You don't know.

17 **MS. PACHTER:** Thank you.

18 **THE COURT:** Anything further?

19 **MS. PACHTER:** No.

20 **THE COURT:** Very well.

21 Now, redirect, Mr. Thompson?

22 **MR. THOMPSON:** Thank you, your Honor. And I have my
23 very last binder of the trial, for myself anyway. It's very
24 short. May I approach, please?

25 **THE COURT:** Well, that's good news.

1 (Laughter.)

2 (Whereupon, binders were tendered

3 to the Court and the witness.)

4 **REDIRECT EXAMINATION**

5 **BY MR. THOMPSON:**

6 **Q.** Professor Miller, you were asked some questions about
7 materials provided to you by counsel. And my question is: How
8 many of the topics in your report did you personally
9 investigate?

10 **A.** All of them.

11 **Q.** How many of the materials considered in your -- listed at
12 the end of your report, the 427 of them, how many did you
13 personally consider?

14 **A.** I reviewed most of them. I can't recall closely analyzing
15 all of them, but I believe that I reviewed -- I tried to review
16 all of them, yes.

17 **Q.** And please describe the research methodology that underlay
18 your opinions relating to progressive religious support for the
19 No On 8 campaign?

20 **A.** I'm sorry. Can you rephrase the question?

21 **Q.** Sure. Please describe the research methodology that
22 underlay your opinions relating to progressive religious
23 support for the No On 8 campaign?

24 **A.** So I did extensive reading of progressive religious
25 organizations' websites; the Pew report, which provides a lot

1 of -- or the Pew website, which provides lots of information
2 across various denominations; and those are some of the
3 important things that I looked at.

4 **Q.** All right. Now, I would like to switch gears. You were
5 asked some questions about a study you had done over a
6 four-decade period of ballot initiatives and you had made some
7 comments about California and Colorado and another state and
8 how there was a potential of some of these initiatives to tap
9 into anti-minority sentiment.

10 And my question is: How successful were the
11 California initiatives in the 1970's that had the potential to
12 tap into a strain of anti-minority sentiment against
13 homosexuals?

14 **A.** The only one I'm aware of that I can recall is Proposition
15 6. I think that was the only one on the ballot during that
16 decade, and it was defeated by the voters.

17 **Q.** And how successful were the California initiatives in the
18 1980's that had the potential to tap into a strain of
19 anti-minority sentiment against gays and lesbians?

20 **A.** Those were the three measures dealing with HIV, Aids and
21 the -- either quarantine or reporting of suspected HIV
22 patients, which was, I considered, very anti-homosexual and --
23 or a gay and lesbian initiative. And it was -- all those
24 initiatives were defeated by the voters decisively in
25 California.

1 Q. All right. Now, you were asked some questions about
2 polling, and you were asked questions about whether a majority
3 of the gay and lesbian community supported the repeal of DOMA.
4

5 I would like to direct your attention to tab D of
6 your binder.

7 A. Okay.

8 Q. And this is a document prepared by Professor Segura and a
9 Ken Cimino, and it's DIX-2649.

10 And I would like to direct your attention to the last
11 page, table five, where it says halfway through the table,
12 "Self-identified LGBT," and it lists in the right-hand column
13 that the support, at least at the time of this document, which
14 was 2005, for same-sex marriage was 73.5 percent.

15 Do you have any basis to dispute that number, the
16 validity of that number?

17 A. No.

18 MR. THOMPSON: Your Honor, we would move the
19 admission of DIX-2649.

20 MR. BOIES: Your Honor, we would object. Mr. Segura,
21 Dr. Segura was on the stand and he could have been examined
22 about this document.

23 There is no foundation for it to come in through this
24 witness, who never saw it. And we think it is not appropriate
25 to bring in the document after the witness is off the stand so

1 the witness can't explain it or to put it in context.

2 **THE COURT:** This was, I gather, not an exhibit that
3 was used with Professor Segura.

4 **MR. THOMPSON:** It was, as a matter of fact, and I
5 forgot to move it into evidence, and --

6 **MR. BOIES:** In that case, your Honor, I withdraw my
7 objection.

8 **MR. THOMPSON:** Very well.

9 **THE COURT:** 2649 will be admitted.

10 **MR. THOMPSON:** Thank you, your Honor.

11 (Defendants' Exhibit 2649 received in evidence.)

12 **BY MR. THOMPSON:**

13 **Q.** Now, you were also asked some questions about prejudice
14 today in society directed against gays and lesbians.

15 What polling data, if any, are you aware of that
16 analyzes the relative warmth or feelings of the people of
17 California towards gays and lesbians?

18 **A.** Of California specifically?

19 I'm aware of a field poll. This is the field
20 organization poll in, I believe, it was 2006, where there was
21 questions asked sort of similar to the National Election
22 Studies Feeling Thermometer Index, zero to 100. And the --
23 this was in, as I recall, 2006 and from my memory 65 percent,
24 something like that, close to two-thirds of Californians held
25 either positive or neutral views towards gays and lesbians.

1 Q. All right. Now, let me ask you some questions about
2 religion and prejudice.

3 Do you recall that you were shown document from the
4 Vatican and the Southern Baptist Convention?

5 A. Yes.

6 Q. All right. I would like to direct your attention to tab
7 your binder. This is Plaintiffs' Exhibit 5. It's called "The
8 Ten Declarations For Protecting Biblical Marriage."

9 And the first line is:

10 "God loves all people. Therefore, we love
11 all people and we will do so regardless of
12 how some view or define themselves sexually."

13 How does this comport with your understanding of the
14 position of Evangelical churches?

15 A. I think this is very consistent with the vast majority of
16 Evangelical churches.

17 MR. THOMPSON: Your Honor, we would move the
18 admission of Plaintiffs' Exhibit 5.

19 MR. BOIES: No objection, your Honor.

20 THE COURT: Very well. Exhibit 5 is admitted.

21 (Defendants' Exhibit 5 received in evidence)

22 BY MR. THOMPSON:

23 Q. Now, you were also asked about the role that prejudice may
24 have played in the Proposition 8 campaign.

25 MR. THOMPSON: And, your Honor, with the Court's

1 permission, I would like to play what I believe is a
2 thirty-second ad that was run during the campaign. It's
3 DX-2308. I would like to publish it on the screen.

4 **THE COURT:** Has it been moved in?

5 **MR. THOMPSON:** No, your Honor. I would be happy to
6 play it and then let Mr. Boies see it and object at that time
7 if he -- or however the Court would prefer to proceed.

8 **MR. BOIES:** Your Honor, I did not go into messaging
9 with this witness. I did not put to him the campaign messages
10 or ask him about that. I don't know what's on the --

11 **THE COURT:** Well, it is certainly something that was
12 put in in the plaintiffs' case.

13 **MR. BOIES:** Yes, it was. It was clearly put in in
14 the plaintiff's case. I'm just talking about the scope of
15 cross-examination.

16 **THE COURT:** Well, let's hear it and then I can
17 determine whether it's beyond the scope.

18 **MR. THOMPSON:** Well, in fact, why don't we
19 actually -- very well. Let's play it.

20 (Brief pause.)

21 **THE COURT:** Is this a video or an audio.

22 **MR. THOMPSON:** It is, your Honor. It is a video. I
23 think we are experiencing technical difficulty, and I'm happy
24 to move to a different subject and come back to this, unless we
25 can --

1 **THE COURT:** All right. Why don't we do that?

2 **MR. THOMPSON:** Yes. I apologize, your Honor. We
3 will come back to that in just a short moment, because I don't
4 have very much.

5 **BY MR. THOMPSON:**

6 **Q.** Now, you were asked some questions about laws that were
7 enacted pursuant to the Defense of Marriage Act; do you recall
8 that?

9 **A.** Yes.

10 **Q.** When were the vast majority of those laws passed?

11 **A.** You mean, the state Defense of Marriage Acts? The vast
12 majority were in the mid-2000s; 2004, in that period.

13 **Q.** How do you explain the timing of those laws?

14 **A.** So my analysis, as I set forward in my book, is that they
15 are largely following the *Goodridge* decision in Massachusetts,
16 and that was in 2003, as I recall.

17 **Q.** All right. And let me ask you, you were shown and you
18 discussed at some length your *Santa Clara Law Review* article
19 that you did before you completed your PhD.

20 And since you completed your PhD and have written
21 your book, *Direct Democracy In The Courts*, can you explain the
22 evolution of your thinking on this subject?

23 **MR. BOIES:** Object to the form of the question, your
24 Honor.

25 **THE COURT:** I beg your pardon?

1 **MR. BOIES:** I object to the form. It's just an
2 objection as to form.

3 **BY MR. THOMPSON:**

4 **Q.** Can you explain the evolution of your thinking on the
5 initiative process?

6 **THE COURT:** Since when?

7 **BY MR. THOMPSON:**

8 **Q.** Since the time you wrote the *Santa Clara Law Review*
9 article in 2001 when you were a graduate student.

10 **A.** So in 2001, we've had a lot of discussion of articles I
11 wrote a decade ago.

12 Again, I pursued what I thought was a Madisonian
13 critique of the initiative process and its comparative
14 institutional disadvantages compared to representative
15 government, and those articles are very clear on that
16 comparison.

17 And at the time I thought that the -- the best way to
18 think about this problem was to think of the courts as being an
19 important institutional check on pure democracy. So that was
20 my approach to this problem up through about 2001, 2002.

21 I decided to continue pursuing this area of research
22 over the -- after I finished my time as a graduate student.
23 And I took a year-long research leave at U.C. Berkeley. And
24 this was in the period shortly after the *Goodridge* decision.
25 And the paper I wrote for the A.P.S.A. in 2005 started to show

1 my -- the shift in my thinking about this. It becomes fully
2 developed in my book, which was published a year ago or less
3 than a year ago and that is that I have a more favorable view
4 of the initiative process after having reviewed the entire
5 100-plus years of this process, dating back to the very
6 beginning of the 20th century. I see it as a way in which the
7 people can express and -- express popular sovereignty in a
8 constitutional system.

9 The other thing that I -- that shaped my thinking
10 about this -- again, going back to the origins of the
11 initiative process -- is that many of the arguments, early
12 arguments for direct democracy, especially presented by
13 Theodore Roosevelt during that period, was that it could
14 provide a check on judicial activism are. This was the Lochner
15 era and a lot of progressives thought that courts were
16 expanding rights beyond what the people wanted, and so that
17 direct democracy could exercise an institutional check on
18 courts and when there is a contestation over the proper scope
19 of rights.

20 And so this becomes the basis for my book *Direct*
21 *Democracy In The Courts*, which is that there are two competing
22 forces in the American constitutional system that diverge from
23 what I consider the Madisonian ideal. The Madisonian ideal is
24 that popular sovereignty and minority rights are harmonized
25 within the legislative process.

1 My early research showed that in my view, direct
2 democracy could pull decisions out of the legislative process.
3 My later analysis looked at ways that the courts could pull the
4 decision-making process away from the people.

5 And so the way I now look at the marriage controversy
6 is that it's one of these conflicts over the scope of rights
7 and the ability of the people to have an input into the
8 definition of marriage.

9 Ideally, from my perspective, this would happen
10 through legislatures. We have an initiative process in this
11 country that allows the people to vote directly, and I don't
12 have a problem with that.

13 I noted that we had some discussion yesterday about
14 state DOMAs and where did they come from. Eleven of them came
15 from citizen petition, but the majority of them came from
16 legislatures.

17 So if we are concerned about Defense of Marriage
18 Amendments coming -- you know, bypassing representative
19 government, that's not the case in the majority of states where
20 they have been adopted. In the United States you have a
21 consensus between representative government and direct
22 democracy in establishing this definition of marriage.

23 In my view, and this came out of my analysis of the
24 *Goodridge* decision and later *In Re Marriage* cases in
25 California, taking that decision out of the hands of the people

1 in general is an example of the courts taking too strong a
2 position on this issue, this fundamental issue of social policy
3 in the country.

4 And so I think of it differently than the Court's
5 exercising a check on the majority imposing their will on the
6 minority.

7 **Q.** All right. Now, how, if at all, has your thinking about
8 Proposition 22 evolved since the time you wrote your 2001 *Santa*
9 *Clara Law Review* article?

10 **A.** Again, this was before I had done this project that I just
11 described of comparing direct democracy and judicial review in
12 the form of judicial activism. And so I was still thinking in
13 terms of the problem of majorities and minorities.

14 And, again, I would say that many of these
15 initiatives we described affecting gays and lesbians I would
16 still put in that category. Proposition 6 would be one of
17 those where the majority was imposing, you know, anti --
18 discrimination against school teachers who happened to be gay
19 and lesbian.

20 And I decided after a long time thinking about this
21 that marriage was a different situation and that the people
22 should be able to have input on the definition of marriage and
23 that it wasn't necessarily invidious discrimination against the
24 minority group. I think it's perfectly fine if the consensus
25 builds in the country for there to be legal recognition of

1 same-sex marriage, but that's different then having it imposed
2 by the Court.

3 Finally, with respect to Prop 22. At that point I
4 viewed gays and lesbians in California as being what I
5 considered a vulnerable minority. And if you look at the
6 context of 22, there's more evidence for that. There was -- I
7 think the No On 22 campaign raised -- or was able to spend
8 maybe \$4 million to fight that initiative compared to
9 \$43 million in 2008. The amount of coalition allies they had
10 in 2000 was very different than they had this 2008.

11 So I may have misread the situation in 2000 with Prop
12 22, but I definitely have a different view of it today.

13 **Q.** If we leave aside the marriage referendum and initiatives
14 that you have examined, how have the political goals of gays
15 and lesbians fared in the initiative process in the last couple
16 of decades leaving aside the marriage issue?

17 **A.** Okay. There have been very few initiatives in the --
18 across the United States that affect gays and lesbians, if you
19 set aside the marriage initiatives. And so it can't be said
20 that the initiative process is stripping away rights.

21 Now, there's -- you know, there's a few examples. If
22 we go back to the 1990's, Amendment 2 in Colorado would be
23 something that I would look at as, you know, an initiative that
24 was very sweeping and broad and eliminated the opportunity for
25 gays and lesbians across the board to achieve rights through

1 the political process or through ballot measures. And so that
2 would be something that I would still think would be in the
3 category of an initiative that would adversely affect gays and
4 lesbians.

5 But aside from that, there are very few that I can
6 think of that would be -- that would fall into that category of
7 negatively affecting gays and lesbians.

8 **Q.** Now, do you recall that Mr. Boies also showed you an
9 amicus brief that William Eskridge had co-authored in the *In*
10 *Re Marriage* cases?

11 **A.** Yes.

12 **Q.** And do you recall that this -- relevant sentences he read
13 to you said.

14 "The proponents of Proposition 8 centrally
15 maintained that state recognition of same-sex
16 marriage would require schools to teach
17 vulnerable children that gay marriage is just
18 as good as traditional marriage."

19 **A.** Yes. I believe I recall that was a sentence in that
20 amicus brief, yes.

21 **Q.** And the next sentence, do you recall, said.

22 "That claim has no basis and its acceptance
23 by some voters probably made the difference
24 between the gay minorities having the same
25 marriage rights as the straight majority and

1 having no marriage rights at all."

2 Do you recall that?

3 **A.** Yes.

4 **MR. THOMPSON:** Your Honor, I would like to now
5 publish as a demonstrative PX-20, which is already in evidence
6 and it's one of the official ads of the campaign.

7 **THE COURT:** Very well.

8 (Videotape played in open court.)

9 **BY MR. THOMPSON:**

10 **Q.** All right. Now, Professor, you were asked questions about
11 anti-gay stereotype.

12 Leaving aside anti-gay stereotypes, what political
13 themes were articulated in that ad?

14 **MR. BOIES:** Objection, your Honor.

15 **THE COURT:** It is beyond the scope.

16 **MR. THOMPSON:** Well, your Honor, he was asked about
17 the messaging and he was asked whether the messaging --

18 **THE COURT:** That question is clearly beyond the
19 scope.

20 **BY MR. THOMPSON:**

21 **Q.** Okay. Well, do you think that that ad is confined to the
22 proposition that schools would teach vulnerable children that
23 gay marriage is just as good as traditional marriage; the very
24 thing that Professor Eskridge said probably made the
25 difference?

1 **MR. BOIES:** Your Honor, I object. Both on terms
2 of -- I object both on terms of scope and he has no expertise
3 in interpreting ads.

4 **MR. THOMPSON:** I'm just reading from the portion of
5 the amicus brief that he was cross examined about extensively,
6 about whether -- the central maintaining message.

7 **THE COURT:** Objection overruled.

8 **MR. THOMPSON:** Thank you, your Honor.

9 **A.** I'm sorry. You are going to have to restate the question.

10 **BY MR. THOMPSON:**

11 **Q.** Okay. So leaving aside --

12 **MR. THOMPSON:** Actually, could the court reporter
13 read it back so we don't have another objection?

14 **THE COURT:** He's not the only one who's forgotten the
15 question.

16 **MR. THOMPSON:** Yes, I apologize, your Honor.

17 **THE COURT:** That happens, counsel.

18 (Whereupon the record was read
19 as requested.)

20 **A.** My answer is no.

21 **BY MR. THOMPSON:**

22 **Q.** And why is that?

23 **A.** Well, there were -- I might have to go back and look at it
24 again, to refresh my memory.

25 **Q.** I'm sorry. Why don't we just play it again?

1 **A.** That would be helpful.

2 **MR. BOIES:** Your Honor, I object. We are not going
3 to play this ad a second time.

4 **MR. THOMPSON:** We are almost done, your Honor.

5 **THE COURT:** I thought you were on the right track,
6 Mr. Thompson.

7 **MR. THOMPSON:** I apologize.

8 **THE COURT:** You were focusing on the Eskridge article
9 since that was placed before the witness during his
10 cross-examination.

11 So if you are going to proceed that way, that's fine.

12 **MR. THOMPSON:** Okay. Okay.

13 **BY MR. THOMPSON:**

14 **Q.** Okay. Given your familiarity with the campaign materials,
15 what were some of the issues, other than children being taught
16 in schools that gay marriage is just as good as traditional
17 marriage?

18 **A.** Okay. I'm recalling the ad a little bit, and I -- one of
19 the things is you have a law professor there talking about the
20 imposition by judges of a decision in this issue that would
21 prevent the people from being able to, through democratic
22 processes, determine this issue.

23 And I think there's also a theme in there of
24 tradition, traditional marriage, which is, I think, a
25 different -- different certainly than, you know, what was

1 suggested by Professor Eskridge. So there is really two
2 themes.

3 **MR. THOMPSON:** Very well, your Honor. We have no
4 further questions.

5 **THE COURT:** Are you saying that it is never
6 appropriate for the judiciary to intervene in the initiative
7 process?

8 **THE WITNESS:** No, your Honor.

9 **THE COURT:** When is it appropriate?

10 **THE WITNESS:** In my view, it's appropriate when an
11 initiative or just like any other statute enacted by a
12 legislature violates in this case the federal constitution.

13 **THE COURT:** And who is to make that determination?

14 **THE WITNESS:** That's ultimately a question for the
15 courts to decide. The context of -- this is a the first time
16 we are really getting this aired in the federal courts. There
17 was an issue in the state courts as to the interpretation of
18 state constitutions.

19 And -- should I explain what I mean --

20 **THE COURT:** Well, you made an interesting comment
21 that the initiative process provides a check on a Lochner era
22 judicial activism. And, yet, you have just said that it is
23 appropriate for the courts to intervene in the initiative
24 process in some circumstances.

25 And what I'm trying to tease out is what are the

1 circumstances in which you think it is appropriate?

2 **THE WITNESS:** Where there is a well-grounded
3 constitutional principle that is violated by the initiative,
4 and that's my view on it.

5 And the Eskridge article -- the Eskridge/Cain brief
6 dealt with state constitutional law, which is somewhat
7 different. It's more flexible. There's opportunities for the
8 voters to amend constitutions.

9 And so that's where you have the interplay between
10 popular majorities and courts, which is somewhat different than
11 the relationship between the initiative process and federal
12 constitutional law.

13 **THE COURT:** So where there is that well-grounded
14 constitutional principle at stake, the initiative process in
15 your view should, consistent with political theory, be checked?

16 **THE WITNESS:** In the same way that state legislatures
17 or Congress should be checked.

18 **THE COURT:** Very well. Thank you for your testimony,
19 sir.

20 And, counsel, we are going to take a break for
21 luncheon. I'm going to hear a motion to suppress while you are
22 having luncheon, and it probably will mean that we won't be
23 back until 1:15 or thereabouts. Is that agreeable?

24 **MR. THOMPSON:** Yes, it is.

25 **THE COURT:** All right. See you then.

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(Witness excused.)

(Whereupon at 11:58 a.m. proceedings
were adjourned for noon recess.)

P R O C E E D I N G S

JANUARY 26, 2010

1:11 P.M.

THE COURT: Very well. Mr. Cooper, please call your next witness.

MR. COOPER: Yes, Your Honor. Thank you. We call David Blankenhorn, Your Honor.

And we have a binder to hand out. May I approach the witness with it?

THE COURT: You may, indeed.

THE CLERK: Raise your right hand, please.

DAVID BLANKENHORN,

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

THE WITNESS: I do.

THE CLERK: Thank you. State your name.

THE WITNESS: David Blankenhorn.

THE CLERK: And spell your last name, please.

THE WITNESS: B-l-a-n-k-e-n-h-o-r-n.

THE CLERK: And your first name.

THE WITNESS: David.

THE CLERK: Spell it out, please.

THE WITNESS: D-a-v-i-d.

THE CLERK: Thank you.

DIRECT EXAMINATION

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BY MR. COOPER:

Q. Good afternoon, Mr. Blankenhorn.

A. Hi.

Q. Mr. Blankenhorn, I would like you to turn to tab 1 in the binder that's in front of you.

MR. COOPER: And, Your Honor, this is the declaration of Mr. Blankenhorn.

BY MR. COOPER:

Q. And I'd like you to turn back to -- actually, it's not a numbered page, but it's right behind page 25. And is that your CV, Mr. Blankenhorn?

A. Yes, sir.

MR. COOPER: Okay. Your Honor, behind tab A in the binder we have created a new exhibit that is just Mr. Blankenhorn's CV. It's exhibit DIX2693. And we would move that into evidence.

MR. BOIES: No objection, Your Honor.

THE COURT: Very well. DIX2693 is admitted.

(Defendants' Exhibit 2693 received in evidence.)

BY MR. COOPER:

Q. Mr. Blankenhorn, would you please briefly describe your educational background for the Court.

A. I graduated from high school in Salem, Virginia, in 1973. I graduated from college from Harvard College, in 1977, with a

1 degree in social studies. And I graduated in 1979, with an
2 M.A. in history from the University of Warwick in Coventry,
3 England.

4 **Q.** And did you receive any honors?

5 **A.** As an undergraduate, I received the honor of magna cum
6 laude, and it's with -- my M.A. degree, they called it "with
7 distinction."

8 **THE COURT:** I didn't hear what you said.

9 **THE WITNESS:** It was called "with distinction," M.A.
10 with distinction.

11 **BY MR. COOPER:**

12 **Q.** And did you receive any fellowships?

13 **A.** I received the John Knox fellowship as an undergraduate
14 to -- for a year of study abroad.

15 **Q.** And were you on that fellowship at the University of
16 Warwick?

17 **A.** Yes, sir.

18 **Q.** After your graduation from the University of Warwick, what
19 did you do then?

20 **A.** I served two years in the VISTA program, Volunteers In
21 Service to America, where I worked as a community organizer in
22 several communities in Boston, Massachusetts. And, then, for
23 the next four years, I worked as a -- after VISTA, I continued
24 my work as a community organizer in several different
25 communities in Massachusetts and in Virginia.

1 Q. Okay. And what -- what did your work in these
2 neighborhoods entail?

3 A. Well, it was working -- working and living in low-income
4 communities, where there were a lot of challenges. And our job
5 as organizers were to create grassroots organizations in those
6 communities to increase their voice in the political system and
7 to advocate for reforms that they thought were important.

8 Q. You mentioned challenges. What did you mean by
9 "challenges" in those communities?

10 A. Well, you -- you see a lot of the problems firsthand when
11 you live and work in, you know, in poor communities where there
12 are lots of issues that need addressed.

13 And I think, for me, seeing the weakening of the --
14 seeing the weakened state of community and family institutions
15 in those communities in some ways was -- especially the role
16 of -- especially how children were living without their
17 fathers, it caused me to be particularly interested in that
18 issue and to -- then led me to my next round of work.

19 Q. Okay. And what was that?

20 A. Well, I started -- with some colleagues, I started an
21 organization called -- this is -- we're now up to 1987.

22 I started an organization called Institute for
23 American Values, which is a nonpartisan think tank, that it
24 works on -- their primary focus is on issues of marriage,
25 family, and child well-being.

1 Q. And what -- what is your position in the Institute for
2 American Values?

3 A. I'm the president.

4 Q. And could you explain the type of work that -- that the
5 Institute does?

6 A. Well, we commission research, usually by putting together
7 teams of scholars that would work on projects for one, two,
8 three or -- years, or more. Then we would release the findings
9 of that work.

10 We hold conferences and we -- I would say, perhaps,
11 our signature product is what we call "Report to the Nation."
12 And that's where an interdisciplinary team of scholars tries to
13 tackle what we consider to be an important issue, working very
14 intensively for a fair period of time. And then they jointly
15 release these -- these findings and these recommendations.

16 Q. Are you one of the -- what are the subject matters that
17 the Institute focuses on?

18 A. Well, as I mentioned, the main subjects would be
19 fatherhood, marriage, family structure, child well-being.

20 In recent years, we have added several other issues
21 to our agenda. But that has -- was -- has always been our
22 primary area of concentration.

23 Q. And does the Institute produce any regular publication?

24 A. We produce an annual report called "The State of Our
25 Unions," which is a report on the state of marriage in America.

1 And we produce a periodic report. We're working on the third
2 edition now, called "Why Marriage Matters: Conclusions from
3 the Social Sciences."

4 **Q.** And that latter report, what does it address, seek to
5 address?

6 **A.** We've got -- we pulled together about 15 scholars from
7 different fields in the social sciences and from different
8 points of view on the political spectrum, and had them work
9 together very carefully to come up with a consensus statement
10 on what they felt were the social -- the principal social
11 science findings regarding marriage as an institution.

12 And we've published the two editions now. We renew
13 them as more research becomes available. And now we are
14 working on the third edition.

15 **Q.** Mr. Blankenhorn, are you personally involved in the
16 Institute's research and publications in its other work?

17 **A.** Yes, sir. Either, in some cases, as a principal writer or
18 investigator, and in other cases more as the -- in the capacity
19 of iden- -- identifying the teams of scholars and working with
20 them to refine the topic, and then working with -- with them in
21 a non-leadership capacity as they do their work and as they
22 then release the results of their work.

23 **Q.** And is there a subject matter or field that you devote
24 your personal efforts to in connection with that -- with --
25 with your personal involvement in those projects?

1 **A.** Marriage, fatherhood, family structure.

2 **Q.** Mr. Blankenhorn, have you authored any books?

3 **A.** Yes, sir. I authored -- relevant to this topic, I
4 authored a book in 1995, called *Fatherless America*. That was a
5 study or a book about the consequences of having approximately
6 35 percent of U.S. children living apart from their fathers.
7 And it pointed to -- I argued that this was a serious social
8 problem.

9 And then in 2006, I published a book called -- 2007,
10 rather, published a book called *The Future of Marriage*, that
11 just looks at what is happening to marriage today, and how we
12 might take steps to -- to strengthen it in the future.

13 **Q.** Okay. I want to explore a little further both of those --
14 both of those books.

15 Let's start with the *Fatherless America*. Describe
16 the research you undertook in connection with writing that
17 book.

18 **A.** I did interviews with fathers in six different cities
19 around the country, and used the transcripts of those
20 interviews as bases for writing portions of the book.

21 And I conducted a literature review of the
22 scholarship at that time, on the role of fathers in the lives
23 of children. That was a basis.

24 And, thirdly, I convened scholarly conferences or
25 gatherings where commissioned papers were produced. And we

1 would discuss these papers on different aspects of fatherhood
2 and father absence. And those discussions and working with the
3 scholars in that way also furthered my -- my thinking about the
4 topic.

5 **Q.** And did your book, *Fatherless America*, receive any
6 commentary? Or what kind of reaction did it receive when it
7 was published?

8 **A.** I think it's fair to say that it was widely and generally
9 respectfully reviewed, in the *New York Times*, and *Washington*
10 *Post*, *Book World*, and *L.A. Times*, *Chicago Tribune*, *Wall Street*
11 *Journal*, *Newsweek*, *U.S. News & World Report*. It was featured
12 on the CBS Evening News. It was -- it was -- it was widely
13 reviewed.

14 **Q.** And did it occasion any appearances, on your part, in
15 connection with discussion of the book?

16 **A.** It led to quite a bit of public speaking at university and
17 civic groups, and elsewhere.

18 **Q.** And I think you said it was reviewed. A Dr. Michael Lamb
19 has testified in this case. Did he review your book?

20 **A.** Yes, he reviewed it in one of the professional journals.
21 And he disagreed with some of its findings, but said some
22 respectful things about it as well.

23 **MR. COOPER:** Well, and, in fact, I'd like to publish
24 to the screen, Your Honor, if I may, Demonstrative number 1.

25 (Document displayed.)

1 **BY MR. COOPER:**

2 **Q.** Now, on the screen, Mr. Blankenhorn, is this the -- is
3 this among the things that Mr. Lamb said?

4 **A.** This is among the nicer things he said, yes.

5 (Laughter)

6 **MR. BOIES:** Your Honor, may I inquire whether the
7 review is in evidence?

8 **MR. COOPER:** I don't know.

9 **MR. DUSSEAULT:** It is.

10 **THE COURT:** It rings a bell, I must say.

11 **MR. THOMPSON:** I believe I used it with Dr. Lamb,
12 Your Honor, and moved it into evidence. We can check.

13 **THE COURT:** I think we have seen this before. I
14 could be mistaken, of course.

15 **MR. THOMPSON:** We have seen it, Your Honor.

16 **THE COURT:** All right. Mr. Thompson and I have seen
17 it before.

18 (Laughter)

19 **MR. COOPER:** And, Your Honor, I believe
20 Mr. Blankenhorn's book, *Fatherless America*, is in evidence. I
21 think there may have been some confusion about its exhibit
22 number, but I believe it's in evidence.

23 **THE COURT:** The witness's book or the Lamb article?

24 **MR. COOPER:** The witness's book, *Fatherless America*.

25 **THE COURT:** And that's exhibit number?

1 **MR. COOPER:** Your Honor, it's defense Exhibit 103.

2 **THE COURT:** Thank you.

3 **MR. COOPER:** DIX103.

4 **THE COURT:** Very well.

5 **BY MR. COOPER:**

6 **Q.** Now, I'd like to turn to the other book you mentioned, *The*
7 *Future of Marriage*. Would you turn to tab 2 of your book -- I
8 mean, of your witness binder here.

9 **A.** Yes.

10 **Q.** And would you describe what you find there?

11 **A.** Well, that's a picture of the cover of the book, *The*
12 *Future of Marriage*.

13 And, as I said, it was from 2007, and talks about
14 what is happening to marriage, and what the consequences of
15 these trends are. And it makes recommendations on how we
16 might, as a society, seek to strengthen the institution.

17 **Q.** And could you describe how you researched and prepared
18 to -- to author this book?

19 **A.** I spent some concentrated period of time, with some
20 guidance from some colleagues, trying to immerse myself and
21 become familiar, a literature review, conduct a literature
22 review of the anthropological literature related to fatherhood
23 as -- sorry, marriages as a cross-cultural institution.

24 And I conducted a series of consultations with an
25 interdisciplinary group of scholars, three of them in different

1 parts of the country, to discuss the issue.

2 And then I just also consulted my own accumulated
3 body of having read and written and spoken about this issue for
4 about the past 20 years.

5 **Q.** And this book, *The Future of Marriage*, did it receive
6 commentary when it was published, as well?

7 **A.** It did. It was not as widely reviewed as *Fatherless*
8 *America*, but it did receive some attention from reviewers.

9 And it also caused me to be invited to do quite a bit
10 of public speaking and to engage in conversation with -- in the
11 book, I argue that we should not adopt same-sex marriage, and
12 so the book caused me to be invited to participate in lots --
13 quite a number of conversations with proponents of adopting
14 same-sex marriage.

15 And I think, in a way, that might have been the most
16 interesting and important outcome, in terms of the public
17 impact or public -- you know, the results of the book.

18 **Q.** I would like to publish now Demonstrative number 2, with
19 respect to the commentary on your book.

20 (Document displayed.)

21 **MR. COOPER:** And, Your Honor, for the record, if the
22 Court please, I'll just read that Mr. Dale Carpenter, Professor
23 Dale Carpenter, a University of Minnesota law professor, said
24 of the book:

25 "Probably the best single book yet written

1 opposing gay marriage. Blankenhorn is a
2 serious scholar and thinker."

3 And then Professor Francis Fukuyama had this to say:

4 "David Blankenhorn enormously deepens the
5 current debate on same-sex marriage by
6 recovering the historical understanding of
7 marriage as a public institution designed to
8 promote and foster procreation and the
9 raising of children, an understanding based
10 not on religious conviction but on
11 observation of how our species has resolved
12 over time. It is a thoughtful and important
13 addition to the contemporary debate."

14 **BY MR. COOPER:**

15 **Q.** Are these among the comments that your book generated?

16 **A.** These are -- these mean something important to me because
17 Fukuyama is an internationally-respected scholar, author of
18 many books.

19 Professor Carpenter is a prominent law professor who
20 is a very active proponent of gay marriage. So when he says
21 it's the best book against, he might have been dampening his
22 praise a little bit, from his point of view. But it was a very
23 generous thing for him to say.

24 **MR. COOPER:** Your Honor, I would like to introduce
25 Mr. Blankenhorn's book, *The Future of Marriage*. It is marked

1 as DIX956.

2 **THE COURT:** Hearing no objection.

3 **MR. BOIES:** No objection, Your Honor.

4 **THE COURT:** 956 is admitted.

5 **MR. COOPER:** Thank you.

6 (Defendants' Exhibit 956 received in evidence.)

7 **MR. COOPER:** Thank you.

8 **BY MR. COOPER:**

9 **Q.** I'd also now like to publish to the screen Demonstrative
10 number 3, and in that connection ask you if you have edited any
11 books on subject matters relevant to your testimony today?

12 (Document displayed)

13 **A.** Yes, sir. Well, I thought there were four. The *Black*
14 *Fathers in Contemporary American Society*, which I co-edited
15 with Obie Clayton and Ron Mincy, who were two prominent
16 African American sociology professors.

17 *The Book of Marriage*, which I co-edited with Dana
18 Mack, who worked with me at the Institute at the time.
19 *Promises to Keep* and *Rebuilding the Nest*, are both groups of
20 essays which I co-edited, and each essay -- each of these books
21 is a compilation of scholarly essays examining the status and
22 future of marriage.

23 **Q.** Have the books that you have written or edited been
24 reviewed in any peer-reviewed academic journals?

25 **A.** Well, I counted up recently, and there were over 50

1 citations in peer-reviewed academic journals. And I believe
2 there were reviews in seven -- book reviews in seven journals,
3 including the *Journal of Marriage and the Family*, and social --
4 *Family Relations*, and those -- journal of *Family Relations*
5 being -- *Journal of Marriage and the Family* being the most
6 prominent journal in the field of -- when it comes to sociology
7 of the family.

8 So, yes, there were some -- a number of reviews, and
9 also a number of citations in peer-reviewed journals.

10 **Q.** And I just to be clear, if I understood your testimony
11 correctly, your book has been actually reviewed, and you say
12 seven times. But it's been cited over 50 times in
13 peer-reviewed journals?

14 **A.** Yes. Seven -- seven reviews, and I think about 53
15 citations of the works in peer-reviewed journals.

16 **Q.** And has your scholarship ever been cited in any reported
17 judicial opinions?

18 **A.** It's been cited five times in court cases, including by
19 the California Supreme Court and by the Massachusetts Supreme
20 Judicial Court.

21 **Q.** And were those citations in the same-sex marriage cases in
22 those?

23 **A.** Both of the latter two were with respect to the same-sex
24 marriage cases, yes, sir.

25 **Q.** I see on your CV you are a member of the National

1 Commission on America's Urban Families. Could you describe
2 that commission, please.

3 **A.** That commission was appointed by President George Bush,
4 the 41st president, in 1992, to examine the state of America's
5 urban families and to issue a report to the President.

6 I was one of about seven members. The chairman of
7 that committee was then Governor John Ashcroft, of Missouri.
8 The vice-chairwoman was former mayor, Annette Strauss, from
9 Dallas. And we met six or seven times, when we issued our
10 report in January of '03 -- of '93, excuse me.

11 **Q.** Have you ever served in any other advisory role to federal
12 governmental officials?

13 **A.** I was asked during the -- President Clinton's
14 Administration, I was asked by Vice President Al Gore to work
15 with him in a program called Family Reunion, which was focused
16 on family issues. And it was a conference that the vice
17 president sponsored and chaired in Nashville, Tennessee, each
18 summer during that period of time.

19 And I was asked -- I was one of a number of people to
20 be asked by him to meet with him, to help him develop the
21 agenda, and to participate in that conference. The theme at
22 the conference that year was "fatherhood."

23 **Q.** And the National Fatherhood Initiative is listed on your
24 CV. What is that?

25 **A.** That is a group that was founded by me and several other

1 people in 1995, I believe was the first time we had a meeting.
2 '96, perhaps.

3 It's to raise consciousness and to really, I guess,
4 inform public opinion about the importance of active, involved
5 fathers in the lives of children. I was the founding chairman.

6 **Q.** Earlier in your testimony you mentioned that you had done
7 some speaking. Have you delivered lectures in academic
8 settings?

9 **A.** Yes, I have. Quite often over the years, yes.

10 **Q.** And have these been on the subject matters that we're
11 discussing now?

12 **A.** Marriage, fatherhood, family structure.

13 **Q.** And have you been invited to participate in debates or
14 panel discussions on the subject specifically of marriage
15 and/or same-sex marriage?

16 **A.** Yes. I'd say quite a few times, I've had a chance to meet
17 and engage in conversation on this issue with some of the
18 leading proponents of same-sex marriage, Evan Wolfson, Andrew
19 Sullivan, Jonathan Rauch, others.

20 **Q.** So you've engaged in debates with them over the years, on
21 this subject matter?

22 **A.** Yes, sir. We -- we try to call them conversations now,
23 but, yes, that's the -- that's the issue.

24 **Q.** And have you provided legislative testimony in these
25 areas?

1 **A.** Uhm, I believe I've testified either -- I've testified
2 three times before either a congressional committee or a state
3 legislative committee, on subjects of marriage and fatherhood.

4 **Q.** Thank you, Mr. Blankenhorn.

5 **MR. COOPER:** Your Honor, I would like to tender
6 Mr. Blankenhorn as an expert on the subject of marriage,
7 fatherhood, and family structures.

8 **THE COURT:** Very well. Voir dire?

9 **MR. BOIES:** Yes, Your Honor.

10 **VOIR DIRE EXAMINATION**

11 **BY MR. BOIES:**

12 **Q.** Good afternoon, Mr. Blankenhorn.

13 **A.** Hello.

14 **Q.** We haven't met, but my name is David Boies, and I
15 represent the plaintiffs.

16 You got a master's degree, and that degree was in
17 history; is that right?

18 **A.** Yes, sir. Comparative labor history.

19 **Q.** And you did a thesis for that master's?

20 **A.** Yes, sir.

21 **Q.** And what was that thesis in?

22 **A.** Labor history.

23 **Q.** Was it a particular subject?

24 **A.** Yes, sir. It was a study of two cabinetmakers' unions in
25 19th century Britain. And it was published in a peer-reviewed

1 academic book several years after I wrote it.

2 **Q.** Now, "peer-reviewed," you just said. What is your
3 understanding of what a peer-reviewed publication is?

4 **A.** It's a publication that prior to it being published is
5 reviewed by competent persons to give -- to give their views on
6 whether or not -- first, whether or not the article should be
7 published. And then, if it should, whether it requires
8 revisions.

9 **Q.** Now, other than the thesis that you wrote on cabinetmakers
10 in Britain, have you ever had a peer-reviewed publication?

11 **A.** Yes, sir.

12 **Q.** And what was that?

13 **A.** Well, I co-edited a book with Obie Clayton and Ron Mincy,
14 called *Black Fathers in Contemporary American Society*, that was
15 published by Russell Sage Press. That was a peer-reviewed
16 publication.

17 **Q.** Anything else?

18 **A.** No, sir. To the best of my memory, that's it.

19 Except it might be of interest to note that in my own
20 organization, where over the past 20 years many of my pieces of
21 work have been published, we have, to the best of our ability,
22 instituted our own peer-review process. And we've been very
23 scrupulous about carrying that out because of our high regard
24 for the entire process.

25 **Q.** But you do understand that "peer-reviewed," as is normally

1 used --

2 **A.** I am using it as it's normally used.

3 **Q.** "Peer-reviewed," as it is normally used does not refer to
4 something that you do internally. It's done by somebody
5 independent, correct?

6 **A.** All of our peer reviews are done by external people that
7 have no connection to the Institute or the work that we're
8 doing.

9 **Q.** And are you saying that those independent people
10 peer-reviewed your work?

11 **A.** Yes, sir.

12 **Q.** Okay. Now, I thought I had two pieces of peer-reviewed
13 publications.

14 **A.** I thought that the import of your question was to exempt
15 from our consideration things that were published by my own
16 organization, for reasons that you're implying.

17 And I'm happy to stipulate that let's bracket that
18 and just say that, apart from anything that was published by my
19 own organization, where you could question, if you wish, the
20 integrity of the peer-review process -- although, I think, if
21 you were familiar with it you would not question it; but as an
22 outsider you may question it -- let's bracket that for a moment
23 and just say everybody else. We're looking at two publications
24 only.

25 **Q.** And those two publications didn't have anything to do with

1 same-sex marriage or the effects of same-sex marriage, correct?

2 **A.** No, sir.

3 **Q.** In other words, I'm correct?

4 **A.** You're correct. They did not.

5 **Q.** Okay. Thank you.

6 Now, you have never taught a course in any college or
7 university on marriage, correct?

8 **A.** No, sir.

9 **Q.** And you have never taught a course in any college or
10 university on fatherhood, correct?

11 **A.** No, sir.

12 **Q.** And you've never taught a course in any college or
13 university on family structure?

14 **A.** No, sir.

15 **Q.** And do you understand that the fields of psychology and
16 sociology and anthropology are relevant to the subjects of
17 marriage and fatherhood and family structure?

18 **A.** That is my understanding, yes, sir.

19 **Q.** And you've never gotten any kind of degree in psychology,
20 correct?

21 **A.** No, sir.

22 **Q.** Or in psychiatry?

23 **A.** No, sir.

24 **Q.** Or in sociology?

25 **A.** No, sir.

1 Q. Or in anthropology?

2 A. I think we could go through the whole list because I've
3 enumerated for you all the degrees I have.

4 Q. And you've never taught any course in any college and
5 university --

6 A. I have never been employed by a university or a college to
7 teach --

8 Q. In any capacity?

9 A. -- in any way, ever.

10 Q. And you said you had testified three times. Were any of
11 those three times relating to the effects of same-sex marriage?

12 A. No, sir.

13 Q. In preparation for your testimony, did you undertake any
14 scientific study of what the effects of permitting same-sex
15 marriage had been in any jurisdiction in which same-sex
16 marriage had been permitted?

17 A. Specifically in preparation for my testimony, did I
18 undertake such study? The answer to that would be, no, sir, I
19 did not.

20 Q. Okay. Independent of the preparation for your testimony,
21 have you conducted any scientific study as to what the effects
22 of permitting same-sex marriage were in any of the
23 jurisdictions where same-sex marriage was permitted?

24 A. Well, I have undertaken a study of that question in the
25 best way I know how. Whether or not it would meet your

1 definition of "scientific" is probably something we might have
2 to explore. I would be happy to tell you what I did.

3 **Q.** Let me explore it. You are saying that you undertook a
4 attempt to study what the effects were of permitting same-sex
5 marriage in various jurisdictions where same-sex marriage was
6 permitted; is that your --

7 **A.** No, sir.

8 **Q.** Okay.

9 **A.** I want to say what I did do, though, if I may be
10 permitted.

11 **Q.** Let me be sure I've got answers to my questions first,
12 though, okay, sir.

13 **A.** I thought you were asking me did I undertake independent
14 of this preparation from testimony, I thought your question
15 was: Did I undertake any effort to understand the likely
16 consequences of adopting same-sex marriage? And I wish to tell
17 you that I did.

18 **Q.** No. I'm sure you would like to answer questions that I'm
19 not asking, sir.

20 (Laughter)

21 And you'll have a chance to do that with your
22 counsel. I would like you to listen to the question I'm asking
23 you, okay, because I think your question kind of slid over a
24 couple of words.

25 My question was whether you had conducted any study,

1 in connection with your expert work or otherwise, of the
2 effects of permitting same-sex marriage in the countries where
3 same-sex marriage was permitted? That begins with a yes or no
4 answer.

5 **A.** I don't think I'm able to answer that question yes or no,
6 if those are my only two choices.

7 **Q.** Well, the question is whether you have attempted to study
8 the effects of same-sex marriage in the jurisdictions where
9 they have been permitted. You have either attempted to do that
10 or not attempted to do that. It may very well have been that
11 you attempted to do something entirely different or even
12 related to it. But I'm not asking you about that. Do you
13 understand?

14 **A.** May I tell you what I did do?

15 **Q.** I would like you to answer my question, sir. Now, do you
16 understand what my question is?

17 **A.** No, sir, because --

18 **Q.** If you don't understand my question, anytime you don't
19 understand my question, please let me know.

20 **A.** I'm letting you know now.

21 **Q.** Okay. Let me try to be as clear as I can.

22 You are aware that there are some jurisdictions that
23 have permitted same-sex marriage?

24 **A.** I am so aware.

25 **Q.** Okay. Now, have you studied any of those jurisdictions to

1 try to determine what the effect of permitting same-sex
2 marriage in those jurisdictions has been, subsequent to the
3 time that same-sex marriage was adopted?

4 **A.** The answer to your question is: Yes.

5 **Q.** Okay.

6 **A.** If by --

7 **Q.** As long as you answer yes, then I can begin to ask more
8 questions.

9 **A.** I'm just afraid that you won't accept my definition of
10 "study." And I don't want to try to say something that is --
11 is -- that it doesn't meet your definition of a study.

12 **Q.** Well, I will explore that. I will explore that. But I
13 would like to do it in an orderly way.

14 And the first thing I'd like to do is, I'd like you
15 to identify which jurisdictions you have, in your
16 interpretation of the word "studied," studied.

17 **A.** I've tried to pay some attention to the evolution of
18 the -- of this phenomenon of same-sex marriage in the
19 Scandinavian countries. And I have tried to pay some attention
20 to the impact of same-sex marriage in Massachusetts.

21 But what I was trying to say before is that, I have
22 not engaged in a scientific study where I find data and -- and
23 write up an article that would be published of that nature. I
24 have not done those things. That's what I was trying to say.
25 I have not done those things.

1 I have just read articles and had conversations with
2 people, and tried to be an informed person about it. But that
3 is really the extent of it.

4 I haven't developed a methodology or a set of expert,
5 you know, findings about the topic that you're -- I have not
6 done that, the topic that you're asking me to address.

7 **MR. BOIES:** Okay. Your Honor, I would object.

8 **THE COURT:** The objection is that the witness is not
9 qualified to opine on the subject of marriage, fatherhood, and
10 family structure, correct?

11 **MR. BOIES:** Yes. And in particular -- and in
12 particular, with respect to the effect of same-sex marriage,
13 which is what he is being proffered to do within those general
14 subjects.

15 **THE COURT:** Mr. Cooper, any further foundation for
16 the opinion testimony that the witness is prepared to offer?

17 **MR. COOPER:** Your Honor, I think if the Court will
18 permit the witness to testify, the Court will observe and hear
19 the foundation for his judgments, and can certainly reserve
20 judgment. But --

21 **THE COURT:** Well, I understand. And I may very well
22 do that. But the question is whether you want to lay any
23 further foundation for his expertise.

24 **MR. COOPER:** In these subjects of marriage, family
25 structure, and fatherhood?

1 **THE COURT:** Yes, and same-sex marriage, as
2 Mr. Boies --

3 **MR. COOPER:** And same-sex marriage. No, Your Honor.

4 **THE COURT:** Okay. Well, the testimony is, of course,
5 governed by the rules of evidence concerning opinion testimony.

6 And the cases that the Supreme Court has laid down to
7 guide the Court in admitting such testimony, obviously, the
8 standards are somewhat different in the physical sciences than
9 they are in the social sciences.

10 Relevant to the social sciences, as I understand the
11 standards that have been adopted by the Supreme Court and by
12 the Courts of Appeal, the Court looks to whether the work that
13 the witness has done meets the standards of intellectual rigor,
14 using criteria much like those that have been developed in the
15 Daubert case and the Daubert line of cases; whether the
16 proffered testimony is based upon the expert's special skills,
17 and his special skills as opposed to the insights of an
18 intelligent layperson; and whether the proffered testimony will
19 assist the trier of fact to understand or determine a fact
20 which is in issue in the case.

21 With respect to Mr. Blankenhorn's qualifications,
22 were this a jury trial, I think the question might be a close
23 one.

24 But this being a court trial, I'm going to permit the
25 witness to testify; and, as Mr. Cooper has suggested, to weigh

1 that testimony in light of the witness's qualifications, his
2 background, training, and experience, and the reasons that he
3 offers for his opinions.

4 So you may proceed.

5 **MR. COOPER:** Thank you, Your Honor.

6 **DIRECT EXAMINATION RESUMED**

7 **BY MR. COOPER:**

8 **Q.** Mr. Blankenhorn, what is marriage?

9 **A.** Marriage is a socially-approved sexual relationship
10 between a man and a woman.

11 **Q.** And on what do you base that opinion?

12 **A.** I base that on the broad consensus findings of the
13 scholars, principally from the field of anthropology, but
14 others as well, who have carefully sought to investigate this
15 question in the modern era.

16 **Q.** And what does marriage do?

17 **A.** Marriage does a number of things, but the most important
18 thing it does is regulate filiation. It establishes who are
19 the child's legal and social parents.

20 **Q.** And on what do you base that opinion?

21 **A.** The same body of evidence, the -- the views that have been
22 drawn from scholarly investigations, principally from the field
23 of anthropology, but elsewhere as well, spanning across the --
24 the modern era of scholarship.

25 **MR. COOPER:** Your Honor, I would like to publish to

1 the screen Demonstrative number 4, and now present the
2 witness's testimony and his expert opinions which have been
3 disclosed, of course, to the -- to the plaintiffs.

4 (Document displayed)

5 And for purposes of the record, Your Honor, I would
6 like to read into the record proposition number one, and then
7 ask the witness questions about that.

8 **MR. BOIES:** Objection. Leading, Your Honor.

9 **MR. COOPER:** Beg your pardon?

10 **THE COURT:** It's a leading objection. I think it's a
11 well-taken objection. Maybe you could just jump right into the
12 subject.

13 **MR. COOPER:** Well, Your Honor, I would be happy to do
14 that. Although, I have to say that the plaintiffs led their
15 witnesses throughout the course of the presentation of their
16 case. And on the one occasion when we objected to it, we
17 recognized that it moved the pace of the --

18 **THE COURT:** It does move things along. I will let
19 you do some leading.

20 But rather than simply reading from the demonstrative
21 and then asking the witness whether he agrees with this or
22 doesn't agree with it, and so forth, it might be helpful if you
23 were to take him through in a somewhat more traditional manner.

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

25

1 **BY MR. COOPER:**

2 **Q.** Mr. Blankenhorn, what is the primary purpose of marriage
3 in human groups?

4 **A.** We're embodied as male and female. That's the basic
5 division in the species. We -- we reproduce sexually. We
6 don't -- you know, that's -- that's how -- how we reproduce.
7 And the -- marriage is the social institution that rests upon
8 those very primary biological facts.

9 In fact, the famous anthropologist, recently deceased
10 but very famous anthropologist, Claude Levi-Strauss, once
11 described marriage as a social institution with a biological
12 foundation. And this is really what he was referring to.

13 He was saying that in -- across societies, that we
14 have an interest in having it be, insofar as we can make it so,
15 that the man and the woman who -- whose sexual union makes the
16 child, who are the biological creators of the child, that those
17 same two individuals are also the social and legal parents of
18 the child.

19 And there is only one institution in the world that
20 performs the task of bringing together the three dimensions of
21 parenthood: The biological, the social -- that's the caring
22 for the child -- and the legal. That institution is -- is
23 marriage.

24 It -- it -- it -- we think of it, in a way -- if you
25 don't mind the poetry, we think of it as a gift that we give to

1 children. We say: You as a child are being given this gift of
2 being able to know and be known by the two people who brought
3 you into this world.

4 So this question -- this word "filiation," or the
5 word "affiliation," who is the child affiliated with, that,
6 according to the scholars, has been the primary cross-cultural
7 purpose of the institution. If it wasn't -- if that need was
8 not there, we -- we likely would not have the institution at
9 all.

10 So marriage does numerous things. There are numerous
11 dimensions to it, of course. And it changes historically, and
12 it evolves over time, and there's great diversity.

13 But the wonderful finding, from the scholars who
14 looked at it, is that it always is primarily organized
15 everywhere, around the globe, to achieve this goal of giving
16 the child -- of uniting the biological, social, and legal
17 dimensions of parenthood, in fixing that, because we know how
18 important this is for children.

19 That's really -- that's really the main rationale for
20 why we have the institution.

21 **Q.** What is the significance of the fact that marriage is a
22 cross-cultural, as you put it, institution and exists
23 everywhere?

24 **A.** The fact that it exists everywhere or at least nearly
25 everywhere, I think, suggests just how important the need must

1 be. Because marriage can look very different in different
2 places and different times. But what's so astonishing about
3 this is that it's always doing this thing. East, west, north,
4 south, a thousand years ago, today, it's doing this thing.

5 So this thing must be pretty important. It must be
6 pretty fundamental. It must be at the -- at the very species
7 level, critical to our -- to the society's success. It's not
8 just one thing among many, and so forth.

9 Because of its universality in the midst of
10 diversity, I think that's a good piece of evidence to suggest
11 the absolutely fundamentally important nature of the need that
12 is being addressed singularly by this institution.

13 **Q.** When you said earlier "this thing," I just want to be
14 clear, what do you mean when you say marriage addresses "this
15 thing"?

16 **A.** The need for the child to know and be known by the two
17 people, to make it as likely as we can, that the biological
18 parents are also the social and legal parents. That's what I
19 mean by the thing.

20 **Q.** Mr. Blankenhorn, I'd like you to turn to tab 3 in your
21 binder. And would you please identify that document.

22 **A.** This is from a book by Suzanne Frayser, called *Varieties*
23 *of Sexual Experience*." And she is a quite prominent
24 anthropologist.

25 **Q.** And now I would like to invite your attention to page 248,

1 which is the only page excerpted behind the tab there. And
2 it's the -- and, specifically, to the second full paragraph.
3 And if you will, please, Mr. Blankenhorn, would you read --
4 read the first three sentences, as I count them.

5 **A.** (As read)

6 "My own definition of marriage derives from a
7 review of the careful attempts to define it
8 made by other social scientists, for example,
9 Gough and Goodenough, as well as from my
10 analysis of ethnographic reports of marriage
11 in a variety of societies. I have found that
12 I can most consistently and usefully identify
13 marriage in cross-cultural context by using
14 the following definition: Marriage is a
15 relationship within which a group socially
16 approves and encourages sexual intercourse
17 and the birth of children."

18 **Q.** Is this among the scholars that you've previously cited
19 and on which you rely for your opinion in this subject matter?

20 **A.** This, because of her expertise and also because of its
21 consistency with many, many others.

22 **MR. COOPER:** Your Honor, I would like to introduce
23 plaintiffs' -- this is a Plaintiffs' Exhibit 1626, into
24 evidence.

25 **THE COURT:** 1626?

1 **MR. COOPER:** That's -- that's what I see here.

2 **MR. BOIES:** Plaintiffs Exhibit 1626 has additional
3 pages.

4 **MR. COOPER:** And I am happy to have additional pages
5 placed in the record.

6 **MR. BOIES:** I don't know how many pages. But
7 whatever 1626 is, we have no objection to it.

8 **THE COURT:** There is no objection. All right. 1626
9 is in.

10 (Plaintiffs' Exhibit 1626 received in evidence.)

11 **MR. BOIES:** A lot more than one page. I know that.

12 **THE COURT:** All right.

13 **MR. COOPER:** I just have one excerpted here in the
14 binder.

15 **BY MR. COOPER:**

16 **Q.** And would you please now turn to the document behind tab
17 4, Mr. Blankenhorn.

18 **A.** It's *A History of Marriage Systems*, by Robina Quale, who
19 is a historian.

20 **Q.** Okay. And would you turn your attention, please, to page
21 2 of the pages that are excerpted there. And, in particular, I
22 invite your attention to the fourth paragraph on that page.

23 If you read the two sentences that begin that
24 paragraph, if you would, please.

25 **A.** (As read)

1 "Marriage, as the socially recognized linking
2 of a specific man to a specific woman and her
3 offspring can be found in all societies.
4 Through marriage, children can be assured of
5 being born to both a man and a woman who will
6 care for them as they mature."

7 **Q.** Is this among the works on which you relied to form your
8 expert opinion?

9 **A.** Yes, sir.

10 **MR. COOPER:** Your Honor, I would like to move this
11 into evidence. This is DIX79.

12 **MR. BOIES:** No objection, Your Honor.

13 **THE COURT:** Very well. DIX79 is admitted.

14 (Defendants' Exhibit 79 received in evidence.)

15 **BY MR. COOPER:**

16 **Q.** Now, turn to document behind tab 5.

17 **A.** This is from the very distinguished sociologist Kingsley
18 Davis, whose book he edited, is called *Contemporary Marriage*.
19 And this is from his introductory chapter to that book.

20 **Q.** And if you'll turn to page 5, please.

21 **A.** Yes, sir.

22 **Q.** In the second full paragraph on that page, would you
23 please read the first two sentences.

24 **A.** (As read)

25 "Granted that the unique trait of what is

1 commonly called marriage is social
2 recognition and approval, one must still ask,
3 approval of what? The answer is that it is
4 approval of a couple's engaging in sexual
5 intercourse and bearing and rearing
6 offspring."

7 **Q.** And have you relied on this work in forming your opinion?

8 **A.** Yes, sir.

9 **MR. COOPER:** Your Honor, I would like to introduce
10 this exhibit, as well -- it's DIX50 -- into evidence.

11 **MR. BOIES:** No objection, Your Honor.

12 **THE COURT:** Very well.

13 (Defendants' Exhibit 50 received in evidence.)

14 **BY MR. COOPER:**

15 **Q.** Proceed, now, to tab 6, Mr. Blankenhorn.

16 **A.** This is from the 1951 -- which is the sixth and final
17 edition of a book -- a publication called *Notes and Queries on*
18 *Anthropology*. It's put out by the Anthropological Institute of
19 Great Britain, which is widely considered to be the most
20 respected group of anthropologists in the world.

21 **Q.** And if you'll turn to page 71 of that document, and the
22 first full paragraph if you'll read that sentence, please.

23 **A.** I meant to say that another thing that's interesting about
24 this book, despite its kind of banal title, is that this is a
25 dictionary and a field worker's training guide. These are

1 concepts that are used from senior anthropologists to train
2 young anthropologists as they go into the field for their work.

3 And a lot of it is providing definitions. And here
4 is what they say on marriage, quote:

5 "The family in this sense is based on
6 marriage, which is defined as a union between
7 a man and a woman such that children born by
8 the woman are recognized as the legitimate
9 offspring of both partners."

10 **Q.** And you relied on this, as well?

11 **A.** This is probably the most famous definition of marriage in
12 the history of anthropology. Yes, I did.

13 **MR. COOPER:** And, Your Honor, I would like to move
14 this exhibit, which is DIX73, as well, into evidence.

15 **MR. BOIES:** No objection, Your Honor.

16 **THE COURT:** Very well. 73 is admitted.

17 (Defendants' Exhibit 73 received in evidence.)

18 **BY MR. COOPER:**

19 **Q.** And if we could proceed to the document behind tab 7.

20 **A.** It's a book called *Human Family Systems*, by Pierre
21 van den Berghe, published in 1979. He's an anthropologist.

22 **Q.** And who is Mr. van den Berghe?

23 **A.** He's an anthropologist.

24 **Q.** Okay. Will you turn your attention to page 46 of that
25 document. And at the bottom of the page, the last paragraph,

1 read the four sentences there, beginning that paragraph, into
2 the record.

3 **A.** (As read)

4 "Here I shall argue that, while all this is
5 true, marriage is nevertheless the cultural
6 codification of a biological program.

7 Marriage is the socially-sanctioned pair-bond
8 for the avowed social purpose of
9 procreation."

10 **Q.** And you relied on this source, as well?

11 **A.** Yes.

12 **MR. COOPER:** Your Honor, I would like to move this
13 document, marked as DIX89, into evidence.

14 **MR. BOIES:** No objection, Your Honor.

15 **THE COURT:** 89, DIX89 is admitted.

16 (Defendants' Exhibit 89 received in evidence.)

17 **BY MR. COOPER:**

18 **Q.** Now, the document behind tab 8, if you'll describe that,
19 please.

20 **A.** This is from a book called *Sex, Culture and Myth*,
21 published in 1962 by Bronislaw Malinowski. Malinowski is, I
22 think, widely and fairly viewed as the father of kinship
23 studies in anthropology.

24 **THE COURT:** Of what, sir?

25 **THE WITNESS:** The father of kinship studies, the

1 study of kinship.

2 **THE COURT:** Kinship.

3 **THE WITNESS:** Kinship, yes, sir.

4 **BY MR. COOPER:**

5 **Q.** And if you'll turn to page 11 of that document. The first
6 lines on the page.

7 **A.** (As read)

8 "We are thus led at all stages of our
9 argument to the conclusion that the
10 institution of marriage is primarily
11 determined by the needs of the offspring, by
12 the dependence of the children upon the
13 parents."

14 **Q.** And you relied on this authority, as well, in forming your
15 opinions?

16 **A.** I made a pretty close study of Malinowski because of his
17 importance in the field. So, yes, sir.

18 **MR. COOPER:** Your Honor, I would like to introduce,
19 as well, this document, which is DIX66, into evidence.

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

21 **THE COURT:** Very well. 66 is admitted.

22 (Defendants' Exhibit 66 received in evidence.)

23 **BY MR. COOPER:**

24 **Q.** If you'll turn now to tab 9 -- I beg your pardon. Tab 9
25 has been left empty. Let's skip to tab 10.

1 A. This is a 1985 book called *The View From Afar*, by the
2 anthropologist Claude Levi-Strauss.

3 Q. I think you mentioned him earlier in your testimony?

4 A. He is one of the giants in the field.

5 Q. And on page 40 and 41, if you'll turn to those pages.

6 A. Yes, sir.

7 Q. At the bottom of the page, on 40, if you'll read the
8 passage that begins, "The family."

9 A. Yes.

10 "The family - based on a union, more or less
11 durable, but socially approved, of two
12 individuals of opposite sexes who establish a
13 household and bear and raise children -
14 appears to be a practically universal
15 phenomenon, present in every type of
16 society."

17 Q. And you relied on this authority, as well?

18 A. Yes.

19 MR. COOPER: Your Honor, I would like to move into
20 evidence this document marked DIX63.

21 MR. BOIES: No objection, Your Honor.

22 THE COURT: 63 is admitted.

23 (Defendants' Exhibit 63 received in evidence.)

24 BY MR. COOPER:

25 Q. Now, are these the only authorities on which you have

1 studied in -- in your examination of the issue of marriage?

2 **A.** No. These are what I view as representative -- I'm not
3 saying that every other person who's ever written about this
4 agrees with what these people are saying. But I view these as
5 representative of what the leading people in the field have
6 concluded about the meaning of marriage, what marriage is. I
7 view these as representative.

8 And I don't know how many we've discussed today, five
9 or six. But you could multiply by ten and you could get 50 or
10 60 distinguished people saying, in effect, this exact same
11 thing.

12 **Q.** And what conclusion do you draw from your review of these
13 and other similar authorities in these fields?

14 **A.** My conclusion is that they are correct, that this is what
15 marriage is, and that this is its primary role and contribution
16 to society.

17 **Q.** Is there an opposing view? Is there an alternative view
18 of marriage's purpose?

19 **A.** Yes, there is. And this view is significant. And this
20 opposing view is, I think it's fair to say, also of
21 significantly more recent vintage and more recent prevalence.
22 But it is certainly a well-developed and opposing point of view
23 about what marriage is.

24 **Q.** And what is that?

25 **A.** This view is that marriage is fundamentally a private

1 adult commitment.

2 **Q.** And on that subject, would you please turn to the document
3 behind tab 11 of your binder.

4 **A.** Yes. This is from a report called "Beyond Conjugalilty:
5 Recognizing and supporting close personal adult relationships."

6 And it was published by the Law Commission of Canada,
7 a distinguished group of Canadian legal professionals, in 2001.

8 **Q.** And what was the purpose of the -- of the publication of
9 this document?

10 **A.** To offer -- to make analyses and to offer recommendations
11 regarding marriage and family law in Canada.

12 **Q.** And was this in connection with Canada's adoption of
13 same-sex marriage?

14 **A.** Well, I would not say that this report was primarily
15 concerned with that topic, but it was certainly concerned with
16 that topic. That was one of the issues that the report
17 addresses.

18 **Q.** Would you turn your attention to Roman -- page Roman
19 xviii.

20 **A.** I've got it.

21 **Q.** And on the -- what appears to be the first full paragraph
22 there, or the first indented paragraph in the middle of the
23 page, would you please read the material that begins with the
24 second sentence.

25 **A.** (As read)

1 "The state's objectives and underlying
2 contemporary regulation" --
3 I'm sorry. I misspoke. I'm going to start again.
4 "The state's objectives underlying
5 contemporary regulation of marriage relate
6 essentially to the facilitation of private
7 ordering, providing an orderly framework in
8 which people can express their commitment to
9 each other, receive public recognition and
10 support, and voluntarily assume a range of
11 legal rights and obligations."

12 **Q.** And does this statement reflect the view you've described
13 previously as the private adult commitment view of marriage?

14 **A.** Yes, sir. And I believe it's significant because it was
15 developed in somewhat precise language by a group of prominent
16 lawyers who -- who were pretty, I think, determined to say what
17 they actually meant.

18 (Laughter)

19 **Q.** Now, turn to tab -- that's not always the case with
20 lawyers.

21 **A.** I didn't know that would get a laugh.

22 **Q.** If you would turn to the document behind tab 12, please.

23 **A.** This is from an article in the --

24 **MR. BOIES:** Excuse me, Your Honor, was this
25 introduced?

1 arrangement between parties committed to
2 love."

3 **Q.** And you relied on this, as well, for your opinion on this
4 subject?

5 **A.** Yes, sir. My understanding of this is that it's a more
6 colloquial way of restating exactly the views offered by the
7 Law Commission of Canada, as to the purpose of marriage.

8 **MR. COOPER:** Your Honor, this is DIX84, and we would
9 offer it now into evidence.

10 **MR. BOIES:** No objection.

11 **THE COURT:** Very well. 84 is in.

12 (Defendants' Exhibit 84 received in evidence.)

13 **BY MR. COOPER:**

14 **Q.** If you'll now turn to the document behind tab 13 of your
15 binder.

16 **A.** This is from a book called *The Case for Same-Sex Marriage*.
17 It was written by Professor William Eskridge, whose views were
18 discussed earlier today. He's a law professor from Yale
19 University.

20 **Q.** Is he one of the individuals you mentioned that you have
21 been invited to debate on this subject of same --

22 **A.** Yes, sir.

23 **Q.** Would you turn please to page 11 of that. And,
24 essentially, in the middle of the first -- of the first full
25 paragraph, beginning with "In today's society," would you read

1 that, please.

2 **A.** (As read)

3 "In today's society, the importance of
4 marriage is relational and not
5 procreational."

6 **Q.** And are there other authorities that you have studied that
7 articulate this adult-centric view of marriage, as you've
8 described it?

9 **A.** The view that marriage is fundamentally a private adult
10 commitment, yes, sir, there are very, very many examples of
11 this conclusion being proffered in the public discussion and in
12 the academic discussion. And these are merely a very few of
13 many, many possible representative examples of this -- of this
14 proposition.

15 **Q.** And do you believe that this adult-centered view of
16 marriage is an accurate view of the institution of marriage
17 today and in the past?

18 **A.** No, sir, I do not believe it's accurate. I believe that
19 the affective private dimensions of marriage are often, and
20 including in our own society a dimension of marriage, even an
21 important dimension of marriage. But I do not believe that it
22 has ever been the -- I do not believe that in the -- in the
23 history of societies, it has been understood to be the sum and
24 substance of marriage, the -- the heart and soul, the core, the
25 fundamental thing itself could be encapsulated with this idea

1 that marriage is a fundamentally a private adult commitment. I
2 do not believe that's consistent with -- with the human record.

3 **Q.** I think you used the words "the private affective
4 dimension of marriage." What did that mean?

5 **A.** It just means the tender feelings that the spouses have
6 for one another, the feelings of love and regard and
7 solicitude, and emotional commitments that the -- and
8 feelings -- feelings of commitment and obligation and love,
9 that the spouses feel to one another. That would be -- that's
10 the -- I'm using the term "affective dimension of marriage."

11 And that dimension, in many societies, of course,
12 it's very negligible. There are many societies where most
13 marriages are arranged or they've governed by kin groups.

14 In some societies, the affective dimension is not --
15 is a very negligible dimension of the institution. But in
16 ours, of course, that is not true.

17 In our western tradition in the United States, the
18 affective dimension is an important dimension and one that we
19 celebrate on Valentine's Day and so forth.

20 But it is never -- the idea that that is what
21 marriage is, that's how we understand the institution, is, I
22 think, first of all, what these analysts are saying. And I
23 think they are -- are incorrect. As a matter of our history
24 and our lives, I think they are incorrect in that assertion.
25 They may as a -- as a question of what they wish would happen

1 in the future, that's one question. But if we look at actual
2 lived experience of marriage in human groups, this is not an
3 accurate analysis, in my view.

4 **Q.** Now, I'd like to ask you a few questions about why
5 marriage regulates filiation as you put it.

6 **MR. COOPER:** And I would like to publish to the
7 screen, Your Honor, Demonstrative number 7.

8 (Document displayed.)

9 **BY MR. COOPER:**

10 **Q.** Mr. Blankenhorn, was -- what role has religion played in
11 defining the traditional institution of marriage?

12 **A.** If we start with the question of the customary man-woman
13 nature of the marital institution, the idea that marriage
14 brings together the man and the woman, I think the record is
15 completely clear that this concept which we know now, or as I
16 am saying, is a universal or nearly universal presence in human
17 societies, this feature of marriage simply is not the creation
18 of religion. It is not something that religion invented. It
19 does not depend upon religion for its rationale or its --
20 its -- people having allegiance to it.

21 Its evolution in our species cannot be explained with
22 reference to religion. And that fact is borne out by us
23 realizing that marriage is a natural human institution. That
24 is, it concerns itself with natural facts, not supernatural
25 facts.

1 And it exists in societies that have monotheistic
2 belief-based religions, societies that believe in what we in
3 the west might call magic or witchcraft. You know, the variety
4 of beliefs about the supernatural in the human experience is
5 breathtakingly diverse. And yet in all of these societies, the
6 man and the woman form something called marriage.

7 And it simply is erroneous to imagine that this
8 foundational aspect of the institution is the artifact of a
9 particular religious doctrine or a religion generally.

10 And I further believe that what I have just said is
11 noncontroversial amongst scholars. I simply do not think that
12 this is a controversial statement among people who have looked
13 at this.

14 **Q.** You don't -- you -- you don't disagree, do you, that
15 marriage is sacred to many religions, modern religions?

16 **A.** Well, of course. I mean, marriage -- religion is a very
17 powerful influence in human affairs in all areas of life. And
18 marriage is no exception.

19 And so, for example, in so many societies we see that
20 individuals who marry, they believe that that promise is, in
21 part, a sacred promise. They believe that they are promising
22 something to God or to a higher power, in addition to the
23 promise to the spouse.

24 And many people have a religious -- you know, they --
25 the marriage ceremony occurs in a church or a synagogue or a

1 mosque. And so, of course, in -- and sometimes religious
2 officials are also agents of the state, in actually legally
3 performing the -- the marriage -- legally performing the
4 marriage.

5 So there is -- in these and many other ways -- oh,
6 and many people draw from religion the -- the -- the
7 inspiration to live up to the calling of the marital vocation,
8 and so forth.

9 So with these and other ways there is a strong sense,
10 certainly in our nation, and I would say generally across the
11 world, there is a -- this interconnection or this, I guess you
12 might say, this strong influence of religion on this dimension
13 of life.

14 You might call marriage, in so many societies, a
15 religiously-informed institution in some ways. But I'm trying
16 to make the distinction between that and saying that the thing
17 itself, the marriage institution itself, particularly its
18 man-woman basis, which is universal -- I'm -- I'm -- I'm trying
19 to be very clear, that this does not derive from religious
20 doctrine. It does not derive from the concept of religion. It
21 does not derive from any ideas about the supernatural.

22 It is what scholars call a natural institution. It
23 derives from facts of our embodiment and reproduction that do
24 not call upon supernatural beliefs for their coherence.

25 **Q.** Do you believe that the customary man-woman definition of

1 marriage is attributable in some fashion or some way to
2 anti-homosexual prejudices or hostility?

3 **A.** I do not. I believe that homophobia is a real presence in
4 our society and, I'm pretty confident, in many, many other
5 societies around the world. And I regret and deplore it, and
6 wish it to go away.

7 As I have sought to look at the reasons for the
8 evolution of marriage in human societies, as I've sought to
9 understand and wrestle with the evidence about why marriage
10 evolved in the first place, how it became institutionalized
11 through law and custom, how it became universal in its reach
12 and impact, and how those custodians of the institution over
13 time, across time and around the world, have sought with words,
14 both written and oral, to state the reasons for the
15 institution, the purposes of the institution, the goals of the
16 institution, what the thing was trying to do and why it
17 mattered so much, I am not able to find any evidence that
18 animus toward gay and lesbian people or that hatefulness toward
19 homosexuality -- homosexual persons, I am not able to find
20 evidence that that was a central component of how they
21 understood their activities, how they understood their
22 commitment to the marital institution, why they justified their
23 participation in the marital institution, or why they
24 established the laws and customs surrounding the institution
25 that they did.

1 Now, I am not saying that no such evidence exists.
2 And if evidence -- such evidence exists, I would welcome -- I
3 would -- I want to know it. But I'm telling you that I have
4 looked for it, and I cannot find it.

5 **Q.** Well, to return now, then, to your earlier testimony that
6 marriage is designed, I think as you put it, to regulate
7 filiation, why does it matter whether the child is raised by
8 his or her own biological parents?

9 **A.** Well, it matters for two large clusters of reasons. And
10 I'll just go into this, very briefly.

11 But the first one somewhat accords with our
12 commonsense understanding of things. But the scholars have
13 given it a name called "kin altruism." And it really means,
14 you know, you care a lot about who you are related to. You
15 care about your relatives. You care about who your parents
16 are, who your child is.

17 And you would be -- they have measured this with
18 great precision. You typically sacrifice more for people to
19 whom you are related. You typically extend yourself, whether
20 it's risking your life or loaning money or inconveniencing
21 yourself, on their behalf.

22 They have really looked at this fairly carefully.
23 And this notion of kin altruism means that in humans because we
24 seem to be -- we seem to care a lot about where we came from
25 physically, and we seem to care a lot about the people to whom

1 we are related, particularly closely related.

2 So that if you have a -- a child to be cared for, if
3 you had your druthers and you would -- for this reason you
4 would want, if you wanted what was best for the child, you
5 would want that child -- other things being equal, of course,
6 you would want that child to be cared for by the two
7 individuals who are most closely related to the child. And
8 that would be the child's mother and the child's father. And,
9 of course, that's how we humans have organized ourselves for
10 millennia now.

11 The second body of evidence on this concerns child
12 outcome studies. And here we shift, now, to the field,
13 principally of sociology. And we are not looking at
14 motivation. We are not looking at the self-sacrificing nature
15 of kinship. We're just looking at outcomes for the children.

16 And, here, there is a very large body of literature.
17 My organization has been quite involved in this kind of work,
18 now, for 20 years. And there's many, many others, scholars and
19 researchers, who have pursued this quite carefully. And I
20 would say that there is a broad consensus among the scholars in
21 this field.

22 And I would further say that this consensus grows
23 stronger almost every year, because of the accumulating weight
24 of evidence that the optimal environment for children is if
25 they are raised from birth by their own natural mother who is

1 married to their own natural father.

2 And, of course, one wants to say that this isn't
3 always possible. Sometimes this family form fails. Sometimes
4 alternative family forms different than that succeed.

5 When we get to the level of specificity and
6 individual cases, there is quite a bit of complexity to the
7 situation, and the scholars have spent many years and many
8 effort trying to tease all of this out.

9 But if you just look at the weight of evidence and
10 you look at the most distinguished -- well, I think, among -- I
11 believe, the most distinguished scholars in this field, they
12 are increasingly clear and emphatic that based on the available
13 evidence today, it is clear that -- that the optimal outcome
14 for children, in terms of outcomes, the optimal environment for
15 children, in terms of outcomes, whether it be the likelihood of
16 living in poverty, whether it be the likelihood and mental and
17 emotional distress and suffering, whether it be juvenile
18 delinquency, or educational achievement, or occupational
19 success, or the likelihood of experiencing abuse and neglect,
20 that across the range of outcome measurements, that this family
21 form of the two biological parent, married couple home, in a
22 stable marriage, is the best model from the child's point of
23 view.

24 **Q.** In that connection, I'd like you to turn to the document
25 behind tab 15 in your binder. Will you identify that document

1 when you've reached it.

2 **A.** This is a -- a summary in the form of a research brief, of
3 research carried out by a group of scholars, a group of three
4 scholars from Child Trends. This is a nonpartisan research
5 group in Washington, D.C. And this brief, this summary of
6 research, was published in, I believe -- I believe 2002. And
7 it's called "Marriage from a Child's Perspective."

8 **Q.** Would you turn to page 6, please.

9 **A.** Yes.

10 **Q.** And in the right-hand column, about halfway down the page,
11 the paragraph beginning, "First," would you please read that
12 for the Court.

13 **A.** (As read)

14 "Research clearly demonstrates that family
15 structure matters for children. And the
16 family structure that helps children the most
17 is a family headed by two biological parents
18 in a low-conflict marriage. Children in
19 single-parent families, children born to
20 unmarried mothers, and children in
21 stepfamilies or cohabiting relationships face
22 higher risks of poor outcomes than do
23 children in intact families headed by two
24 biological parents. Parental divorce is also
25 linked to a range of poorer academic and

1 behavioral outcomes among children. There
2 is, thus, value for children in promoting
3 strong, stable marriages between biological
4 parents."

5 **Q.** And was this among the research that you have consulted
6 and relied upon in arriving at your opinions in this matter?

7 **A.** Yes, because of the reputation of the Child Trends
8 scholars, because it was a summation of work done by a number
9 of them over time, and because, you know -- well, I'll just
10 stop there. But, yes, it is.

11 **MR. COOPER:** Your Honor, this document is already in
12 evidence, is my understanding.

13 **THE COURT:** Very well. 26 is in.

14 **BY MR. COOPER:**

15 **Q.** Turn, now, to the document behind tab 16, please.

16 **A.** This is a book called *Growing Up With A Single Parent*.
17 It's by Sara McLanahan and her colleague Gary Sandefur. And it
18 was published by Harvard University Press in 1994.

19 McLanahan is one of the most prominent family
20 sociologists in the country. She teaches at Princeton.

21 **Q.** Please, turn to page 1 of the document. And in the second
22 full paragraph, the third sentence, will you read that sentence
23 to the -- about the middle of the paragraph, please.

24 **A.** (As read)

25 "We have been studying this question for ten

1 years. And our opinion -- and in our
2 opinion, the evidence is quite clear,
3 children who grow up in a household with only
4 one biological parent are worse off, on
5 average, than children who grow up in a
6 household with both of their biological
7 parents, regardless of the parents' race or
8 educational background, regardless of whether
9 the parents are married when the child is
10 born, and regardless of whether the resident
11 parent remarries."

12 **Q.** And was this document among those you have relied upon?

13 **A.** Yes, sir.

14 **MR. COOPER:** Your Honor, this, too, is in evidence
15 already.

16 **THE COURT:** Very well.

17 **BY MR. COOPER:**

18 **Q.** Mr. Blankenhorn, does the customary man-woman definition
19 of marriage benefit only the child?

20 **A.** Well, it certainly benefits the child. But it also
21 benefits the mother and the father and society as a whole.

22 The mother because it lessens the likelihood of her
23 having to raise the child alone and isolated. The father
24 because it connects him to his own child and to the mother of
25 his child, connects him to the process of generativity in a way

1 that would be unlikely for him to achieve any other way. And
2 society as a whole because these are the family units that are
3 most likely to produce good outcomes for children and, thus, be
4 the kind of seedbeds from which come good citizens and people
5 who are, you know, more likely to be, you know, positive
6 contributors to society.

7 So it's a human -- a kind of human capital question.
8 It's the highest level of investment that we can make in
9 children, is to give them the great gift, really, of growing up
10 in this family form.

11 It doesn't -- it doesn't guarantee success. And
12 growing up outside of this form certainly does not guarantee
13 failure. But it shifts the odds in a very dramatic way, that
14 has been very carefully documented by the scholars.

15 **Q.** I'd like to turn now to the concept of
16 deinstitutionalization.

17 **MR. COOPER:** I would like to publish to the screen,
18 Your Honor, demonstrative number 8.

19 (Document displayed.)

20 **BY MR. COOPER:**

21 **Q.** Mr. Blankenhorn, could you please describe this concept of
22 deinstitutionalization.

23 **A.** It's a term that comes from sociology. It has scholars
24 who study it. There is a literature on it. The first paper I
25 ever worked on at the Institute was called "Marriage in

1 America," published in 1995. And it anchored, it centered in
2 part, on large part, on the concept of deinstitutionalization.

3 I wish it was a prettier word to say or listen to.

4 But what it really means is, you have an institution
5 which can be briefly defined as a relatively stable pattern of
6 rules and structures intended to meet social needs. This is
7 what, in brief, we think of when we think of a social
8 institution.

9 Marriage is a social -- is one social institution.
10 The concept of deinstitutionalization is when -- to speak
11 briefly -- that institution weakens. That institution becomes
12 frailer.

13 Its rules become thinner or removed altogether, and,
14 therefore, the rules that govern the institution become less
15 comprehensible and clear and less -- therefore, less
16 authoritative.

17 And when its structures become less stable, less able
18 to give robust shape to the institution, it's like a -- kind of
19 a shrinking process. And as a result of
20 deinstitutionalization -- you don't have to think about
21 marriage. You could think about, you know, a baseball team or
22 a museum, or any -- any institution. When you take away its
23 rules and you weaken its structures, scholars say that you're
24 seeing deinstitutionalization.

25 And so that the people, the participants in the

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

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

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

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

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

23 What are some of the manifestations of that process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 **A.** Yes.

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

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

1 Q. Would you turn to page 850 of that excerpt. And if you'll
2 look in the right-hand column of the page, first full paragraph
3 there, would you read the first sentence.

4 A. (As read)

5 "The most recent development in the
6 deinstitutionalization of marriage is the
7 movement to legalize same-sex marriage."

8 Q. And does this -- is this authority among those you've
9 relied upon to arrive at your judgment on this subject?

10 A. Yes.

11 MR. COOPER: Your Honor, this is -- this document is
12 marked as DIX49, and I'd like to offer it into evidence.

13 MR. BOIES: No objection, Your Honor.

14 THE COURT: DIX49 is admitted.

15 (Defendants' Exhibit 49 received in evidence.)

16 MR. COOPER: Thank you, Your Honor.

17 BY MR. COOPER:

18 Q. And if you'll continue in your binder to the document
19 behind tab 18.

20 A. Yes. This is a article called "The Struggle for Same-Sex
21 Marriage," written by Professor Norval Glenn, who's a prominent
22 family sociologist from the University of Texas at Austin.
23 This was published in 2004.

24 Q. Would you turn to page 26 of that document, please. And
25 in the right-hand column at the top of the page, if you'll read

1 the passage beginning with the word "however," please.

2 **A.** (As read)

3 "However, acceptance of the arguments made by
4 some advocates of same-sex marriage would
5 bring this trend to its logical conclusion.
6 Namely, the definition of marriage as being
7 for the benefit of the couple who enter into
8 it, rather than as an institution for the
9 benefit of society, the community, or any
10 social entity larger than the couple."

11 **Q.** And was this among the sources that you relied upon for
12 your thinking on this?

13 **A.** Yes.

14 And I -- it may be worth noting that these two
15 authors who have just -- I've just cited, are both prominent
16 scholars. But they are on opposite sides of the policy
17 question on whether we should adopt gay marriage.

18 **Q.** And are there others who -- who have identified this --
19 this phenomenon of deinstitutionalization of marriage in
20 connection with same-sex marriage?

21 **A.** Yes.

22 **MR. COOPER:** Your Honor, this document is marked
23 DIX60. And I'd like now to offer it into evidence.

24 **MR. BOIES:** No objection, Your Honor.

25

1 **THE COURT:** Very well. 60 is admitted.

2 And would you remind me just where on page 26 the
3 witness was referring.

4 (Defendants' Exhibit 60 received in evidence.)

5 **MR. COOPER:** Yes.

6 **THE COURT:** Missed that.

7 **MR. COOPER:** Very top of the page of the right-hand
8 column, begins with the word "however" there, the second word
9 on that column.

10 **THE COURT:** Thank you.

11 **MR. COOPER:** Yes.

12 **BY MR. COOPER:**

13 **Q.** Mr. Blankenhorn, how confident are you that redefining
14 marriage to include same-sex marriage, same-sex couples, would
15 further the deinstitutionalization of marriage?

16 **A.** It's impossible to be completely sure about a prediction
17 of future events. I don't think anyone can.

18 But I do have a great deal of confidence in the
19 likelihood of the weakening of marriage through the process of
20 deinstitutionalization to a greater degree than would be the
21 case otherwise, if we move toward the adoption, widespread
22 adoption of same-sex marriage.

23 And, you know, if you think about it, it's really
24 just hard to imagine how it could be otherwise.

25 If you change the definition of the thing, it's hard

1 to imagine how it could have no impact on the thing.

2 (Laughter)

3 If you change the structure of the thing, it's hard
4 to imagine how you could not have an effect on the content of
5 the thing.

6 And if you decisively move an institution from the
7 public realm to a question overwhelmingly of private ordering
8 rather than public purpose that can be specified, it's hard to
9 imagine a more textbook example of what scholars mean when they
10 say "deinstitutionalization."

11 And we do know, from evidence, that the process of
12 deinstitutionalization has already weakened marriage, and could
13 weaken it more in the future.

14 So while I don't think anyone here can say that they
15 know from scientific study based on data, that they know with
16 absolute certainty that this will happen, I sincerely believe
17 that this is the most -- this is a likely outcome, this is a
18 likely result of adopting same-sex marriage.

19 **MR. COOPER:** Your Honor, I'd like to publish, now,
20 demonstrative -- my next demonstrative, I think, is number 9.
21 Yes. And ask the witness a series of questions -- I'm getting
22 close to the end of the examination, Your Honor -- a series of
23 questions about the consequences that he believes will likely
24 flow from redefining marriage to include same-sex couples.

25 (Document displayed.)

1 **BY MR. COOPER:**

2 **Q.** And the first question I'd like to ask is this:

3 How, in your opinion, would the further
4 deinstitutionalization of marriage caused by the legalization
5 of same-sex marriage manifest itself in society?

6 **A.** I'm sorry. Would you mind restating the question?

7 **Q.** In what ways, in your opinion, will extending marriage to
8 same-sex couples and, therefore, in your opinion
9 deinstitutionalize further the deinstitutionalization of
10 marriage, manifest itself in society?

11 **A.** As we have discussed now, I think a likely consequence is
12 a -- an acceleration of deinstitutionalization or devaluation
13 that would help to produce higher rates of non-participation in
14 marriage, higher rates of fragility of one-parent homes,
15 divorce; the general -- you know, all of the consequences that
16 we have discussed in the last hour or so on -- of the weakening
17 of the institution relating to divorced non-marital
18 cohabitation or children outside of charge and so forth.

19 My -- my fear, you know, really, and my conclusion is
20 that this is a likely -- this is a likely outcome.

21 **Q.** How, in your opinion, would redefining marriage to include
22 same-sex couples impact the traditional view that a child needs
23 both its mother and its father?

24 **A.** Well, I have had some personal experience with this,
25 because since 1995 I may have spent as much time as anybody in

1 the country saying children need their fathers. And it seems
2 like it ought to be a simple idea that shouldn't get you in a
3 lot of trouble, but I can tell you it does.

4 And one of the things that I think will happen, and I
5 can already see it beginning to happen, is that simply saying
6 publicly that a child needs and deserves her father will go
7 from being what it is now, which is mildly controversial, will
8 go to being viewed as simply inappropriate public speech, as
9 really beyond the pale, as offensive, as divisive, as
10 mean-spirited.

11 And I -- I -- you know, if -- it's hard for me to see
12 how -- if you cannot speak publicly about a value, then it's
13 hard for me to see how that could do anything other than to
14 weaken the value over time if you cannot say its name.

15 And I have had personal experience with this, as well
16 as my observation. And I may sound simplistic, but simply
17 being able to say that children need -- a child needs its
18 mother and father, if that becomes just impermissible in any
19 venue, a church, a school, a civic group, a PTA meeting, I
20 think we lose something precious.

21 **MR. BOIES:** Your Honor, I object and move to strike.
22 That goes beyond even the most expansive definition of
23 expertise even in a bench trial, I respectfully submit.

24 **THE COURT:** Very well. I will overrule the
25 objection.

1 You indicated you are getting close to the end?

2 **MR. COOPER:** Your Honor, we're approaching it
3 rapidly. Thank you.

4 **BY MR. COOPER:**

5 **Q.** What impact, in your opinion, Mr. Blankenhorn, would
6 extending marriage to same-sex couples have on alternative
7 marriage forms and family structures?

8 **A.** I think it would have the impact of further mainstreaming
9 the acceptability and prevalence of these alternative family
10 forms.

11 **Q.** And what, in particular, do you have in your mind there?

12 **A.** You know, when Canada adopted same-sex marriage several
13 years ago, they struck the term "natural parent" from Canadian
14 law and replaced it with the term "legal parent." And the
15 implications of that, I think, are very profound in terms of
16 transfer of power to the state and so forth.

17 But it indicates that there is a growing trend for
18 family forms in which the child will not be raised by her -- by
19 her own biological parent.

20 So there is the diminution, the diminished likelihood
21 of -- there is a -- sorry, an increased likelihood of children
22 being raised in family forms other than her own two parents,
23 her own two natural parents.

24 There is also the possibility, you know -- there
25 could be the possibility of more public willingness to consider

1 family forms, such as polygamy that involve more than two
2 people.

3 **Q.** And what's the -- what's the basis of your concern about
4 that?

5 **A.** I think polygamist marriages are not in the interests of
6 women especially and, also, not really in the interests of
7 society.

8 There is already a standing history of this in our
9 society and many others. The concept that marriage involves
10 only two people is the -- probably the weakest of marriage's
11 core rules. It's already tested significantly by polygamy and
12 polyandry and polyamory.

13 So I think if the rule of -- if the concept of
14 opposites -- you know, the concept of man/woman goes, it's hard
15 to imagine, really -- and this is already being actively, you
16 know, reviewed by scholars in the journals and it's hard to --
17 well, I'll just put it this way.

18 It seems likely that over time this -- this aspect of
19 the institution as well will come under criticism and calls for
20 reform.

21 **Q.** And why would redefining marriage as an adult-centric
22 institution, as you have put it, increase the possibility of
23 this?

24 **THE COURT:** Of what?

25 **MR. COOPER:** Of polygamy being an acceptable

1 alternative family form.

2 **A.** Because the man/woman customary basis of marriage is
3 reinforced by and is, in turn, reinforces the idea of limiting
4 marriage to two. And if you knock out one of the pillars, the
5 other one becomes less comprehensible and, therefore, less
6 defensible.

7 **BY MR. COOPER:**

8 **Q.** Thank you.

9 Mr. Blankenhorn, I would now like to turn to the last
10 subject, and that is the issue of domestic partnerships.

11 And I would like to ask you what your position is on
12 domestic partnerships?

13 **A.** I support them. I think that they could be part of a kind
14 of a humane compromise in which, on the one hand, we protect
15 marriage and allow it to continue to carry out its distinctive
16 contribution to society, while at the same time extending
17 protections and recognition to gay and lesbian couples.

18 I don't think it's a perfect solution, but I do think
19 it's a possibly humane compromise on this issue. And I so
20 stated in an article that I wrote in the *New York Times*, I
21 co-authored Jonathan Rauch last year.

22 **Q.** Who is Jonathan Rauch?

23 **A.** He is a visiting scholar at the Brookings Institution. He
24 is a prominent proponent of same-sex marriage and his most
25 recent book is called *Gay Marriage: Why It's Good For Gays*,

1 *Good For Straights and Good For America.*

2 **Q.** And when did you publish this article you just referenced
3 in the *New York Times*?

4 **A.** I think it was February of 2009.

5 **Q.** Have you always held the view that you have just
6 articulated?

7 **A.** No. I have actually come pretty much full circle on the
8 issue. I really -- I really hadn't thought about it very much.
9 I was really focused on the topic of marriage and I had not
10 given the topic of domestic partnerships much thought. I
11 certainly hadn't given it any careful consideration until about
12 two years ago.

13 There was an event in Washington D.C., a debate -- we
14 call them conversations now, but we called it then a debate --
15 with Jonathan Rauch and he kind of publicly challenged me and
16 called me out on this topic and said, Your thinking about
17 domestic partnerships is immature and wrong and you have to
18 rethink it and, you know, it's -- I have also, speaking --
19 Jonathan said he also was evolving his position on the topic
20 and he really challenged me in that forum to consider more
21 carefully this idea, and I told him that I would, and I did.

22 And that began a kind of a journey with him
23 personally and, also, with other leaders in the push, who were
24 pro-same-sex marriage, where I tried to devote some real --
25 some real time to the topic and that led then to Rauch and I

1 writing the article endorsing civil unions or domestic
2 partnerships in the *New York Times*.

3 **Q.** Why hadn't you thought carefully about the issue of
4 domestic partnerships prior to that time?

5 **A.** I didn't really think I had -- I didn't feel that I had to
6 think about them carefully at that time.

7 I -- I went into my first conversations about this
8 with a kind of -- an instinctive or just a general feeling that
9 if you set up a comparable institution to marriage, that that
10 could have a weakening effect on marriage because --
11 particularly if that comparable institution was open to
12 opposite-sex couples as well, I was worried that you would have
13 kind of a, you know, smorgasbord effect of choosing -- and I
14 thought that that diversification would possibly weaken the
15 marital institution.

16 So I was -- I was very concerned that that not
17 happen, so I was personally suspicious of endorsing domestic
18 partnerships for that reason.

19 And the other reason was that Rauch and the others,
20 you know, the people that I was talking to were just very
21 vociferous in their denunciation of civil unions and domestic
22 partnerships. They just said it was a horrible idea; that it
23 was discriminatory; that it was -- that this was invidious;
24 this was demeaning, two gay and lesbian people; and this was a
25 form of unequal treatment.

1 And I -- I accepted that view. I was strongly
2 influenced by that view. In fact, I repeated that view. Back
3 of the bus, you know, discriminatory and wrong and unfair.

4 And so for those reasons, my concerns about diluting
5 marriage by setting up this dual institutional structure and,
6 also, the concerns about just the -- I guess you might say the
7 un- -- the unfairness, the idea that this would be
8 discriminatory, I embraced that -- I embraced both of those
9 points of view, just as an initial way of thinking about the
10 topic without having written or thought much about it, but --
11 and it was really then in the meeting with Rauch in 2007 and
12 then the next two years I tried to rethink it afresh. I tried
13 to think about it deeply and carefully with Rauch and others
14 and that led to the written article about the subject that I
15 published with him last year.

16 **Q.** I take it you no longer agree with the views that you had
17 on the subject before?

18 **A.** I still worry that domestic partnerships could -- could
19 possibly have a weakening effect on the marital institution,
20 but I think that it's something we should do anyway because of
21 other issues involved, and I have satisfied myself on this
22 question of fairness. That's been the big issue for me, you
23 know, personally. The issue of, is it unjust to have a
24 domestic partnership program? That's been really the core
25 journey and exploration that I have undergone on that issue.

1 So I -- my thinking on it now is that the core
2 principle that we can hold out for our understanding is that
3 marriage as a social institution is larger than the sum of its
4 legal incidents.

5 When we say the word "marriage," it's a big
6 institution that performs a very large contribution to society
7 and it's much bigger, much more powerful and potent as a role
8 in society than merely or only the enumeration of its legal
9 incidents. Marriage predates law. Marriage is not a creature
10 of law in the same way that other things are.

11 The law did not create marriage. We look to law to
12 recognize and support marriage and to give it support, but we
13 do not simply understand the institution only with reference to
14 its legal incidents.

15 So if you look at the legal -- the legal incidents of
16 domestic partnerships and then look at the legal incidents of
17 marriage, the fact that those legal incidents are comparable
18 does not mean that we are looking at the same institution, the
19 content of it.

20 The marital institution is differently purposed, is
21 specifically purposed. As I have tried to say today, probably
22 more times than you want to hear, the purpose of it is to bring
23 together the biological male and the biological female, to
24 bring together the two genitors of the child, to make it as
25 likely as possible that they are also the social and legal

1 parents of the child. That's the loadstar. That's the
2 distinctive contribution. There are others, but that's the
3 distinctive and core contribution of the institution of
4 marriage.

5 The domestic partnership institution is a differently
6 purposed institution with respect to this bringing together --
7 with respect to parenthood, particularly with respect to
8 parenthood.

9 The parenting process in the -- this loadstar notion
10 that animates the marital institution is not the same that is
11 operative in the domestic partnership institution.

12 It is discriminatory and un- -- and morally wrong in
13 my view, morally wrong to refuse to call two things that are
14 the same by the same name. That was my -- that was my -- that
15 was my -- that was what the big thing I had to grapple with in
16 my own mind to be able to look myself in the mirror.

17 And what I worked out with Rauch and others -- I'm
18 not saying he is responsible for my views. I'm saying that the
19 process I'm describing of developing this proposal with Rauch,
20 I had to be sure myself, personally, ethnically, that this
21 issue of is this discrimination to have an institution purposed
22 in this way as a domestic partnership institution. That was
23 the thing that I had to work out, and I have worked that out to
24 my satisfaction.

25 And it -- it means a lot to me personally, but I feel

1 that I have been able to understand this in a way that then
2 allows me as an advocate for customary marriage to say we can
3 have a compromise here. We don't all get everything we want,
4 but we all have a humane compromise on this issue.

5 **MR. COOPER:** Thank you, Mr. Blankenhorn.

6 **THE COURT:** Maybe we better take a very brief recess
7 for ten minutes and then we will resume with the
8 cross-examination of this witness.

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

10 **MR. COOPER:** Thank you, your Honor.

11 (Whereupon there was a recess in the proceedings
12 from 3:23 p.m. until 3:31 p.m.)

13 **THE COURT:** New binders?

14 **MR. BOIES:** Not quite yet, your Honor, but soon.

15 **THE COURT:** I beg your pardon?

16 **MR. BOIES:** Not quite yet, but soon. I'm going to
17 begin by asking some questions from the defendants' binders.

18 **CROSS EXAMINATION**

19 **BY MR. BOIES:**

20 **Q.** Good afternoon, Mr. Blankenhorn.

21 **A.** Good afternoon.

22 **Q.** Would you turn to tab 16 in your binder?

23 (Witness complied.)

24 **Q.** And this was one of the documents that you indicated that
25 you had relied on, is that correct?

1 **A.** Yes, sir.

2 **Q.** And Mr. Cooper directed your attention on the first page
3 to a quotation where it said:

4 "Children who grow up in a household with
5 only one biological person are worse off on
6 average than children who grow up in a
7 household with both of their biological
8 parents."

9 Do you recall that?

10 **A.** Yes, sir.

11 **Q.** Now, there are a number of questions that I want to ask
12 you about that, but did you understand the authors here to be
13 asserting that the fact that there was only one biological
14 parent was causally related to the fact that the children were
15 less well off?

16 **A.** Yes, sir. That was my understanding -- is my
17 understanding.

18 **Q.** That is your understanding?

19 **A.** Yes, sir.

20 **Q.** Now, did you read this entire chapter?

21 **A.** I read the entire book.

22 **Q.** Let me see if you remember reading the very next page, the
23 first full paragraph.

24 "But are single motherhood and father
25 absence, therefore, the root cause of child

1 poverty, school failure and juvenile
2 delinquency? Our findings lead us to say no.
3 While living with just one parent increases
4 the risk of each of these negative outcomes,
5 it is not the only or even the major cause of
6 them."

7 Do you recall reading that?

8 **A.** I do.

9 **Q.** Now, you referred a number of times in your of testimony
10 to biological parents; do you recall that?

11 **A.** Yes, sir.

12 **Q.** And you were not meaning to imply, were you, that
13 biological parents were any better parents than adoptive
14 parents?

15 **A.** No, sir.

16 **Q.** In fact, the studies show that all other things being
17 equal, two adoptive parents raising a child from birth will do
18 as well as two biological parents raising a child from birth,
19 correct?

20 **A.** No, sir, that's incorrect.

21 **Q.** Well, sir --

22 **A.** May I say another word on that, please?

23 **Q.** You will have an opportunity on redirect.

24 **A.** Okay. It was a clarifying thing and actually supports
25 something you just said.

1 The studies show that adoptive parents, because of
2 the rigorous screening process that they undertake before
3 becoming adoptive parents, actually on some outcomes outstrip
4 the biological parents in terms of providing protective care
5 for their children.

6 **Q.** Yes, I was going to come to that, and I appreciate your
7 getting there.

8 In addition, your Institute for American Values
9 publishes something called *The Marriage Index*, correct?

10 **A.** Yes, sir.

11 **Q.** And let me ask that you be handed Plaintiffs' Exhibit
12 2880. I didn't have this in the volume because I didn't know
13 it was going to come up.

14 (Discussion held off the record.)

15 **MR. BOIES:** I'm informed we were more perceptive than
16 I thought. It's in witness binder one, which we will hand out.

17 (Whereupon, binder was tendered
18 to the Court and the witness.)

19 **BY MR. BOIES:**

20 **Q.** Now, this is a document you recognize, is that correct,
21 sir?

22 **MR. COOPER:** I'm sorry. I --

23 **MR. BOIES:** 2880.

24 **MR. COOPER:** 2880. Thank you.

25

1 **BY MR. BOIES:**

2 **Q.** 2880.

3 **A.** I'm sorry. I just --

4 **Q.** It should be in numerical order.

5 **A.** Oh, here it is.

6 Yes, sir, I have it.

7 **Q.** And you recognize that?

8 **A.** Yes, sir.

9 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
10 Exhibit 2880?

11 **MR. COOPER:** No objection, your Honor.

12 **THE COURT:** Very well. 2880 is in.

13 (Plaintiffs' Exhibit 2880 received in evidence.)

14 **BY MR. BOIES:**

15 **Q.** And when your Institute For American Values does its
16 analyses, it treats adoptive parents and biological parents
17 together, correct?

18 **A.** I did not do the research for this particular study, but
19 it is -- I would not at all be surprised if for the purposes of
20 this report we followed what is a common practice among
21 scholars in the field and lumped those two categories together
22 for the purposes of this study.

23 If you want to compare outcomes for children who are
24 adopted to outcomes to children in other family forms, you
25 really have to do a study on that specific issue, and that is

1 not what this was.

2 But the answer to your question is, I wouldn't be at
3 all surprised if we did not follow the customary -- a very
4 common custom among researchers who, for a number of reasons,
5 including practical, very practical ones, often tend to include
6 in the -- they clump them together in the way that you've said.

7 **Q.** Let me be sure I understand what you are saying.

8 Ordinarily researchers include adoptive parents in
9 the same category as biological parents; is that what you said?

10 **A.** No, sir.

11 **Q.** Okay. Let me try it again.

12 In the research that you are familiar with, do
13 researchers ordinarily include both biological parents and
14 adoptive parents in the same category?

15 **A.** It depends on the question they are seeking to answer.
16 The -- it depends on what they are studying.

17 **Q.** Well --

18 **A.** I'm sorry. That's really the determinative factor.

19 **Q.** Let me jump right to the bottom line, okay, sir?

20 **A.** Good.

21 **Q.** Are you aware of any studies -- and let's just talk about
22 gay and lesbian couples. Let's just jump right to the bottom
23 line.

24 Are you aware of any studies showing that children
25 raised from birth by a gay or lesbian couple have worse

1 outcomes than children raised from birth by two biological
2 parents?

3 **A.** No, sir.

4 **Q.** Okay.

5 **A.** Would it be okay for me to say additional --

6 **Q.** It would not be okay for you to volunteer anything. I
7 heard your -- the speech that ended, and I'm really trying to
8 move along; okay, sir? You will have a chance to make speeches
9 when your counsel is asking you questions.

10 **A.** Okay.

11 **Q.** Let me follow up on a question that your counsel did ask,
12 which was about domestic partnerships, and I want to be sure I
13 have your testimony.

14 You thought a lot about domestic partnerships in
15 recent years, correct?

16 **A.** My testimony was that I had not thought very much at all
17 about them and had given really no serious consideration to
18 them until I was kind of publicly challenged to do so in 2007
19 in an exchange with Jonathan Rauch and that, as you -- I'm sure
20 you heard me say this whole thing. That's what happened.

21 **Q.** Does that mean that the answer is that since 2007, you
22 have given a lot of thought to it?

23 **A.** Yes, sir.

24 **Q.** Okay. And is it your view that domestic partnerships
25 contribute to the deinstitutionalization of marriage?

1 And I would like you to begin with a "yes," "no," or
2 "I don't know."

3 **A.** Mr. Boies, I know the answer to your question.

4 **Q.** Well, then --

5 **A.** But I cannot answer it if the only choices you are going
6 to give me are the choices between the words "yes" and "no."

7 **Q.** No, it wasn't only between "yes" or "no."

8 **A.** Well, you gave me three. You gave me, "I don't know,"
9 "yes" or "no."

10 I do know, but I cannot give you an accurate answer
11 to the question if the only words I'm allowed to choose from
12 are "yes" and "no."

13 **Q.** Listen to the question, okay?

14 **A.** I have heard of word of it.

15 **Q.** Okay. What is the question?

16 **A.** You asked me if I had a view on this subject. You asked
17 me if -- you were asking me to state my opinion on this.

18 **Q.** Well, what I asked you was whether it was your view that
19 domestic partnerships contributed to the deinstitutionalization
20 of marriage?

21 **A.** My answer to your question is that I believe that they
22 could do so.

23 And an additional part of my answer is I believe that
24 that risk is --

25 **Q.** I didn't ask you whether the risk was worth it or not.

1 **A.** Then I won't tell you.

2 **Q.** I asked you whether you had a view --

3 **A.** I do.

4 **Q.** (Continuing) -- as to whether domestic partnerships
5 increased the deinstitutionalization of marriage, and you said
6 they could.

7 That's what you told me, right?

8 **A.** I said I thought it was possible or likely that they
9 would.

10 **Q.** Okay. Now, "possible" and "likely" are two different
11 standards.

12 **A.** Well, maybe we could rewind the tape and find out what I
13 actually said. I think I maybe used the word that it was
14 "possible," but I can't recall the exact word that I used a
15 moment ago.

16 **Q.** Well, let's try to get what your view is, regardless of
17 what you said before.

18 In your view, do domestic partnerships increase the
19 deinstitutionalization of marriage?

20 **A.** I believe that it's possible that they could do so.

21 **Q.** Okay. Now, when you say it's possible, obviously,
22 anything is possible. Do you believe that it is likely that
23 they do so?

24 **A.** I believe that those domestic partnerships --

25 **Q.** Sir, I have got to ask you, I mean, this is going to move

1 along a lot faster if you at least begin with a "yes," "no," or
2 "I don't know."

3 **A.** I cannot do that on this, because the -- there are
4 different domestic partnerships. I have to be able to say what
5 kind of domestic partnerships we are talking about.

6 **THE COURT:** Mr. Blankenhorn, counsel is entitled to
7 an answer to his question.

8 **THE WITNESS:** May I ask a --

9 **THE COURT:** That's how this process works. There is
10 a question and then there's an answer. The answer has to
11 respond to the question.

12 **THE WITNESS:** Does he mean domestic partnerships that
13 are open to opposite sex couples or not?

14 **BY MR. BOIES:**

15 **Q.** Let me take them one at a time, okay. And I may take it
16 one in three times.

17 First, do you believe that domestic partnerships that
18 are open to opposite-sex couples increase the
19 deinstitutionalization of marriage?

20 **A.** I believe that they would be likely to do so.

21 **Q.** Okay. Do you believe that domestic partnerships that are
22 not open to opposite-sex couples will increase the
23 deinstitutionalization of marriage?

24 **A.** I believe they would be dramatically less likely to do so.

25 **Q.** Nevertheless, I want to know whether you think they would

1 be likely to do so or not. Even though they may be less
2 likely, would they nevertheless be less likely to do so?

3 **A.** I don't know.

4 **Q.** Do you believe that domestic partnerships that are open to
5 different-sex couples only when one of the participants is over
6 62, which happens to be the law in California as I understand
7 it, increases the deinstitutionalization of marriage?

8 **A.** My answer is the same as I just said. I believe they
9 would be significantly less likely to do so.

10 **Q.** Now, you believe that gays and lesbians today are raising
11 children, correct?

12 **A.** Of course, yes.

13 **Q.** And, in fact, hundreds of thousands of children are being
14 raised by gay and lesbian couples, correct?

15 **A.** I don't know how many.

16 **Q.** Did you ever try to find out?

17 **A.** I did.

18 **Q.** And were you able to make an approximation?

19 **A.** I was -- yes, sir, I was.

20 **Q.** What was that approximation?

21 **A.** I can't recall.

22 **Q.** Can you recall approximately?

23 **A.** No, sir.

24 **Q.** Okay. And you recognize that in some cases the gays and
25 lesbians are raising a child that is the biological child of

1 one of the parents and in some cases they are raising adopted
2 children, correct?

3 **A.** Those would be two -- two of -- of course, they would
4 be -- those would be examples of -- those would be examples of
5 children in gay and lesbian homes, yes.

6 **Q.** And you believe that permitting gay and lesbian couples to
7 marry would significantly advantage the gays and lesbians
8 themselves and the children that they are raising, correct,
9 sir?

10 **A.** When you say "advantage," do you mean improve the
11 well-being of?

12 **Q.** Yes.

13 **A.** My answer to your question is that I believe that adopting
14 same-sex marriage would be likely to improve the well-being of
15 gay and lesbian households and their children.

16 **Q.** Now, in binder number one, we have a copy of your book,
17 *Future of Marriage*. I think that is Defendant's Exhibit 956.

18 **A.** I do not have a copy with me here, if you are addressing
19 your question to me.

20 **Q.** No, I think --

21 **THE COURT:** It's in the binder, I believe,
22 Mr. Blankenhorn.

23 **BY MR. BOIES:**

24 **Q.** It's in the binder. The binder we handed up to you. In
25 other words, the --

1 A. The binder you handed me?

2 Q. Yes. The binder that your counsel handed you only had the
3 cover page.

4 A. Yes.

5 Q. We have handed you a binder that, unless we have screwed
6 it up in some way, ought to have the entire book in it.

7 A. Okay. Well, if you tell me the number, I will track it
8 down.

9 Q. 956, Defendants' 956.

10 This is an excerpt. It's not the entire book, but it
11 is more pages than just the top page.

12 A. Got it.

13 Q. Okay.

14 A. A pretty short excerpt.

15 Q. Well, it is -- it's not the whole book, but it's longer
16 than just the cover page.

17 Would you turn to page two of the book?

18 A. Yes, sir.

19 Q. And the last two sentences. And for context you may want
20 to read earlier in the paragraph. You will see that your
21 writing there on the issue of same-sex marriage is this
22 profound principle of equal dignity, the heart of the matter?

23 "After all, part of the reason why the
24 principle is so revolutionary is that it can
25 grow and deepen over time. Groups that had

1 long been considered effectively outside its
2 moral reach, African-Americans, women, people
3 of certain colors or languages or religions,
4 can over time and often as a result of great
5 struggle, enter into its protective sphere."

6 And then you get to the two sentences that I want to
7 particularly direct your attention to. You say:

8 "I believe that today the principle of equal
9 human dignity must apply to gay and lesbian
10 persons."

11 Do you see that?

12 **A.** Yes, sir.

13 **Q.** And the "I" there is you, correct?

14 **A.** That's correct.

15 **Q.** And you say:

16 "In that sense insofar as we are a nation
17 founded on this principle, we would be more,
18 emphasize more, American on the day we
19 permitted same-sex marriage than we were on
20 the day before."

21 And you wrote those words, did you not, sir?

22 **A.** I wrote those words.

23 **Q.** And you believed them then, correct?

24 **A.** That's correct.

25 **Q.** And you believe them now, correct?

1 **A.** That's correct.

2 **Q.** Now, let me direct your attention to some of the scholars
3 that you say you relied on.

4 And Mr. Cooper took you through a number of
5 publications by a number of scholars and you indicated that you
6 had relied on what they had written; do you recall that?

7 **A.** I do recall.

8 **Q.** Now, were any of the scholars that you and Mr. Cooper
9 identified scholars who have asserted that permitting same-sex
10 marriage would cause a reduction in heterosexual marriage?

11 (Brief pause.)

12 **Q.** If you don't understand the question, I will try to make
13 it clear.

14 **A.** No, I do understand it. And I'm -- may I say it back to
15 you and see if I have got it?

16 I think you are asking me, did any of the scholars
17 that I have cited, do they believe that adopting same-sex
18 marriage would lower the marriage rate among heterosexuals?

19 **Q.** Almost. And I -- I just want to clarify one thing.

20 You said "believe" and I said "asserted." And I'm
21 not asking you to try to probe their minds. I'm simply asking
22 what they have said and written.

23 Do you understand the difference, what I'm saying?

24 **A.** Yes.

25 **Q.** And what I'm asking you is, whether any of the scholars

1 that you have relied on have asserted that permitting same-sex
2 marriage would result in a lower rate of heterosexual marriage?

3 **A.** I -- I think the safest answer would, for me, to say I
4 don't know.

5 But if you'll also permit me, I think -- I believe
6 the answer is yes, some of them have.

7 **Q.** In that case what I will now do is ask you which ones?

8 **A.** Well, I thought you might. That's why I was kind of
9 careful in walking into it, but...

10 **Q.** It comes from those discussions.

11 **A.** Yes, yes.

12 (Laughter.)

13 **A.** Professor Norval Glenn in his article called the
14 *Struggle For Same-Sex Marriage* I have not reread that article
15 in some time, but I know he is a long-time -- I have read many
16 things of his and he is a -- I know him and I believe that he
17 has voiced reservations about same-sex marriage along the lines
18 of this statement that I read from, in the article; that is,
19 that he is saying that if --

20 **Q.** Sir?

21 **A.** Yes.

22 **Q.** I -- I need to have you focus relatively precisely, if I
23 can, on my question.

24 You did read a -- or Mr. Cooper read to you a portion
25 from Mr. Glenn's article where he was talking about the

1 deinstitutionalization of marriage, and I do remember that,
2 okay?

3 My question is different, okay? My question is
4 whether Mr. Glenn or any scholar that you relied on has
5 asserted that permitting same-sex marriage will result in a
6 lower rate of heterosexual marriage?

7 **A.** The problem here -- I'm not trying to be evasive, but you
8 must let me just say my answer, which is that if they are
9 arguing --

10 **Q.** No, no, sir. I don't have to do this. All that's going
11 to happen is you're going to say something, then I'm going to
12 have to follow up. Okay?

13 What I'm trying to do is -- this is a very simple
14 question, all right?

15 **A.** It is not simple to me.

16 **Q.** All right. Well, let me try to make it simple.

17 **A.** If you are using.

18 **Q.** Let me try to make it simple.

19 **A.** (Continuing) -- the exact form of the words --

20 **Q.** If you are trying to --

21 **THE COURT:** Let's not argue with one another. Let's
22 just have a question and an answer.

23 (Laughter.)

24 **BY MR. BOIES:**

25 **Q.** Let me try to make the question as simple as I can.

1 Have any of the scholars that you have said you
2 relied on said in words or in substance, okay, this permitting
3 same-sex marriage will cause a reduction in heterosexual
4 marriage?

5 That's "yes," "no," or "I don't know."

6 **A.** I know the answer. I cannot answer you accurately if the
7 only words I'm allowed to choose from is "yes" or "no." I can
8 give you my answer very briefly in one sentence.

9 **THE COURT:** If you know the answer, why don't you
10 share it with us?

11 **THE WITNESS:** I would be happy to, but he is only
12 permitting me to give "yes" and "no," and I cannot do that and
13 be accurate.

14 **THE COURT:** He is giving you three choices, "yes,"
15 "no," "I don't know."

16 **THE WITNESS:** But I do know. I do know the answer.

17 **THE COURT:** Then is it "yes" or is it "no"?

18 **THE WITNESS:** Your Honor, I can answer the question,
19 but I cannot give an accurate answer if the only two choices I
20 have are "yes" and "no."

21 I -- if you give me a sentence, I can answer it. One
22 sentence is all I'm asking for.

23 **THE COURT:** All right. Let's take a sentence. One
24 sentence.

25 **A.** Can you ask me the question again, please.

1 **BY MR. BOIES:**

2 **Q.** Yes, yes.

3 Have any of the scholars who you say you relied on
4 asserted, written, that they believe that permitting same-sex
5 marriage will result in a reduction in the heterosexual
6 marriage rate?

7 **A.** My answer is that I believe that some of the scholars I
8 have cited have asserted that permitting same-sex marriage
9 would contribute to the deinstitutionalization of marriage, one
10 of the answer -- one of the manifestations of which would be a
11 lower marriage rate among heterosexuals.

12 But I do not have sure knowledge that in the exact
13 form of words you are asking me for they have made the direct
14 assertion that permitting same-sex marriage would directly
15 lower the marriage rate among heterosexuals.

16 **BY MR. BOIES:**

17 **Q.** Mr. Blankenthorn?

18 **A.** Horn.

19 **Q.** Mr. Blankenhorn.

20 **A.** That wasn't so long.

21 **Q.** Questions and answers.

22 **THE COURT:** If I were to take that as an "I don't
23 know" would that be fair?

24 **THE WITNESS:** With respect, your Honor, I would
25 disagree with you.

1 I know exactly my answer to this question, and I have
2 just stated it. And I would be happy to restate it.

3 **THE COURT:** The record is clear on what you said.

4 **BY MR. BOIES:**

5 **Q.** And let me try to see if I can clarify what you meant.

6 You have said that some of the scholars have said
7 that permitting same-sex marriage would lead to the
8 deinstitutionalization of marriage.

9 You have then said that the deinstitutionalization of
10 marriage would lead or might lead to reduced heterosexual
11 marriage rates. You said that, right?

12 **A.** Yes, sir.

13 **Q.** Okay. Now, what I am asking you is whether the linkage
14 that says deinstitutionalization of marriage leads to lower
15 heterosexual marriage rates is something that the scholars said
16 or is that something that you are saying?

17 **A.** Scholars.

18 **Q.** Okay. Now, what scholars have said that the
19 deinstitutionalization of marriage will lead to lower
20 heterosexual divorce rate? What scholars?

21 **A.** I think you mean to say marriage rates.

22 **Q.** Marriage rates.

23 **A.** Would you like me to name one?

24 **Q.** I would like you to name every one that you know.

25 **A.** Okay, I will.

1 It's going to take me a moment to compose my memory
2 here, but let's start with --

3 **Q.** Let's be sure that we know the question.

4 The question is: Which of the scholars that you have
5 said to Mr. Cooper that you rely on are scholars who have
6 written, one, that permitting same-sex marriage leads to the
7 deinstitutionalization of marriage; and, two, that that
8 deinstitutionalization of marriage leads to a lower rate of
9 heterosexual marriage?

10 Do you have the question clear?

11 **A.** I thought you were asking me to name scholars on whom I
12 relied to form my opinions.

13 I did not know that you were asking me to restrict it
14 to the few that you were enumerated in the colloquy with Mr.
15 Cooper. I thought you were asking me, am I aware of scholars
16 who make this claim.

17 If you are asking me to choose among the few scholars
18 that were involved in the earlier colloquy, my answer would be
19 that, to the best of my knowledge, Professor Glenn has argued
20 that permitting same-sex marriage would lead -- would likely
21 lead to the further deinstitutionalization of marriage. I'm
22 not saying he used those exact form of words, but I'm saying
23 the substance of his arguments, written arguments have been
24 such.

25 And I'm saying that in addition to that, Professor

1 Glenn has argued that the deinstitutionalization of marriage
2 has a manifestation of lower participation rates of
3 heterosexuals in marriage.

4 I'm saying that Professor Norval Glenn is one such
5 person among the very small number that were cited in this --
6 that's the universe you are limiting me to. I'm saying that,
7 to the best of my knowledge, the answer to your question is
8 Professor Norval Glenn.

9 Q. And --

10 A. I'll also add that he is one of the most distinguished
11 family scholars in the nation.

12 Q. Anybody other than Professor Glenn among the scholars that
13 you told Mr. Cooper that you were relying on? Anybody else?

14 A. In forming my views on this subject, I --

15 Q. Mr. Blankenhorn. Mr. Blankenhorn.

16 A. My views are not restricted to the few that are on this
17 list.

18 MR. BOIES: Your Honor, could I please?

19 A. If you want to know who I rely on --

20 BY MR. BOIES:

21 Q. This is a simple question.

22 A. I'm happy to tell you.

23 MR. BOIES: He identified several scholars that he
24 said to Mr. Cooper that he relied on.

25 A. These were illustrative only.

1 **BY MR. BOIES:**

2 **Q.** I will accept that it's your testimony that these were
3 illustrative only.

4 **A.** I have others that you would be pleased to know their
5 pedigree, and I would be happy to give them to you.

6 **THE COURT:** I think Mr. Boies is asking for their
7 names.

8 **A.** Professor David Popenoe from Rutgers University would be
9 another one.

10 **BY MR. BOIES:**

11 **Q.** Okay. Now, this is somebody who has written that the --
12 permitting same-sex marriage leads to deinstitutionalization of
13 marriage and that that, in turn, leads to lower heterosexual
14 marriage rates, correct?

15 **A.** Well, my -- my only hesitation in answering yes is that I
16 have not refreshed myself on his exact writings and whether the
17 form of words are close enough to satisfy your concerns.

18 But it's my belief, based on an extensive
19 acquaintance with his books and writings in recent years, that
20 those represent the substance of his beliefs. And I -- I can't
21 sit here right now without reference to his works to prove it
22 in exact word formulation.

23 So I want to issue that caveat, but I believe if he
24 were here right now, sitting here, and you asked him, I believe
25 he would say, Yes, those are my beliefs.

1 Q. Okay. Now, Mr. Blankenhorn, I want to try to make as
2 clear to you as I possibly can that my questions here are
3 asking about what these people have written, not what you think
4 they would say if we brought them in to testify; not what you
5 think is in their heart or mind based on your conversations
6 with them; but what they have actually written.

7 Do you understand the difference?

8 A. Of course, I do.

9 Q. Okay. So focusing on that -- and I'm afraid I'm going to
10 mispronounce David's last name. Could you give that to me
11 again?

12 A. Popenoe.

13 Q. Popenoe. It is your testimony that Mr. Popenoe, Professor
14 Popenoe may or may not have actually written something in which
15 he said:

16 A, permitting same-sex marriage leads to the
17 deinstitutionalization of marriage;

18 And, B, the deinstitutionalization of marriage leads
19 to a lower rate of heterosexual marriages.

20 Correct?

21 A. I know that he did -- has written -- I'm trying to answer
22 your question. You know, it's an important issue and I'm
23 trying to give you a short but clear answer.

24 Q. But if you answered the questions that I'm actually posing
25 --

1 **A.** I am doing so to the very best of my ability. I came all
2 the way here from New York to answer your questions absolutely
3 to the best of my ability.

4 And my answer is that I believe that Professor -- I
5 know certainly that he has written that the
6 deinstitutionalization of marriage would lead to -- would
7 likely lead to lower rates of marriage among heterosexuals.

8 I believe, but I am not certain, that he has written
9 that same-sex marriage would likely contribute to
10 deinstitutionalization.

11 **Q.** Okay. While we were talking, I was trying to read through
12 Norval Glenn's article which you have here.

13 And while I haven't maybe read it as carefully as I
14 would like, I don't see anything in here in which he talks
15 about heterosexual marriage rates.

16 Do you recall anything in here about heterosexual
17 marriage rates?

18 **A.** I was relying for that statement on a paper that he wrote
19 several years ago that I was involved in. That's why I can
20 remember it, where he was a co-author of a paper that talked
21 extensively about deinstitutionalization and he -- and in that
22 paper, of which he was a co-author, it specifically talked
23 about lowering marriage rates as a likely consequence.

24 **Q.** And was that paper that you just referred to one of the
25 documents that you relied on in your expert report?

1 **A.** I -- I don't recall now whether it was --

2 **Q.** Why don't you look?

3 **A.** Okay. Maybe I misunderstood something, but it never
4 occurred to me that everything I would say regarding my views
5 had to be represented in the list of documents. I have been
6 studying this topic for more than 20 years, and I certainly am
7 relying on many, many more things other than the few things in
8 this report.

9 **MR. BOIES:** Your Honor --

10 **THE COURT:** The question is whether or not this is
11 reflected in your expert report.

12 **THE WITNESS:** Let's -- let's -- well, it's reflected
13 in the sense that this was a thing that influenced my thinking,
14 but let's answer the question of whether it is listed and --

15 **BY MR. BOIES:**

16 **Q.** You listed the things that you considered and relied on,
17 correct? That's what you were asked to do, right?

18 **A.** Maybe I made a mistake, but it certainly never occurred to
19 me that all of the views that I expressed had to be traceable
20 to one of those documents at the end of this report. If that
21 -- if I had understood that that was the requirement, there
22 would have been many, many scores more documents cited. They
23 would have gone back for 20 years of the work and study and
24 reflection that I have done on this issue.

25 **Q.** Mr. Blankenthorn -- Mr. Blankenhorn.

1 A. Horn.

2 Q. Mr. Blankenhorn, I apologize.

3 A. Let's find out if it's listed. That would solve the whole
4 problem.

5 Q. That would, although even regardless of whether it's
6 listed or, not I do want to follow up on some things you just
7 said.

8 (Brief pause.)

9 A. No, sir. It is not listed.

10 Q. Now, at the end of your expert report you prepared an
11 index of materials considered, correct?

12 A. I believe that's the list I was just looking over to see
13 if I could find Norval Glenn's article.

14 Q. And it wasn't there, correct?

15 A. No, sir. I did not find it, upon reading it quickly.

16 Q. I don't find it either.

17 There is a Norval Glenn article, but it's a different
18 article, correct?

19 A. Well, that's correct. It's a different article.

20 Q. Now, maybe the easiest way for me to approach this is to
21 go through the materials that you went through with Mr. Cooper,
22 and I will try to go through them as quickly as I can.

23 Turn to tab three. This would be the --

24 Q. In your book, yes, sir, in your book.

25 A. Got it.

1 Q. And this is an excerpt from a book by Suzanne G. Frayser,
2 correct?

3 A. Yes, sir.

4 Q. Now, does Dr. Frayser assert that permitting same-sex
5 marriage will cause a reduction in heterosexual marriage rates?

6 A. I do not know of her having made such an assertion.

7 Q. Okay. Does Professor Frayser assert that permitting
8 same-sex marriage will result in an increase in heterosexual
9 divorce rates?

10 A. In the interest of moving along, I think I can say that I
11 do not know of any statement about same-sex marriage that
12 Suzanne Frayser has made.

13 I don't know of any comment that she has made on that
14 topic.

15 Q. Okay. Let's go to the next expert that you told Mr.
16 Cooper you relied on, tab number four. Professor Quale, the
17 book *The History of Marriage Systems*.

18 Does Professor Quale assert anywhere here that
19 permitting same-sex marriage will cause a reduction in
20 heterosexual marriage rates?

21 A. My answer is the same. I'm not aware of Professor Quale
22 having in this book made any comments, one way or the other,
23 about -- this was 1988 and it would have been highly unlikely
24 for her, or anyone, to be writing about it.

25 But the answer is no. I do not know of anything she

1 has said in this book or elsewhere on the subject of same-sex
2 marriage. I'm not aware of anything.

3 **Q.** Did Professor Quale assert that deinstitutionalization of
4 marriage, however it was caused, would result in a reduction in
5 heterosexual marriage rates?

6 **A.** No, sir. Nor was I relying upon her to talk about
7 deinstitutionalization. She is under the section under what is
8 marriage, not about what is same-sex marriage and not is what
9 is the theory of deinstitutionalization.

10 If you want to talk about sources for my views on
11 deinstitutionalization, I can save you some time and take you
12 right to them.

13 But, no, she does not in this book discuss same-sex
14 marriage and, to the best of my knowledge, she doesn't say --
15 use the term "deinstitutionalization." She is a historian and
16 deinstitutionalization is a term that comes from sociology.

17 **Q.** So maybe we can move this along.

18 Neither Professor Frayser nor Professor Quale nor
19 Professor Kingsley Davis nor the Committee of the Royal
20 Anthropological Institute of Great Britain and Ireland, nor
21 Professor van Den Berghe, nor Professor Malinowski, none of
22 them talk about -- insofar as you were relying on them talk
23 about same-sex marriage or talk about the
24 deinstitutionalization of marriage, correct?

25 **A.** That would not be correct.

1 Q. Okay. It didn't work to speed it up.

2 A. May I --

3 Q. It was a compound question, but I thought --

4 A. Mr. Boies --

5 Q. Let me do it my way.

6 A. I was trying to save us some time.

7 Q. I was, too. But first Professor Frayser. Professor

8 Frayser does not deal with deinstitutionalization of marriage,

9 does not deal with same-sex marriage at all, correct?

10 A. Nor was I relying upon her for any of my views on those
11 subjects. The answer is no, she doesn't.

12 **THE COURT:** Or the answer is yes, she doesn't.

13 (Laughter.)

14 **THE WITNESS:** Yes, she does not.

15 **BY MR. BOIES:**

16 Q. And Professor Quale, does --

17 A. Same.

18 Q. Does Professor Quale deal at all with

19 deinstitutionalization of marriage or with same-sex marriage?

20 A. Not to my knowledge, no, sir.

21 Q. Okay. Professor Kingsley Davis, does Professor Davis deal
22 at all with same-sex marriage or the deinstitutionalization of
23 marriage?

24 A. Yes, sir. Based on my memory, I am confident -- well, I

25 would say that based on my memory of his writings, that he does

1 speak either with specific use of the word
2 deinstitutionalization, because he is a sociologist, or making
3 the same argument.

4 So my best understanding is that he does speak about
5 that issue in his work.

6 **Q.** Okay. Now, you see if you begin with a "yes," "no," or "I
7 don't know" answer --

8 **A.** Well, now we are back to the same old problem.

9 **Q.** Well, but you got to the "yes" at the end of that long
10 speech, and what I'm trying to do --

11 **A.** It wasn't a very long speech.

12 **Q.** Well, let's not argue about that or we will be here too
13 long, okay?

14 **A.** Okay.

15 **Q.** What I'm trying to do is I'm just trying to -- I get to
16 ask the questions. You get to answer them.

17 **A.** That's what they tell me.

18 **Q.** And I get to choose what questions I ask. And my
19 questions are designed to be precise questions so that I get a
20 "yes" or "no" answer, or you can say "I don't know."

21 **A.** No, sir. I -- often the questions are not amenable to
22 those three choices. I often know the answer that I wish to
23 give. I can give it briefly, but I cannot give the answer
24 sometimes if the only words I'm allowed to choose from are
25 "yes" or "no."

1 Q. Well, but when I ask a question like does Mr. Kingsley
2 Davis -- does Professor Kingsley Davis address the issue of
3 deinstitutionalization or the issue of same-sex marriage, you
4 can answer that question "yes" or "no", can you not, sir?

5 A. That is not the question you just asked, but the -- if you
6 would ask it that way, the answer is yes.

7 Q. Okay. Good. Now, does he do so in the article that you
8 say you relied on?

9 A. I don't know. Hah, see, I did it.

10 (Laughter.)

11 Q. Good for you. Yes. And if I could give you a gold star,
12 I would.

13 A. But that's when the answer really was "I don't know."

14 Q. Now, does he do so in any material that you indicated that
15 you had considered in your expert report?

16 A. Well, see, now we are back to the problem of what's in the
17 expert report. I have read a lot of stuff by him and I believe
18 that he does talk about it, but I am -- let's go back and look
19 at the list.

20 I can tell you that I have relied upon his work in
21 forming my views --

22 Q. Why don't you just answer the question.

23 A. I will have to read the list in order to tell you
24 whether any other article is --

25 Q. Please do so and when you finish, let me know.

1 **A.** (Continuing) -- is listed here.

2 I will.

3 (Brief pause.)

4 **A.** My quick reading shows me that there are no other cites to
5 Davis, other than the one we are discussing.

6 **Q.** Okay. Now, if you turn to tab six, the *Notes and Queries*
7 *on Anthropology*, by the Committee of the Royal Anthropological
8 Institute of Great Britain and Ireland?

9 **A.** Yes, sir.

10 **Q.** And does this publication address, as you recall, either
11 the issue of same-sex marriage or the issue of the
12 deinstitutionalization of marriage?

13 **A.** I know for a fact that it does not discuss the issue of
14 same-sex marriage with -- using that term same-sex marriage.
15 It does not -- it does not.

16 But it is my belief that it does in -- specifically
17 or in substance discuss the process of deinstitutionalization.

18 **Q.** Can you find where it does so?

19 **A.** Well, I only have a few pages here. If you could give me
20 the book, I could -- I believe I could find it for you.

21 **Q.** Let me get that. Let me get that while we are going on to
22 other questions.

23 And the next question is at tab seven. Professor van
24 den Berge was another expert that you said you relied on,
25 correct?

1 **A.** I relied on these views about the definition of marriage,
2 not about deinstitutionalization of same-sex marriage. I have
3 tried to make this clear.

4 **Q.** That's actually what I'm trying to make clear, also. And,
5 in fact, one of the things I'm trying to make clear is that
6 these people that you spent your time on direct examination
7 testifying that you relied on don't talk about in these
8 materials same-sex marriage or the deinstitutionalization of
9 marriage. I'm trying to make that point.

10 **A.** And I'm agreeing with you, by and large, and telling you
11 that their area of study is marriage.

12 **Q.** It's the by and large part --

13 **A.** We have already found Kingsley Davis talking about
14 deinstitutionalization and a couple of these others.

15 **Q.** Wait a minute. Where did we find Kingsley Davis talking
16 about that?

17 **A.** I think wasn't my testimony before that I thought Kingsley
18 Davis in his work was -- does discuss the process of
19 deinstitutionalization?

20 **Q.** Yes. You said you thought that was so, but it wasn't in
21 the materials that were in your book and it wasn't in --

22 **A.** Well, if we are back to that --

23 **Q.** Let me finish, at least.

24 And it wasn't in the materials that were listed in
25 your report, correct, sir?

1 A. The only article by --

2 Q. That is a "yes" or "no" answer, sir.

3 A. If you are asking me was --

4 MR. BOIES: Your Honor, can I get a "yes" or "no"
5 answer to this question?

6 THE COURT: Do you have the question in mind?

7 THE WITNESS: No, sir. I don't, your Honor.

8 THE COURT: Then perhaps you could restate it.

9 MR. BOIES: Okay, okay.

10 BY MR. BOIES:

11 Q. To the extent that Professor Davis addressed the issue of
12 deinstitutionalization of marriage, he did so outside of the
13 publication that was in your book and outside of anything that
14 is listed in your expert report, correct?

15 A. No, sir. I believe that it is certainly true that it's
16 outside anything listed in this report. I can't --

17 Q. It's also outside the publication from Professor Davis
18 that is in your book?

19 A. I can't recall the ways in which I did or didn't use
20 Professor Davis's work in my book.

21 Q. Not in your book. I apologize. I think I created this
22 confusion.

23 You are thinking about your book being -- one of your
24 books, like *The Future of Marriage*, right?

25 A. Yes, sir.

1 Q. I apologize. I was meaning to refer to the binder that
2 you used with your counsel.

3 A. Then the answer is yes. It is not -- your statement is
4 correct.

5 Q. Okay. Now, Professor Malinowski, would it be accurate to
6 say that in the publication that is in the binder that you were
7 using with your counsel that you said that you relied on, that
8 Professor Malinowski does not deal either with same-sex
9 marriage or with the deinstitutionalization of marriage?

10 A. That would not be correct.

11 Q. That would not be correct, okay.

12 Does Professor Malinowski in this book deal with
13 same-sex marriage?

14 A. No, sir.

15 Q. Okay.

16 A. Not -- no, sir.

17 Q. Does he deal with the subject of the
18 deinstitutionalization of marriage?

19 A. I don't think he uses the word, but I'm pretty confident
20 that -- well, I know in his writings as a whole he talks about
21 the process of deinstitutionalization.

22 Q. When you say "his writings as a whole," you mean writings
23 other than what's here in your binder?

24 A. Yes, sir.

25 Q. Okay. Now, you may not have understood the question, but

1 the question was: In the materials that you told your counsel
2 that you relied on and that are in your binder, in those
3 materials does Professor Malinowski deal at all with the
4 subject of the deinstitutionalization of marriage?

5 **A.** I don't know.

6 **Q.** Okay. Tab 10. Professor Lévi-Strauss.

7 **A.** I think I can save time by saying that he does not talk
8 about same-sex marriage, and I don't know whether in this
9 particular writing he deals with the process of the
10 deinstitutionalization of marriage.

11 **Q.** Okay. That does speed it along.

12 Do you have any materials that you have listed as
13 materials considered or relied on in your expert report from
14 Professor Lévi-Strauss other than this publication?

15 **A.** I'm quite confident that I have not included anything
16 other than this one cited article.

17 I've read his work extensively, and they have been
18 very important influences on my views, but the only thing
19 listed here is this one piece.

20 **Q.** Okay. Now, tab 11. The Law Commission of Canada. This
21 does deal with same-sex marriage, correct?

22 **A.** It does, yes. Not only, but it does deal with it.

23 **Q.** Not only, not only.

24 Does the Law Commission of Canada assert in the
25 materials that you have here before you, that you say you

1 relied on, that same-sex marriage may result in a reduction in
2 heterosexual marriage rates?

3 **A.** I don't know.

4 **Q.** Does the Law Commission of Canada in the materials that
5 you have in front of you, that you say you relied on, assert
6 that permitting same-sex marriage may cause an increase in
7 heterosexual divorce rates?

8 **A.** My strong suspicion is that they did not, because they are
9 endorsing same-sex marriage and they are endorsing what I would
10 view to be the radical deinstitutionalization of marriage in
11 general.

12 So it would be my supposition, without having reread
13 the entire document recently, that it would be my very strong
14 speculation that they made no such statement in this document.

15 **Q.** And did the Law Commission of Canada in the materials that
16 you have in front of you, and that you say you relied on,
17 assert that permitting same-sex marriage might lead to a trend
18 towards polygamy?

19 That is "yes," "no" or "I don't know."

20 **A.** I believe that they endorse, at least indirectly --

21 **MR. BOIES:** Your Honor, your Honor this really is a
22 question that can be answered "yes," "no" or "I don't know."

23 **A.** It just depends if you want to know what I think about it.

24 (Laughter.)

25 **THE COURT:** Well, that's the next question, perhaps,

1 and a question that Mr. Cooper can pursue.

2 But Mr. Boies is entitled --

3 **A.** Okay. I don't know I don't know whether they --

4 **BY MR. BOIES:**

5 **Q.** Okay.

6 **A.** -- whether they said that same-sex marriage would lead or
7 could lead to polygamy.

8 **Q.** Okay. And, again, did the Law Commission of Canada and
9 the materials that you have in front of you, that you say you
10 relied on, assert that permitting same-sex marriage might cause
11 an increase in children raised outside of marriage?

12 Again, "yes," "no," or "I don't know."

13 **A.** They are strongly advocating for the trend. So I don't
14 think that --

15 **MR. BOIES:** Your Honor, your Honor, he keeps doing
16 this.

17 **THE COURT:** I wonder in view of the hour whether a
18 good night's sleep might be helpful.

19 (Laughter.)

20 **MR. BOIES:** Thank you.

21 **THE COURT:** Might that not be helpful in moving us
22 along?

23 **MR. BOIES:** I think it might. I hope it will.

24 **THE COURT:** All right. Now, is there a realistic
25 possibility that we could conclude the presentation of evidence

1 sometime in the morning, sometime before noon?

2 **MR. BOIES:** Let me confer with counsel.

3 (Discussion held off the record
4 amongst counsel.)

5 **MR. BOIES:** Your Honor, I think this is the last
6 witness. There may be some short documentary evidence to come
7 in, but I think that there is a -- there is a hope. And I will
8 try to sharpen my questions, and perhaps the witness can think
9 about sharpening his answers; and if we work together, we may
10 be able to get it done.

11 **THE COURT:** Very well. Let me ask Mr. Cooper. Are
12 you planning to present Mr. Schubert as a witness?

13 **MR. COOPER:** No, your Honor, not if we can work
14 this -- these document issues out, which we think we can.

15 **THE COURT:** Very well. So then we should be able to
16 conclude the presentation of evidence with Mr. Blankenhorn and
17 then any documentary evidence that you had want to put in; is
18 that what I understand Mr. Boies to be saying?

19 **MR. BOIES:** Yes, yes.

20 **THE COURT:** Well, I'll look forward to it and that
21 should enable us to conclude sometime before noon, is that
22 correct?

23 **MR. BOIES:** Yes. I think yes, your Honor.

24 **THE COURT:** Do you agree, Mr. Cooper?

25 **MR. COOPER:** I do agree with that, yes. Starting at

1 8:30 again tomorrow morning, your Honor?

2 **THE COURT:** Absolutely.

3 **MR. COOPER:** Okay.

4 **THE COURT:** All right. Have a pleasant evening.

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

6 (Whereupon at 4:35 p.m. further proceedings
7 in the above-entitled cause was adjourned
8 until Wednesday, January 27, 2010 at 8:30 a.m.)

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19	84			2759	11
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20	93			2758	11
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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
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/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

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U.S. Court Reporter

Tuesday, January 26, 2010