

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)
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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.) Monday
) January 25, 2010

TRANSCRIPT OF PROCEEDINGS

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Official Reporters - U.S. District Court

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P R O C E E D I N G S1
2 JANUARY 25, 2010

8:40 A.M.

3
4 **THE COURT:** Good morning, Counsel.

5 (Counsel greet the Court.)

6 **THE COURT:** Trust you had a good weekend.

7 (Laughter)

8 Well, good.

9 Mr. Boutrous, I understand you have some matters that
10 you wish to present before closing with the plaintiffs' case.11 **MR. BOUTROUS:** Yes, Your Honor. Two things before we
12 proceed to Mr. Dusseault's evidentiary presentation.13 The first relates to the proponents' announcement
14 over the weekend that they were planning to call Frank Schubert
15 as a witness.16 And we filed a motion to exclude Mr. Schubert's
17 testimony on several grounds. And because of the immanence of
18 all this, we are hoping we could take that up first thing
19 today.

20 As the Court may recall --

21 **THE COURT:** Should we take this up before the
22 plaintiffs have presented their case?23 **MR. BOUTROUS:** The -- one reason I was hoping we
24 could take it up sooner rather than later is that to the extent
25 the proponents are going to put Mr. Schubert on the stand to

1 talk about the genesis of the strategy and the campaign
2 strategy, we think that would, number one, be a waiver of these
3 privilege claims that were invoked over -- at least 76 times in
4 Mr. Schubert's deposition, and which form the basis of the
5 withholding of thousands of documents.

6 And we think that it would be inappropriate for the
7 proponents to have it both ways. On the one hand, blocking any
8 inquiry. If the Court were to review the deposition of
9 Mr. Schubert, it is remarkable the obstruction, in terms of our
10 inquiry. 76 objections/instructions not to answer.

11 If one looks at page 58 through 65, of the
12 deposition, it sort of encapsulates the degree to which our
13 inquiry was blocked.

14 And in terms of the authentication and admission of
15 documents, which was the ostensible purpose that Mr. Cooper
16 suggested on Friday for Mr. Schubert's testimony, we have let
17 the other side know we have no objections on authenticity
18 grounds, and in fact we're not objecting to the documents they
19 at least first identified as exhibits.

20 So either there is no reason for him to testify; or,
21 to the extent he does, they are opening up a whole new world
22 which we would be entitled to get documents from him so we
23 could conduct an examination of him.

24 **THE COURT:** When did you learn Mr. Schubert might be
25 a witness?

1 If I remember our proceedings on Friday, Mr. Cooper
2 stated that there would be two witnesses presented by the
3 defendants, both expert witnesses, Blankenhorn --

4 **MR. BOUTROUS:** Blankenhorn and Miller.

5 **THE COURT:** Blankenhorn and Miller. Schubert was not
6 mentioned.

7 So when did you learn that the defendants might be
8 calling Schubert?

9 **MR. BOUTROUS:** We first learned Sunday morning, at
10 about 8:30, I believe, in the morning, that Mr. Schubert would
11 be their -- their witness.

12 And the -- as the Court will recall, Mr. Cooper did
13 say on Friday that there might be one other witness, and the
14 primary purpose of that witness would be to authenticate
15 documents.

16 So, frankly, we were --

17 **THE COURT:** I see.

18 **MR. BOUTROUS:** Yes. So we learned Sunday. We filed
19 our motion last night. We did ask them -- we let the
20 proponents know that we were not going to object to the
21 documents on authenticity grounds. They are mostly campaign
22 documents and the like.

23 And so we were hoping that would resolve it because,
24 you know, we had a lot of questions for Mr. Schubert we weren't
25 allowed to ask during his deposition. And they have zealously

1 protected any meaningful inquiry into anything regarding his
2 thinking, his state of mind, his strategic vision. They
3 wouldn't even let him answer questions about the article that
4 he wrote and published, in many respects, during his
5 deposition.

6 So that's why we would like to get that resolved.
7 Because if he is going to testify, there are a number of things
8 we would have to do, and probably be ready to cross-examine him
9 tomorrow.

10 **THE COURT:** Who's going to field this on the
11 defendants' side? Mr. Thompson or --

12 **MR. THOMPSON:** Ms. Moss will, with the Court's
13 permission.

14 **THE COURT:** Ms. Moss. Good morning.

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

16 First of all, we received their motion about 11:30
17 last night. And so to the extent that the Court would like a
18 written response, we would ask for 24 hours, to have until
19 tomorrow.

20 But I think the bigger point would be, this may be
21 moot. We don't know for sure that we are going to call him.
22 It depends upon, at the close of their case, what evidence
23 comes in.

24 There's a variety of documents that we have not been
25 able to agree on the admissibility of. And depending upon

1 whether those come in, and what sort of tender the plaintiffs
2 make as to their relevance and significance, we may need to
3 have a witness such as Mr. Schubert testify about those
4 documents.

5 And, specifically, those documents were ones that
6 were ordered to be turned over following the Ninth Circuit's
7 revision of its opinion regarding the First Amendment. They
8 had been withheld.

9 And my understanding was the Court's order was, if
10 they wanted -- rather than reopening the deposition of
11 Mr. Schubert or any of the other witnesses, that they were free
12 to have called them and to have asked them questions on the
13 stand.

14 And, in lieu of that, they are wanting to move into
15 evidence a variety of documents. And any questioning that we
16 would have of Mr. Schubert would be limited to those documents,
17 if we feel it is necessary to do so following whatever comes
18 into evidence.

19 So it's not clear that we are going to need to call
20 him for anything more than authenticating documents. And that
21 may it itself may not have to happen if they are in fact going
22 to agree that the exhibits we want to move in are admissible.

23 **THE COURT:** Have you been informed which documents
24 the plaintiffs intend to introduce?

25 **MS. MOSS:** Yes.

1 **THE COURT:** Well, would that not tell you whether or
2 not you need to call Mr. Schubert?

3 **MS. MOSS:** Well, it depends upon if they actually
4 come in, and what significance plaintiffs are placing on these
5 documents.

6 This may be jumping ahead a bit, but one of the
7 objections we have --

8 **THE COURT:** Assuming that all of them come in.

9 **MS. MOSS:** Okay.

10 **THE COURT:** And isn't that an assumption that you
11 have to make?

12 **MS. MOSS:** Yes, Your Honor.

13 But if -- it depends upon if they come in -- just
14 come in blank, or if they come in with, as we contend, some
15 kind of a tender by the plaintiff as to why each of these
16 documents that is not coming in under a sponsoring witness
17 is -- what its significance is and what its specific relevance
18 is to this case.

19 They are moving in documents which --

20 **THE COURT:** The evidence is what it is.

21 **MS. MOSS:** Well, they're going to be presumably
22 making representations about what these documents are.

23 And we would contend that the appropriate time to
24 know what those representations are is now, what significance
25 they are placing on some of these documents, so that we can

1 determine do we need a witness to respond to them, as opposed
2 to having to wait until their post-trial briefing when, for the
3 first time, we learn that they are contending a certain
4 document was authored by the campaign, when we know it wasn't,
5 or if they're contending a document shows something that we
6 know it does not.

7 We would have no way of knowing that, if they have
8 not questioned a witness about that or made some sort of a
9 representation about what the specific relevance is of some of
10 these documents.

11 **THE COURT:** These are defendants' documents; are they
12 not?

13 **MS. MOSS:** Some of them are and some of them are not.

14 **THE COURT:** How many documents are we talking about?

15 **MS. MOSS:** I'm not sure.

16 **THE COURT:** Mr. Dusseault.

17 **MR. DUSSEAULT:** Your Honor, we have reached agreement
18 on a number. I would estimate the ones that we haven't -- and
19 I've tried to put them in groups -- it's probably 30 to 40 in
20 total. And I'm trying to address them in groups so we don't
21 have to do them one by one.

22 **THE COURT:** What is the source of these documents, or
23 what are the sources of these documents?

24 **MR. DUSSEAULT:** Your Honor, I think I can fairly
25 group it into three. Documents that were produced before

1 deposition, some of which foundation has been laid; documents
2 that were produced during trial, but from them and from their
3 files; and then a couple of documents that are from websites,
4 where we've shown them the website that we get them. For
5 example, we go on a website and see that there's a simulcast
6 that says, "Presented by ProtectMarriage.com." So we've shown
7 them that.

8 That's, I think, generally the three sources: from
9 them during discovery; from them during trial; and, the
10 Internet.

11 **THE COURT:** Well, are you saying that you believe the
12 source of all 30 or 40 documents, whatever the number is, is
13 ProtectMarriage.com?

14 **MR. DUSSEAULT:** There are a couple of documents, Your
15 Honor, where the source itself is not ProtectMarriage.com, but
16 we do have evidence that shows, for example, that
17 ProtectMarriage.com was involved; funded it; reviewed drafts.
18 And there's a connection that in the course of my presentation
19 we will show. That's the minority of them.

20 But there are a couple where we are showing a
21 connection of a document that comes from another source, but
22 they screened it in advance.

23 **THE COURT:** And I gather that category of documents
24 is the category you're concerned about, Ms. Moss; is that
25 correct?

1 **MS. MOSS:** That is correct.

2 I mean, for many of these documents, we don't dispute
3 that they were produced from the files of the proponents or
4 ProtectMarriage.com.

5 But they are not -- they may, for instance, have been
6 something that was sent in. And whether it was in fact
7 reviewed, whether it was authored by, paid for by,
8 ProtectMarriage.com is very much in dispute.

9 And whether or not we need to put on evidence about
10 that, I think, would depend upon what tender plaintiffs are
11 making as to what presentation that document -- what they're
12 claiming that document represents.

13 And, normally, if it was coming in through a
14 sponsoring witness, they would ask those questions; it would be
15 clear through the testimony of the witness; and we would have
16 an opportunity then to, on cross of that witness, clarify
17 anything we felt needed to be clarified.

18 If the documents are just moved into the record, then
19 we may well then need to put on a witness such as Mr. Schubert,
20 to testify about these documents, to clear up any issues that
21 we -- to present any facts we believe need to be fairly
22 presented.

23 And these are documents that they're moving in. So
24 to say that they need additional documents beyond that, I don't
25 think that we've waived anything. These are documents that we

1 produced because we were ordered to do so. And they are moving
2 them into evidence.

3 And so I think it's perfectly appropriate for us to
4 be able to question the witness about them, about those
5 specific documents, without necessarily going beyond that, into
6 two other areas.

7 **MR. DUSSEAULT:** Your Honor, if I could make one
8 clarifying comment. We're hearing this argument for the first
9 time. They disclosed yesterday, I think at 8:29, documents
10 they were intending to use with Mr. --

11 **THE COURT:** A.m. or p.m.?

12 **MR. DUSSEAULT:** A.m., with an 8:30 deadline.

13 And I believe -- as far as we can tell now, there's
14 only one document in the group that we've asked them to agree
15 to that's on the Schubert list.

16 There are -- there are many, many documents on the
17 Schubert list. And, as far as we can tell, only one of them is
18 a document that we've asked them to agree to.

19 So, clearly, they are trying to do things with
20 Mr. Schubert that go beyond the documents that we are trying to
21 move in today.

22 **MS. MOSS:** Your Honor, the documents that we
23 identified were ones -- they were documents that we're wanting
24 to move in evidence, not the ones that they have themselves
25 identified.

1 We were identifying new exhibits that we would intend
2 to put in through him, which are the public ads and statements
3 from the campaign, which I understand them, by their response
4 to my e-mail, to say they had no objection to.

5 If that was all that it was, we wouldn't need to put
6 him on the stand.

7 But what we don't know, as of this point, is what
8 additional documents are going to come into the record. And if
9 everything that they have identified is going to come in, then
10 we would like the opportunity to determine whether we, in fact,
11 need to put him on the stand and ask him about those documents.

12 **MR. BOUTROUS:** Could I add one point, Your Honor?

13 **THE COURT:** Last point.

14 **MR. BOUTROUS:** This is it. This will be my last
15 point.

16 On this question of the proponents wanting to
17 question Mr. Schubert about the documents, we asked him in his
18 deposition, over and over, about documents, including on page 2
19 of our motion. We quote one example:

20 "Did ProtectMarriage.com help to develop the
21 content of the three simulcast rallies
22 referred to on this page?"

23 And Mr. Dusseault referenced the simulcast.

24 "Instruction not to answer."

25 Everything we asked him about to explain documents

1 they blocked our inquiry. So from what Ms. Moss is saying,
2 now, they would like to reserve the opportunity, having blocked
3 our inquiry, to have Mr. Schubert now, for the first time, on
4 the stand, give the explanation they precluded us from seeking
5 from him in his deposition.

6 It was really quite extraordinary the way the
7 deposition was handled. And I think it would -- it -- it's
8 really trying to have it both ways, now that they are
9 suggesting he would come up and explain these documents when
10 they stopped him from doing it in his deposition.

11 **THE COURT:** Thank you very much --

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

13 **THE COURT:** -- for your presentations.

14 I'm going to reserve on this for the moment. Let's
15 see what documents come in, presented by the plaintiffs. And
16 then, to the extent it's necessary to deal with whether
17 Mr. Schubert testifies or not, we'll deal with that in due
18 course.

19 You have well presented the issue, and I've read your
20 papers. But I'll consider further the issue when it becomes
21 ripe.

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

23 **THE COURT:** All right.

24 **MR. BOUTROUS:** The next preliminary issue I would
25 like to have Mr. Boies address, it relates to the Nathanson and

1 Young deposition excerpts we played, and the designations that
2 proponents have now made.

3 **THE COURT:** Very well. Mr. Boies.

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

5 Mr. Patterson and I have agreed, subject to the
6 resolution of certain objections that we have, as to what will
7 be played. That is, we both designated and counter-designated
8 to each other's designations. We've each designated and
9 counter-designated --

10 **THE COURT:** Yes.

11 **MR. BOIES:** -- to each other's deposition requests.

12 We do have some and we have here --

13 **THE COURT:** Are these additional designations?

14 **MR. BOIES:** These are additional from what we played.

15 In other words, the Court will recall that with
16 respect to Professors Young and Nathanson, who were experts for
17 the defendant, the plaintiffs in their case played certain
18 selections. And because we offered into evidence the
19 deposition, they were entitled to come forward with additional
20 designations.

21 We've now agreed that what's present are responsive
22 to our designations. And we've made a few additional
23 designations for contextual purposes. We have all that agreed
24 to.

25 What we don't have agreed to is that we have certain

1 objections to some of their designations on the grounds that
2 their own designations demonstrate that the witness is not
3 competent to testify about that subject.

4 **THE COURT:** A Daubert challenge?

5 **MR. BOIES:** A Daubert challenge. And it actually
6 goes, maybe, even beyond Daubert in the sense --

7 **THE COURT:** Daubert plus.

8 (Laughter)

9 **MR. BOIES:** Daubert plus.

10 And what we've done, for the Court's convenience --
11 and you might begin with Professor Young.

12 What we've done for the Court's convenience is, we
13 have marked here in yellow the designations that they intend to
14 play. And we have marked in red or pink the designations that
15 they want to play that we object to. The yellow ones are
16 agreed to. The pink or red ones are ones that we object to.

17 **THE COURT:** Well, happily, most of these are yellow.

18 **MR. BOIES:** Most of them are yellow, yes, Your Honor.
19 We tried to keep our objections limited.

20 The -- but if I could just ask the Court, maybe, to
21 skim some of the initial yellow pages, which you'll see is that
22 what they have done is they have designated a whole series of
23 questions and answers that demonstrate that Professor Young has
24 very limited, in their view, expertise.

25 They have established she's not an expert in

1 psychiatry; she's not an expert in psychology; she's not an
2 expert in sociology; she's not an expert in anthropology; she
3 is not an expert in the field of child development; she is not
4 an expert in political science.

5 She is an expert in religion, but she is an expert in
6 Hinduism.

7 She has never done a study in the United States, of
8 whether there is bigotry or prejudice against gays or
9 homosexuals. She doesn't --

10 **"QUESTION:** You are familiar with Roman
11 Catholicism, correct?

12 **"ANSWER:** It's not my area of specialization,
13 subspecialization, which is Hinduism."

14 She has never studied how many gays or lesbians are
15 raising children, or what the consequences of that are.

16 She's not even familiar with what the views of
17 homosexual activity are of United States churches.

18 She has not done studies as to what proportion of
19 children today are being raised by people outside of the
20 marriage that she describes as the norm; or what proportion of
21 children are being raised by gay parents; or what proportion of
22 children are being raised by single gay individuals. Or she's
23 not aware of studies concerning whether permitting gay marriage
24 will increase the number of children being raised by gay
25 couples. And yet --

1 **THE COURT:** I wonder, Mr. Boies -- excuse me for
2 interrupting.

3 **MR. BOIES:** Yes.

4 **THE COURT:** -- if perhaps a way to deal with this is
5 for me to take these into chambers and review them, and then
6 come back and discuss them with you and -- is it Mr. Patterson
7 who is going to be dealing with this? Mr. Nielson.

8 **MR. NIELSON:** I would like to address the Court
9 regarding this.

10 Thank you, Your Honor. I would like to address the
11 Court briefly about this, but Mr. Patterson will be negotiating
12 with plaintiffs' counsel about the details.

13 **THE COURT:** All right.

14 **MR. NIELSON:** All right.

15 And the points that I would like to make are just
16 these: That, Your Honor, the Court did admit into evidence
17 certain designations from the testimony of -- or the
18 depositions of Professor Young and Dr. Nathanson. And we
19 believed that those excerpts were matters that were outside the
20 scope of their expert report and beyond their expertise.

21 Now, there's no question, and as you heard Mr. Boies
22 say, there's no question that our counterdesignations are
23 responsive to their designations, and they should come in under
24 the rule of completeness.

25 The great irony here is, they are saying that they

1 introduced designations outside of their areas of expertise,
2 and they want to prevent us from putting in counterdesignations
3 because they are also outside of their expertise, which stands
4 to reason since they are about the same things.

5 Now, I would say that since their stuff came in, ours
6 should come in under the rule of completeness. And I would
7 remind this court that when this came up, Mr. Cooper requested
8 that the Court take judicial notice of the expert reports of
9 both Professor Young and Dr. Nathanson so the Court could see
10 for itself what the scope of their reports were, what their
11 areas of expertise were, so that the Court could determine and
12 could see that these statements that the plaintiffs introduced
13 into evidence were things that plaintiffs asked about at the
14 depositions that went well beyond anything the experts had
15 opined about in their reports or that they had expertise in.

16 So it's a great irony here, because the argument is,
17 our counterdesignations should not come in because they are
18 outside of the area of designations, but under the rule of
19 completeness they are responsive to the things they pled that
20 were also outside the area of their expertise.

21 **THE COURT:** Well, very well. I think I have
22 reasonably in mind the nubbin of the dispute.

23 **MR. NIELSON:** Thank you, Your Honor.

24 **THE COURT:** But it would be helpful if I could see
25 the testimony that you are both talking about, rather than try

1 to deal with it in the abstract.

2 **MR. BOIES:** Yes. Your Honor, the only thing I would
3 say is that we believe the yellow are responsive to what we
4 said. We do not believe the pink is responsive to what we
5 said -- what we played.

6 In other words, we did not play sections that asked
7 her to compare the result of children living in a so-called
8 traditional family, what she calls a traditional family, and a
9 gay couple. We didn't ask them to compare those two. That's
10 what -- one of the things they are doing.

11 We agree that the yellow it responsive. We do not
12 agree that the pink is responsive.

13 **THE COURT:** It does appear the pink is a relatively
14 small portion of what's designated.

15 **MR. BOIES:** Yes.

16 **MR. NIELSON:** If I could, that's not an objection I
17 have heard before. The objection I have heard is foundation.

18 I think, Your Honor, if you line up the pink as well
19 as the yellow with what was actually put into evidence, you
20 will see the close connection.

21 **THE COURT:** All right. Well, it's very helpful that
22 you've highlighted the passages in this fashion. And I'll read
23 these, perhaps over the lunch break or this evening, and then
24 we can talk further about -- about the matter.

25 All right. Any other preliminaries before we begin?

1 **MS. MOSS:** Your Honor, just very briefly, the
2 defendant-intervenors actually have pending a motion to compel
3 against several No On 8 groups, in response to some subpoenas
4 that we filed.

5 We're happy to rest on our papers, but I did want to
6 raise that because, of course, as we get into our
7 case-in-chief, if the Court were inclined to grant those, now
8 would be when we would need the documents.

9 I just wanted to raise that that is pending. And we
10 are not asking for argument, but we are asking for a ruling, I
11 guess.

12 **THE COURT:** All right. Very well.

13 Mr. Dusseault, I gather, is going to be making the
14 presentation. Is that correct?

15 **MR. DUSSEAULT:** Yes, Your Honor.

16 Good morning, Your Honor. I thought it might be
17 helpful to start what we've been referring to as the
18 evidentiary presentation this morning with just explaining to
19 you the goal that we are trying to accomplish, and the
20 discussions we had with opposing counsel about it.

21 Our goal was to try and find as expeditious and
22 efficient a way as possible to get a limited body of exhibits
23 into evidence, given that many of them were coming in during
24 the trial, and the way we've been sort of responding on the fly
25 to some things coming in, and also dealing with objections and

1 other issues.

2 And I think I can put these documents into three
3 general categories.

4 The first was admissions by a party. And I think
5 we've got pretty broad-based agreement there.

6 The second is campaign messages and structure, which,
7 as you've gotten a brief preview, is the one where we have the
8 most disagreement.

9 And the third is a very limited group of documents
10 that relate to witnesses who testified earlier, that, for
11 whatever reason, didn't come into evidence. And we're going to
12 try and get them in, at this point. And we've tried to reach
13 agreement on those.

14 These are documents that we feel there really
15 shouldn't be, number one, any legitimate dispute about their
16 relevance to the case, about their authenticity, about the fact
17 that they should be in evidence.

18 And we also don't feel any need to ask witnesses
19 questions about the documents. We just want the evidentiary
20 record to reflect the documents and what they say.

21 To start with the good news, we have been able to
22 reach agreement on a relatively large group of those documents.
23 I believe it's 46 documents as to which counsel for
24 defendant-intervenors have indicated they have no objection.

25 And I've given that compiled list to Ms. Moss, but it

1 was the result of our discussions beginning on Thursday. And I
2 very much appreciate the courtesy they showed in doing that.

3 I'd like to hand this to the clerk and to the Court.
4 And, Your Honor, I would ask that the documents on this
5 agreed-upon list be moved into evidence.

6 **THE COURT:** Ms. Moss?

7 **MS. MOSS:** This is the ones you have handed me
8 before?

9 **MR. DUSSEAULT:** Yes.

10 **MS. MOSS:** We have no objection, Your Honor.

11 **THE COURT:** Very well.

12 (Plaintiffs' Exhibits 35, 52, 101, 209, 291, 560,
13 577, 693, 707, 708, 709, 710, 711, 713, 714, 715,
14 716, 717, 718, 719, 720, 721, 722, 723, 724, 725,
15 728, 729, 730, 731, 739, 752, 760, 761, 764, 767,
16 769, 886, 894, 1410, 1765, 2075, 2153, 2156, 2810 and
17 2852 received in evidence.)

18 **MR. DUSSEAULT:** Your Honor, as I mentioned, the first
19 group of documents was admissions by parties. And,
20 fortunately, we've had no disagreements there. There were a
21 couple that we suggested that were not agreed upon, and we've
22 withdrawn that.

23 So I do have a witness binder that we prepared, that
24 reflects those documents. To the extent it's helpful to the
25 Court to have them, we can make it available. But all of these

1 are in evidence now, and there's really no need for any further
2 discussion of them.

3 **THE COURT:** Excuse me. These are what,
4 Mr. Dusseault?

5 **MR. DUSSEAULT:** These are the documents that
6 plaintiffs and defendant-intervenors have agreed are admitted
7 and are now admitted. And they are just copies of the party
8 admissions that we just moved into evidence.

9 **THE COURT:** So --

10 **MR. DUSSEAULT:** Perhaps I can clarify.

11 The list that we gave you includes some documents
12 from each of the categories I described. But all of the
13 admissions are coming in by agreement. We just thought that
14 the Court might want to actually have copies of those documents
15 available, since we are putting them in evidence. But I'm not
16 going to address them any further today.

17 The next group of documents --

18 **THE COURT:** I assume, at some point, you are going to
19 take me through these and tell me what it is you think these
20 documents establish.

21 **MR. DUSSEAULT:** We certainly can, Your Honor. And
22 what we were assuming is that in closing, or in any post-trial
23 briefing that you may ask for, we could certainly draw from
24 certain aspects of it.

25 If Your Honor would prefer that we walk through

1 certain of the admissions as part of our case, we can certainly
2 do that.

3 **THE COURT:** Well --

4 **MR. DUSSEAULT:** The primary goal, Your Honor, was
5 just to be able to have in evidence certain facts -- some of
6 them are somewhat administrative -- just to make sure that
7 we're able to have authority for those as we go forward, if we
8 do additional proposed findings or briefing or closing.

9 **THE COURT:** Well, I don't want to make your
10 presentation overly long, but there are quite a number of
11 documents here. And exactly what I'm supposed to derive from
12 them is not clear.

13 And if you expect -- expect the Court to draw some
14 fact or inference or admission from these, I think at some
15 point or other you need to tell me what it is you want me to
16 get from these.

17 **MR. DUSSEAULT:** Fair enough, Your Honor. Absolutely.

18 And we were maybe erring on the side of being
19 expeditious, since there was not a dispute, not trying to dwell
20 on that.

21 Perhaps what I could do, Your Honor, is to move on to
22 the disputed subjects, and then we could confer about how to
23 best to put that in.

24 The next category of documents, Your Honor, or the
25 one where there is the greatest degree of disagreement, is

1 documents relating to the campaign and the structure of the
2 campaign.

3 And the first group of documents in this category is
4 the one we talked about first thing this morning, these
5 simulcasts. There are three videos of simulcasts that we would
6 seek to move into evidence. And those are 503, 504, and 505.

7 **THE COURT:** 503, 504, and 505?

8 **MR. DUSSEAULT:** Yes, Your Honor.

9 And there are also corresponding transcripts that
10 show what was said in those. And those are 1867, 1868, and
11 506.

12 And 1867, 1868 are certified court reporter
13 transcripts of 503 and 504.

14 And Exhibit 506 is a transcript that's available on
15 iprotectmarriage.com website. It's put out there as a
16 transcript of that particular simulcast.

17 Your Honor, these simulcasts were conducted as part
18 of the grassroots campaign before the election. And they were
19 shown to Mr. Prentice during his deposition, and a clear
20 foundation for moving them in was established.

21 Mr. Prentice -- I don't think there's any dispute as
22 to these facts. Mr. Prentice acknowledged that the simulcasts
23 were put on by the Pastors' Rapid Response Team; that they were
24 held in one church and broadcast to a large group of churches
25 throughout the state; undisputed that ProtectMarriage.com

1 provided the total funding for the simulcasts; and, also
2 undisputed that the simulcasts were part of the grassroots
3 campaign.

4 So what you have here is activity reaching California
5 voters before the election, paid for by the campaign. There is
6 coordination with the campaign. So we think the foundation and
7 the relevance as to these documents is really beyond dispute.

8 If Counsel would like to be heard on that issue at
9 this point, we can do that. The other approach is, there's a
10 couple of other documents that I would also like to move into
11 evidence that talk about the simulcasts. And they may also
12 resolve some questions the Court may have.

13 The first of those -- could we have the exhibit
14 binders? Are they all passed out already?

15 Okay. So we have exhibit binders presented to the
16 Court for the campaign materials. The first of these I would
17 like to draw your attention to is Plaintiffs' 2075.

18 **THE COURT:** Which binder is that?

19 **MR. DUSSEAULT:** This is in the campaign materials
20 binder that we just handed up, Your Honor.

21 **THE COURT:** In which of these binders?

22 **MR. DUSSEAULT:** On the spine, Your Honor, I believe
23 it says, "Exhibits to be Admitted Relating to Campaign
24 Messaging."

25 **THE COURT:** 2075?

1 **MR. DUSSEAULT:** Yes, Your Honor.

2 **THE COURT:** Oh, I see. Here it is.

3 **MR. DUSSEAULT:** Now, I -- I start with exhibit 2075
4 Your Honor, because this is one that we've already moved into
5 evidence. And there was no objection to this document becoming
6 evidence.

7 But I would direct Your Honor's attention -- and I
8 think we can put this one -- publish this one to the screen, as
9 it's already in evidence.

10 This document, Your Honor, is a Blast e-mail from
11 Frank Schubert and Jeff Flint. And in the "From" line it
12 identifies them as "Campaign managers, ProtectMarriage.com, Yes
13 on 8."

14 So it's a Blast e-mail that they sent out in their
15 official capacity running the campaign.

16 And there's a passage four paragraphs down in the
17 e-mail, that begins, "On www.ProtectMarriageCA.com." It says:

18 "You will also find information on three
19 upcoming live videoconference rallies -
20 September 25 for pastors and church leaders,
21 October 1 for young adults and parents, and
22 October 19 for the entire congregation."

23 So this document, which is in evidence, shows the
24 campaign managers of ProtectMarriage.com alerting people to
25 these upcoming rallies that had not yet occurred.

1 The next document to which I would like to direct the
2 Court's attention, which is not yet in evidence, is Plaintiffs'
3 Exhibit 421. Do you have that in front of you, Your Honor?

4 **THE COURT:** Very well.

5 **MR. DUSSEAULT:** Your Honor, Exhibit 421 is one of the
6 ones I referred to this morning, that we got from the website.
7 It wasn't produced.

8 I did, Your Honor, in an abundance of caution, check
9 that website this morning, over breakfast in my hotel room, to
10 make sure it's still there. So it's publicly available as of
11 today.

12 And it is from a website called
13 protectmarriagesimulcast.com. But what I would note is, at the
14 very top of the text here it says, "ProtectMarriage.com
15 presents."

16 **THE COURT:** Where do you see that? Oh, I see.
17 Right.

18 **MR. DUSSEAULT:** "ProtectMarriage.com presents."
19 Which seems to be a rather unequivocal endorsement, contrary to
20 some of what we're hearing from opposing counsel, that
21 ProtectMarriage.com was directly behind the presentation of
22 these rallies.

23 I would also note, Your Honor, that what this website
24 does is offer for sale DVDs of each of the rallies, at a price
25 of five dollars apiece. And this is how we obtained them.

1 So these DVDs are not confidential. They are
2 publicly available for five dollars. We got them in that
3 manner. And the very website from which we got them says it's
4 presented by ProtectMarriage.com.

5 **THE COURT:** Well, there is also a reference, is there
6 not, to, "For more information about Proposition 8, visit
7 www.ProtectMarriage.com"?

8 **MR. DUSSEAULT:** There is, Your Honor.

9 So, Your Honor, I would move Exhibit 421 into
10 evidence.

11 **THE COURT:** Ms. Moss.

12 **MS. MOSS:** Your Honor, this Exhibit 421, it is not a
13 website of ProtectMarriage.com. It is a website created and
14 maintained by a separate organization or individual. I don't
15 know, actually, who maintains the website.

16 ProtectMarriage.com had no control over what was put
17 on this website. And Mr. Prentice, at his deposition,
18 indicated that he had never seen this and was unaware that
19 these simulcasts were for sale.

20 So the fact that they have pulled something off the
21 Internet that -- you know, that suggests that these simulcasts
22 were for sale and attempting to say that, therefore, somehow
23 ProtectMarriage.com is responsible for this, they haven't laid
24 that foundation.

25 No one has testified that ProtectMarriage.com

1 maintained this website. And, indeed, the only testimony on
2 this from Mr. Prentice's deposition was that he was not aware
3 of it.

4 The campaign does not dispute that these simulcasts
5 were paid for with money that was raised by
6 ProtectMarriage.com. But there is no evidence that they had
7 control over the content of these simulcasts or what was said
8 in these simulcasts.

9 Mr. Prentice was not shown these simulcasts at his
10 deposition. And we don't know what in these simulcasts which
11 are, I think, each over an hour, maybe an hour-and-a-half long,
12 what in them specifically the plaintiffs are contending is of
13 relevance.

14 I also believe Mr. Prentice testified that he did not
15 attend these simulcasts. I'm not sure -- my memory could be
16 wrong on this, but I don't know that anybody from
17 ProtectMarriage.com was at these simulcasts.

18 So without some further, I guess, direction or tender
19 from plaintiffs as to what in these three, you know, hour,
20 hour-and-a-half long videos they contend is relevant, we're
21 sort of at a loss for how to respond to this.

22 We don't dispute that the money was paid for, but
23 this is not Protect Marriage's website. They did not offer
24 these simulcasts for sale.

25 And, you know, we did not produce them and can't --

1 we don't necessarily object to the authenticity. We agree you
2 can go to the website, and the website is as it is. But these
3 were not -- these are not from the files of
4 ProtectMarriage.com, and we don't believe they have laid a
5 foundation.

6 **THE COURT:** Mr. Dusseault, what's the evidence here?

7 **MR. DUSSEAULT:** Well, Your Honor, again, I think
8 Ms. Moss just conceded that the simulcasts are paid for by the
9 campaign. So I think the statement that it's presented by
10 ProtectMarriage.com is established as truth by that admission.

11 But this is a document, Your Honor, that we've
12 alerted them to on our exhibit list, and told them Thursday was
13 part of what we were going to move in. And, as I said, the
14 website this morning still says, "ProtectMarriage.com
15 presents."

16 So I think it's a bit odd to hear that they are
17 somehow suggesting that that's a misrepresentation, when it's
18 on this website.

19 I do have another document that might shed some light
20 on this, if Your Honor would like to consider that one before
21 ruling on the admissibility of this.

22 **THE COURT:** Very well.

23 **MR. DUSSEAULT:** If you could look at Exhibit 2656,
24 please. Do you have that in front of you, Your Honor?

25 **THE COURT:** Yes.

1 **MR. DUSSEAULT:** Your Honor, Exhibit 2656 is a
2 document produced by the defendant-intervenors. And it was
3 produced during trial, as I understand, so we didn't have it at
4 the time of depositions.

5 It's an e-mail chain between Jim Garlow, who was one
6 of the driving forces behind the simulcast, and he sends an
7 e-mail to Mr. Flint. But about halfway down the page, Your
8 Honor, there is an exchange between Mr. Pugno and Mr. Garlow
9 about a card relating to these events.

10 And you see there's three points that Mr. Pugno
11 makes. The first is about a statement that says:

12 "CCN is broadcasting these events at no
13 charge."

14 He says:

15 "If we" -- presumably ProtectMarriage.com --
16 "are paying CCN, we can't say CCN is
17 broadcasting at no charge. We can say CCN is
18 broadcasting the simulcast at no charge to
19 the participants."

20 The second point is the one, Your Honor, I think that
21 goes directly to Ms. Moss's objection. This is Mr. Pugno
22 saying:

23 "All of the CWA references need to be taken
24 off. 'CWA presents' should read
25 'ProtectMarriage.com presents.'"

1 **THE COURT:** What's CWA?

2 **MR. DUSSEAULT:** Concerned Women for America.

3 So this is a postcard about the events, where
4 Mr. Pugno is specifically directing that the simulcast should
5 be described as presented by ProtectMarriage.com.

6 And then the third point is also relevant, I think,
7 to the extent defendant-intervenors are trying to distance
8 themselves from this event, in that it says:

9 "The mass mailing must also be identified as
10 coming from the campaign's address, not
11 CCN's."

12 The "campaign" being ProtectMarriage.com.

13 So, Your Honor, I would move this exhibit, 2656, into
14 evidence. And I believe it's further evidence that Exhibit 421
15 should come in.

16 **THE COURT:** Is there an objection to admitting 2656?

17 **MS. MOSS:** I guess, no, there's no objection to
18 admitting 2656.

19 **THE COURT:** Very well. 2656 would be admitted.

20 (Plaintiffs' Exhibit 2656 received in evidence.)

21 **MS. MOSS:** Your Honor, I would simply point out, the
22 advice that Mr. Pugno is giving in there is referring to the
23 card in that exhibit.

24 We have stated that -- and it was advice that was
25 being given, because since money was going to pay for these

1 simulcasts, under the disclosure laws that had to be present;
2 that that disclaimer had to be present.

3 But it does not follow that ProtectMarriage.com knew
4 or authorized that these simulcast events be published on the
5 website, or that they be sold on this website. Again, the
6 testimony from Mr. Prentice was, he was not aware of that and
7 that none of that money came to ProtectMarriage.com.

8 And it still doesn't address the further point, which
9 is, while they may have offered money to pay for this, to the
10 extent that they're trying to draw the inference that somehow
11 this means that ProtectMarriage.com controlled the content of
12 those simulcasts, that has not been established. And we don't
13 know what in these simulcasts they're contending is relevant,
14 or what specific significance there is about these simulcasts
15 which --

16 **THE COURT:** Well, I gather there's no question that
17 ProtectMarriage.com didn't pay for these simulcasts.

18 **MS. MOSS:** That is correct, Your Honor.

19 **THE COURT:** And those are the simulcasts what are
20 referred to in Exhibit 421.

21 **MS. MOSS:** Yes, Your Honor.

22 **THE COURT:** Very well. I think that's a sufficient
23 basis upon which to admit 421, and it is admitted.

24 (Plaintiffs' Exhibit 421 received in evidence.)

25 **MR. DUSSEAULT:** Thank you, Your Honor. And 2656 has

1 also been admitted.

2 **THE COURT:** Yes, 2656 is in.

3 **MR. DUSSEAULT:** And one final document, Your Honor, I
4 would like to admit, before asking the Court to admit the
5 videos and transcripts, is 2655, also in your binder.

6 Your Honor, Exhibit 2655 is a document produced by
7 the defendant-intervenors to us during trial, pursuant to
8 Magistrate Judge Spero's order.

9 And it's an e-mail from Tracy Berger, at Skyline
10 Church, to Ron Prentice, who was the chair of
11 ProtectMarriage.com. And it attaches a number of materials.

12 The first page that follows the e-mail is a Webinar
13 Conference Call Agenda. First two pages. But then three pages
14 into the attachment, Your Honor, there's a page, Defendants'
15 24257. It says, "Satellite Simulcast September 25, Thursday,
16 7:00 p.m."

17 And to the extent there's any question about
18 coordination of content at these simulcasts with the campaign,
19 it's worth noting that this is a four-page agenda of the
20 content of one of the simulcasts that's being sent to
21 Mr. Prentice before it takes place.

22 So we would seek to move Exhibit 2655 into evidence.

23 **THE COURT:** Ms. Moss.

24 **MS. MOSS:** Your Honor, this is an e-mail from someone
25 outside of ProtectMarriage.com and its executive committee, to

1 Mr. Prentice.

2 There is, as far as I know, no documents that they
3 are offering that show that there was any response to this
4 e-mail; that Mr. Prentice ever reviewed this e-mail or even
5 read this e-mail. So I don't think that it, standing alone,
6 establishes anything, other than the fact that Mr. Prentice
7 received this e-mail.

8 **THE COURT:** Well, that goes to the weight of the
9 evidence, doesn't it, rather than to its admissibility?

10 **MR. DUSSEAULT:** And, Your Honor, if I could add,
11 we're not offering it for the truth of the agenda. We're
12 offering it to disprove some suggestion that
13 ProtectMarriage.com wasn't kept apprised of what's going to
14 happen at these simulcasts.

15 **THE COURT:** Very well. 2655 will be admitted.
16 (Plaintiffs' Exhibit 2655 received in evidence.)

17 **MR. DUSSEAULT:** Thank you, Your Honor.

18 So, Your Honor, I think that brings us back to the
19 simulcasts themselves. And --

20 **THE COURT:** Let me go back, just to be sure, from my
21 own notes.

22 Do I understand there is no objection to 505, 504,
23 505, 1867, 1868, and 506? Is that correct?

24 **MS. MOSS:** No, Your Honor. Our objection is --
25 again, our objection would be, we don't believe that they have

1 shown or offered what specific significance or relevance there
2 are to these -- to these --

3 **THE COURT:** All right. And it is to that you are now
4 turning.

5 **MR. DUSSEAULT:** Yes, Your Honor.

6 **THE COURT:** All right.

7 **MR. DUSSEAULT:** And, Your Honor, I think the
8 relevance is quite clear, from what we've established, that
9 this is paid for by ProtectMarriage.com, represented at
10 Mr. Pugno's request as presented by ProtectMarriage.com. It is
11 messages that were communicated to California voters before the
12 election. I think the relevance of that is really
13 self-evident.

14 We would like for the entire three simulcasts to be
15 part of the record of this case. But what we have done is, we
16 have about six minutes of clips that we would like to present
17 to the Court.

18 And my hope would be that we could admit the
19 simulcasts as relevant admissible evidence, and then present to
20 you, as the finder of fact, portions of that that represent
21 messages that were being presented to California voters at the
22 expense of the campaign before the election, as clearly
23 relevant to the issues before the Court.

24 **THE COURT:** All right. So it is the excerpts that
25 you are asking the Court to rely upon in making its findings.

1 **MR. DUSSEAULT:** Yes.

2 **THE COURT:** Okay.

3 **MR. DUSSEAULT:** So with Your Honor's permission, if
4 we could play those excerpts.

5 **THE COURT:** You may.

6 (Video played in open court.)

7 **MR. DUSSEAULT:** Thank you, Your Honor.

8 **THE COURT:** This is 503?

9 **MR. DUSSEAULT:** These, actually, are excerpts -- they
10 are excerpts from two of the three simulcasts, Your Honor.

11 **THE COURT:** Which ones?

12 **MR. DUSSEAULT:** Let me make sure I have the dates
13 right. Get some help from my team, to make sure I don't
14 misstate that.

15 The excerpts that we played were from PX504 and
16 PX505.

17 **THE COURT:** Okay.

18 **MR. DUSSEAULT:** We would, Your Honor, ask to be able
19 to move in the actual DVDs that we obtained from the website in
20 total, 503, 504, and 505, and the transcripts.

21 And what we could do, Your Honor, we could -- and I
22 think we've done this with some of the other excerpts that have
23 been played -- submit later today a document showing where in
24 the transcripts the excerpts come from.

25 **THE COURT:** That would be helpful. Ms. Moss.

1 **MS. MOSS:** Well, Your Honor, we maintain our
2 objection. I would request that if they are going to come in,
3 that we be given copies of these excerpts so that we can
4 determine, under the rule of completeness, if there is
5 additional portions of those simulcasts that we need to be --
6 that may need to come in, to be played and highlighted for Your
7 Honor, to put these excerpts in context and to provide the full
8 breadth.

9 **THE COURT:** Very well. With that understanding, 504
10 and 505 are admitted.

11 (Plaintiffs' Exhibits 504 and 505 received in
12 evidence.)

13 **MR. DUSSEAULT:** Your Honor, what we would do, we
14 would submit the list of the excerpts as an Exhibit 504A, just
15 so that the record is clear.

16 **THE COURT:** All right.

17 **MR. DUSSEAULT:** And, Your Honor, for clarification,
18 we would ask that Exhibit 503 also be submitted into evidence,
19 and the transcripts.

20 Although, we didn't draw a video from 503, we think
21 it's analogous to any other document that may be introduced
22 into evidence and then a particular page is called to the
23 Court's attention.

24 **THE COURT:** But it was another one of these
25 simulcasts that's referred to in the exhibits that have been

1 admitted.

2 **MR. DUSSEAULT:** Correct.

3 **THE COURT:** 421, 2656, and 2655.

4 Very well. 503 will be admitted on that basis.

5 And --

6 (Plaintiffs' Exhibit 503 received in evidence.)

7 **MR. DUSSEAULT:** And just so the record is clear, the
8 exhibit numbers of the transcripts are 1867, 1868, and 506. We
9 would ask that be admitted, as well.

10 **THE COURT:** Very well.

11 (Plaintiffs' Exhibits 506, 1867, 1868 received in
12 evidence.)

13 **MR. DUSSEAULT:** Your Honor, then, with that taken
14 care of, the next document as to which we have a disagreement
15 relates to these simulcasts. And it's in your binder at
16 Exhibit 2773.

17 Your Honor, Exhibit 2773, is an e-mail exchange
18 between Pastor Garlow and Ron Prentice of ProtectMarriage.com.
19 The first portion of the exhibit is an e-mail from Garlow to
20 Prentice, but the second portion of the exhibit is written by
21 Mr. Prentice, who runs ProtectMarriage.com, and sent to
22 Mr. Garlow and others, cc'ing Schubert and Flint. So we would
23 seek to move Exhibit 2773 into evidence.

24 **MS. MOSS:** Your Honor, objection, again, would be
25 just we think that there needs to be some tender about what

1 specifically they believe this document is showing; what
2 relevance it has; what sort of inferences we should be deriving
3 from it, so that we know whether or not we need to respond with
4 evidence, should we have any to respond with.

5 **MR. DUSSEAULT:** Your Honor, I'm happy to do that. I
6 had hoped to do that after moving it into evidence, so that I
7 could publish it to the screen and make clear what I'm talking
8 about.

9 So if we could move it into evidence, I would be
10 happy to highlight the portion that we wish to draw to the
11 Court's attention.

12 **MS. MOSS:** One other point I would make, Your Honor,
13 is, this is a post-election document.

14 **THE COURT:** Yes, I noticed that.

15 **MR. DUSSEAULT:** Your Honor, if I may, I think I can
16 explain the relevance. It is a post-election document. And
17 it's a post-election document in which the head of
18 ProtectMarriage.com is trying very hard to make sure that these
19 simulcasts don't get out to the public. Simulcasts that
20 happened before.

21 And so while the e-mail itself took place after the
22 election, it's talking about pre-campaign messages, preelection
23 messages in the campaign, and a concern if those were to reach
24 a broader audience.

25 **THE COURT:** Your point is that it goes to the control

1 of these simulcasts.

2 **MR. DUSSEAULT:** It does, Your Honor. I think it also
3 goes to state of mind of the defendant-intervenors about what's
4 contained in the simulcasts.

5 If it would help Your Honor, I can read to you the
6 portion I'm referring to. I just thought it might be easiest
7 to put on --

8 **THE COURT:** I assume you're referring to
9 Mr. Prentice's message of the 16th of November.

10 **MR. DUSSEAULT:** Yes, I am, Your Honor. And this is
11 about a Dr. Phil show, and what's going to happen on a Dr. Phil
12 show. And what Mr. Prentice says is:

13 "We must control the message from the
14 simulcast. 'Jim: I don't see how using any
15 portion of it will not permit the show to
16 direct the message to the religious bias.'"

17 We think it's directly relevant, Your Honor, that
18 ProtectMarriage.com, after the election, was trying to make
19 sure that a national audience, like an audience of the Dr. Phil
20 show, didn't learn of this religious bias.

21 And that's Mr. Prentice's words for it, not mine.

22 **THE COURT:** Very well. 2773 will be admitted.

23 (Plaintiffs' Exhibit 2773 received in evidence.)

24 **MR. DUSSEAULT:** Your Honor, the next two documents
25 that we seek to move in are videos. They are 2-part videos of

1 rallies where Mr. Prentice spoke.

2 Again, we don't really see how there could be any
3 dispute over this. They are videos showing Mr. Prentice
4 talking. They are preelection videos. They are admissions
5 that are admissible for that purpose.

6 And we would seek to move Exhibit 390 and 391, the
7 videos, into evidence, and then to play about two,
8 two-and-a-half minutes of those into the record before Your
9 Honor, once it's been admitted.

10 **THE COURT:** 390, 391?

11 **MR. DUSSEAULT:** Yes, Your Honor, both videos.

12 **THE COURT:** Ms. Moss.

13 **MS. MOSS:** Yes. If I'm correct that these are the
14 videos that were shown in their entirety to Mr. Prentice at his
15 deposition, which he did lay a foundation that, you know, it
16 was him speaking and he recalled it, we don't have an objection
17 to these videos.

18 **THE COURT:** Very well. 390 and 391 are admitted.

19 (Plaintiffs' Exhibits 390 and 391 received in
20 evidence.)

21 **MR. DUSSEAULT:** Then, Your Honor, I would now ask
22 permission to show the excerpts from Exhibits 390, 391.

23 (Video played in open court.)

24 **MR. DUSSEAULT:** Thank you, Your Honor.

25 What we'll do, as with the prior exhibit, we'll

1 present an Exhibit 390A, that will show the excerpts that we
2 played from that rally.

3 **THE COURT:** Very well.

4 **MR. DUSSEAULT:** Your Honor, the next document to
5 which I would like to draw Your Honor's attention is PX21.

6 Your Honor, PX21 is a flier produced and distributed
7 by something called the "California Family Council Foundation."
8 You may recall, the California Family Council was one of the
9 entities that Dr. Tam said was part of the broad coalition.
10 Mr. Prentice is also the CEO of the California Family Council.

11 I don't believe there's any dispute that this is a
12 flier that was distributed in an effort to persuade voters as
13 to Proposition 8, that it was before the election, and put out
14 by this organization that shares the same leader as
15 ProtectMarriage.com.

16 And I don't believe there is any dispute as to
17 authenticity, because it came from their files and I believe
18 during trial, Your Honor.

19 So this is something that we believe should properly
20 be considered as part of the body of information that was
21 before the voters.

22 Again, I think any effort to distance the campaign
23 from knowledge or control is undermined by the fact that
24 Mr. Prentice is CEO of this organization, as well.

25 **THE COURT:** Ms. Moss.

1 **MS. MOSS:** Well, as the face of the document makes
2 clear, it is not a Protect Marriage document. I don't know
3 that there has been any testimony or evidence offered that this
4 was in fact distributed.

5 It came from the files of ProtectMarriage.com. I
6 don't know that there's anything in evidence regarding whether
7 this is a draft. I think that there was a dispute at the
8 deposition about the exact date of this document.

9 Mr. Prentice's testimony, I believe, as well, if I'm
10 recalling correctly, was that some of the organizations listed
11 on the document were not necessarily involved in the Prop 8
12 campaign.

13 So there was a question as to -- it raised a question
14 as to whether this was a draft, whether this had been
15 distributed. I'm not clear on those points. And I think
16 without that foundation being laid, that it should not come in
17 as something that was distributed. And if it was, then I think
18 there should be some evidence should come in with it as to who
19 it was distributed to and who it was placed in front of. Did
20 it go to voters in California? To some other group of
21 individuals?

22 I mean, he, Mr. Prentice, is the head of California
23 Family Council. But I don't believe he drafted this document.
24 It's just something that happened to be in his files and,
25 therefore, got produced.

1 **THE COURT:** Again, that appears to go more to the
2 weight to be attached to the document than its admissibility.
3 Therefore, without resolving how much weight to afford to the
4 document, it will be admitted. PX21 is admitted.

5 (Plaintiffs' Exhibit 21 received in evidence.)

6 **MR. DUSSEAULT:** Thank you, Your Honor.

7 And with it admitted, I would seek to publish it on
8 the screen, to direct the Court's attention to two portions.

9 On the second page of the exhibit, in the left-hand
10 column, there is a section called, "Background" or "Issue
11 Background."

12 And, Chris, if you could highlight the text that
13 begins "the goal."

14 (Document displayed.)

15 The text to which I would like to draw the Court's
16 attention reads as follows:

17 "The goal of the homosexual community is not
18 marriage. In fact, in countries where
19 homosexual marriage is legal, no more than
20 three percent of homosexuals are married.

21 The ultimate goal is the annihilation of
22 marriage and full legal acceptance of
23 homosexuality."

24 Your Honor, I would also like to direct the Court's
25 attention, under "Legislative History" to this section which

1 refers to 1999, and describes the onset of domestic
2 partnerships as the California legislature beginning an
3 incremental attack on marriage.

4 Your Honor, the next two exhibits that I would like
5 to address are PX480, which is a video, and PX2681, which is an
6 article by the group that produced the video.

7 As far as I understand, there's no dispute as to the
8 authenticity of the video. The video was put out by the
9 American Family Association, which donated, I believe,
10 half-a-million dollars to the campaign.

11 The video includes clips from Mr. Prentice, which we
12 believe would belie any claim of a lack of involvement or
13 knowledge on the part of the campaign. And I don't believe
14 there's any dispute that it was made available to voters before
15 election day.

16 So we would seek, first, to move into evidence
17 Exhibit 480, and then, once admitted, have permission to show
18 excerpts as we've done with the other videos.

19 **THE COURT:** Ms. Moss.

20 **MS. MOSS:** With respect to the video itself,
21 Mr. Prentice was shown this at his deposition, and he did
22 recognize himself in the video.

23 I don't know that there was any testimony or any
24 evidence offered about where -- when or where this video was
25 made available. So, to that extent, I don't think it has been

1 established that this was made available in California to
2 voters before he election. I just don't know.

3 And I don't know that they have offered that
4 evidence. And until they do, we would object that it's not
5 relevant. You know, it may have been filmed at that time, but
6 I don't know if it was made available.

7 And, likewise, the -- the website that talks about
8 the video, it's a website. It is not a Protect Marriage
9 document. And we -- you know, when it was -- whether it was
10 available at the time, I don't believe the printout shows.
11 There has been no testimony --

12 **THE COURT:** You are talking, now, about 2681?

13 **MS. MOSS:** Yes. I'm sorry, Your Honor. 2681.

14 I don't know that there has been any testimony that
15 that was available on the Web during the election. It is
16 certainly something you can go to the website and pull down
17 now, but that does not mean that there has been evidence
18 showing that that was available during the election.

19 **THE COURT:** Once again, with respect to 480, it does
20 seem to me that Ms. Moss's comments really go to the weight
21 rather than to the admissibility of it. It shows Mr. Prentice.
22 He is a party to the lawsuit. He was shown this video at his
23 deposition. I think that's a sufficient basis for its
24 admission.

25 (Plaintiffs' Exhibit 480 received in evidence.)

1 **THE COURT:** Now turning to 2681

2 **MR. DUSSEAULT:** Yes, Your Honor. And perhaps what
3 would make sense is, perhaps, with 480 admitted, we could show
4 the excerpts of 480, and then come back to the document that
5 talks about the video.

6 **THE COURT:** Very well.

7 (Video played in open court.)

8 **MR. DUSSEAULT:** And, Your Honor, with the Court's
9 indulgence, we would submit an Exhibit 480A, that will identify
10 the excerpts that have been played.

11 **THE COURT:** Very well.

12 **MR. DUSSEAULT:** So turning, then, to 2681, Your
13 Honor, 2681 is an article about this video by the group that
14 made it, the American Family Association.

15 And we acknowledge this is not a document that was
16 produced to us by the other side, but it's a document that we
17 obtained from a website, onenewsnow.com, it's clearly
18 attributed at the bottom of the exhibit. I don't think there's
19 any dispute that American Family Association made the video.
20 And this is a website with --

21 **THE COURT:** American Family Association or American
22 Family Council?

23 **MS. STEWART:** Association.

24 **MR. DUSSEAULT:** Association, Your Honor.

25 **THE COURT:** I'm sorry?

1 **MR. DUSSEAULT:** Association.

2 **THE COURT:** Association.

3 What's the connection to the defendants, of American
4 Family Association?

5 **MR. DUSSEAULT:** Well, we do know that they denoted, I
6 think, half-a-million dollars to the campaign.

7 But they -- I guess, the most direct connection for
8 these purposes is that they were making a video during the
9 campaign, that they wanted to put out to people, that included
10 Mr. Prentice, who ran the campaign, talking to voters.

11 We think, Your Honor -- again, one point I would
12 clarify, we're not and don't need to offer this article for the
13 truth of any matters asserted. In fact, we disagree with what
14 they are asserting. But we think that for the people who made
15 this video with Mr. Prentice's involvement and cooperation, to
16 be characterizing what they're trying to communicate in the
17 video is certainly relevant.

18 **THE COURT:** Ms. Moss.

19 **MS. MOSS:** Again, Your Honor, there is no evidence
20 that this was put out during the campaign. And there is no
21 evidence that Mr. Prentice was speaking on behalf of
22 ProtectMarriage.com. I believe he was identified in the video
23 as the head of California Family Council.

24 Mr. Prentice himself is not a party in this lawsuit.
25 He is -- he is only -- his admissions would be those if he was

1 speaking for the party in this lawsuit, which is
2 ProtectMarriage.com.

3 And there is no evidence that when he gave this
4 interview to this organization, that he knew what it would be
5 used for or that this in fact became something that was
6 available to voters attempting to persuade them one way or
7 another about Proposition 8.

8 And this article, therefore, if they are offering the
9 article to demonstrate that, then that is hearsay. That's an
10 out-of-court statement offered for the truth of the matter
11 asserted, which is, they are asserting that some evidence in
12 that article is proving something about this video.

13 It's not clear to me that it does, but if that's what
14 they are offering it for it's hearsay.

15 **MR. DUSSEAULT:** Your Honor, there is no doubt that
16 this article was before the campaign. It's dated
17 September 2008. And there's a reference on the second page
18 that says, "If Proposition 8 is not passed in November." It's
19 clearly before the campaign. And this is the people who made
20 the video, making statements about the reasons that they are
21 putting the video out.

22 **MS. MOSS:** Maybe Mr. Dusseault could direct me, but I
23 don't know that this says that the video came out before the
24 campaign, even if the article did.

25 And, again, the article may be dated 2008, but

1 there's no evidence it was posted on the Internet at that time.

2 **MR. DUSSEAULT:** Well, Your Honor, the video is in
3 evidence. The question whether an article by the people who
4 made it, talking about what they're trying to accomplish, is
5 something you should be able to consider.

6 **THE COURT:** I'm going to sustain the objection. It
7 seems to me the connection to parties in the lawsuit is
8 sufficiently tenuous that there's not a basis to admit 2681.

9 **MR. DUSSEAULT:** Your Honor, then, I would move on to
10 Exhibit 2589, which is in this same binder.

11 **THE COURT:** Very well.

12 **MR. DUSSEAULT:** Your Honor, Exhibit 21 -- excuse me,
13 2589 is an e-mail from Mr. Prentice to a recipient who's
14 blacked out, I believe, in the interests of the protective
15 order concerns, with the subject, "Wrong again."

16 And its attachment is called "Top Proposition 8
17 Arguments." And this is something that was circulated in July
18 of 2008, before the election.

19 So it comes from Mr. Prentice, purporting to
20 characterize top arguments in favor of the proposition that
21 he's putting on the ballot and wants people to see.

22 **THE COURT:** Any objection?

23 **MS. MOSS:** No objection, Your Honor.

24 **THE COURT:** Very well. 2589 is admitted.

25 (Plaintiffs' Exhibit 2589 received in evidence.)

1 **MR. DUSSEAULT:** And if we could publish 2589,
2 particularly the "Top Proposition 8 Arguments."

3 (Document displayed)

4 And I would like to draw particular attention, Your
5 Honor, to argument number 10, which reads:

6 "10. What gays do in their private lives
7 does not bother me, but I do not want
8 children exposed to it."

9 The next documents I'd seek to move in, Your Honor,
10 is just two documents. And what these documents do is
11 establish a level of connection between ProtectMarriage.com and
12 the National Organization for Marriage.

13 And you may recall, Your Honor, that the National
14 Organization for Marriage did that Gathering Storm video that's
15 in evidence. And there was talk about involvement or lack of
16 involvement in the campaign.

17 We wanted to introduce two documents that we think
18 show a level of cooperation and coordination between
19 ProtectMarriage.com and the National Organization for Marriage.

20 The first of those is Exhibit 2597.

21 **THE COURT:** 25?

22 **MR. DUSSEAULT:** 97.

23 And Exhibit 2597, Your Honor, was produced to us by
24 the defendant-intervenors, so there shouldn't be any
25 authenticity issues. It's written and sent by Mr. Prentice

1 before the election.

2 So I don't believe there should be any issues as to
3 the admissibility of the 2597, and I would ask it be admitted
4 so that I could publish the particular paragraph we wish to
5 address.

6 **THE COURT:** Hearing no objection, 2597 is admitted.

7 (Document displayed.)

8 (Plaintiffs' Exhibit 2597 received in evidence.)

9 **MR. DUSSEAULT:** Then on the last page of this exhibit
10 there's a paragraph that begins, "Never." And I'll just read
11 this into the record, Your Honor.

12 (Document displayed.)

13 "Never in California history has an
14 initiative qualified without the help of paid
15 signature gathering. This is where the
16 cooperation of Bishop Cordileone and the San
17 Diego Catholic community offered tremendous
18 help. The Bishop sought the help of the
19 National Organization for Marriage, NOM, led
20 by Maggie Gallagher, herself a Catholic, with
21 a national reputation for her research and
22 writing on marriage. Gallagher and NOM's
23 executive director Brian Brown assisted the
24 Bishop in articulating the critical need for
25 a constitutional marriage amendment to

1 hundreds of donors and the National Office of
2 the Knights of Columbus, ultimately amounting
3 to more than \$900,000 in gifts directed to
4 signature gathering."

5 The second and final document I wish to address on
6 this subject, Your Honor, is Exhibit 2455.

7 **THE COURT:** 2455?

8 **MR. DUSSEAULT:** Yes, Your Honor.

9 Your Honor, Exhibit 2455 was produced to us by
10 defendant-intervenors during the trial. It's a chain of
11 e-mails.

12 And the one on the first page is the one to which I
13 would like to draw the Court's attention. It is, I believe,
14 from Maggie Gallagher to Brian Brown, who is identified in the
15 previous document. Also to Frank Schubert, of Schubert-Flint,
16 with a cc to Mr. Prentice. And this is before the election.
17 So, again, we think there's no issues as to authenticity or
18 relevance.

19 I would move it into evidence.

20 **THE COURT:** Hearing no objection, 2455 is admitted.

21 (Plaintiffs' Exhibit 2455 received in evidence.)

22 **MR. DUSSEAULT:** Thank you.

23 And then if we could put up on the screen, Chris, the
24 sentence beginning, "We're going."

25 (Document displayed.)

1 And this sentence appears to be written by Brian
2 Brown, of National Organization of Marriage, to Ms. Gallagher.
3 And this is now shared with Mr. Schubert and to Ron Prentice.
4 And it says -- it's talking about -- let me give some
5 background here.

6 You see at the bottom of the e-mail there's a --
7 looks like a press statement. Says:

8 "Hollywood stars, ACLU pour money into
9 anti-marriage efforts in California."

10 And what Mr. Brown is saying is:

11 "We are going to need to get approval from
12 Schubert-Flint on this. The text of the
13 agreement requires anything specific to
14 California to get approved."

15 **MS. MOSS:** Your Honor, while we didn't object to the
16 document coming in, that specific statement itself, we believe,
17 is hearsay and should not be considered as such continues,
18 since it is an out-of-court statement that they are offering
19 for the truth of the matter asserted.

20 **MR. DUSSEAULT:** I believe the document's already in
21 evidence, at this point.

22 **THE COURT:** The document is in evidence. The
23 question is what to make of it.

24 **MR. DUSSEAULT:** Well, Your Honor, I think -- I think
25 it should be admitted as substantive evidence. But, certainly,

1 even as a matter of state of mind, if Mr. Brown, from the
2 National Organization of Marriage, is under the impression that
3 he has an agreement with ProtectMarriage.com, where he has to
4 run all of his messages by them, that in and of itself is, I
5 think, probative and relevant.

6 **MS. MOSS:** Well, Your Honor, that's precisely why
7 it's not appropriate for this to come in. He's making
8 inferences about the state of mind of an individual that's not
9 on the stand, that we can't examine as to whether that was in
10 fact what he understood or what he intended when he wrote that
11 statement.

12 It may have a totally different meaning. We don't
13 have the context of it. And since they're moving this in
14 without a sponsoring witness, there's no way to have that
15 context. And so that statement itself should not be taken into
16 evidence because it is hearsay.

17 **MR. DUSSEAULT:** Your Honor, it's not hearsay if it's
18 state of mind. It's not offered for the truth of the matter
19 asserted.

20 **THE COURT:** Well, the question is how much weight to
21 give this evidence, and exactly what to make of it. It clearly
22 is an admissible document. This may be one of the reasons why
23 the proponents wish to call Mr. Schubert.

24 **MR. DUSSEAULT:** Very well.

25 Your Honor, the next two documents relating to the

1 campaign are on a related topic, which has to do with sort of
2 the breadth of the network and support that ProtectMarriage.com
3 had.

4 The first document on that point is Plaintiffs'
5 Exhibit 2660.

6 **THE COURT:** 26 --

7 **MR. DUSSEAULT:** 60. 2660.

8 **THE COURT:** 2660. Okay.

9 **MR. DUSSEAULT:** And, Your Honor, again, I'm not
10 really clear what the objection is to this document. It's
11 written and sent by Mr. Prentice before the election. And it's
12 produced to us during the trial by the defendant-intervenors.

13 So I would move the document into evidence. And then
14 once it's in evidence, I'd like to publish a portion of it, to
15 address.

16 **THE COURT:** Hearing no objection --

17 **MS. MOSS:** No objection. Well, I'm sorry, the tender
18 of this was you believe it shows -- our only objection to this
19 is we weren't sure what relevance they were attaching to this
20 document. And I'm not sure I caught what he is claiming the
21 document purports to show.

22 **MR. DUSSEAULT:** Well, it talks about having the
23 strongest grassroots response in the history of the California
24 initiative, and goes through some of the people who make up
25 that response.

1 **THE COURT:** Well, it is a document from Mr. Prentice,
2 the chairman of ProtectMarriage.com. And it is, therefore,
3 admissible. 2660 is admitted.

4 (Plaintiffs' Exhibit 2660 received in evidence.)

5 **MR. DUSSEAULT:** Thank you.

6 If we could publish the bold portion at the bottom.

7 (Document displayed.)

8 And in this message sent by Mr. Prentice, what he
9 says, he describes his campaign as "the strongest grassroots
10 response in the history of the California initiative." He
11 talks about the role of the Evangelicals, Catholics,
12 Latter-day Saints, Orthodox Jewish communities.

13 And, then, at the bottom, references something called
14 "The Arlington Group," which is described as 60 plus
15 organizational networks with special offerings nationally.

16 So what we believe this document is describing is not
17 just the religious groups, but also this entity, The Arlington
18 Group, that brings together 60 additional organizations.

19 And then, Your Honor, a second document on this
20 subject is 2385. 2385, Your Honor, was produced to us by
21 Mr. Swardstrom, who, you may recall, is one of the executive
22 committee members who we had a dispute about the depositions
23 and production of documents. He attempted to keep his identity
24 secret for quite some time during discovery. But when his
25 identity was actually disclosed, we did get some documents from

1 him.

2 And I would draw your attention, Your Honor, to the
3 e-mail on the first page. It's from Catherine Snow, of The
4 Arlington Group, to a number of recipients, including
5 Mr. Prentice.

6 And we believe, Your Honor, that this e-mail as
7 something that's sent during the campaign, August 2008, to
8 Mr. Prentice, although not produced by them, is something that
9 is properly admissible into evidence. And we would ask it be
10 moved in.

11 **MS. MOSS:** Again, Ms. Snow's e-mail is -- she is not
12 a party. And so, again, we contend this is hearsay.

13 We don't dispute that this apparently come from
14 Mr. Swardstrom's files. But the portion that they're seeking
15 to go offer in, or what this reflects, is an e-mail from
16 somebody outside the campaign, sending it in.

17 And it's not clear which particular statements he's
18 pointing to, but presumably they are hearsay, since they are
19 not from a party.

20 **THE COURT:** Well, this, nonetheless, is a
21 communication to Mr. Prentice. And, therefore, 2385 will be
22 admitted.

23 (Plaintiffs' Exhibit 2385 received in evidence.)

24 **MR. DUSSEAULT:** Then, with Your Honor's permission,
25 we would show the portion -- publish the portion which refers

1 to a website.

2 And this is -- as Ms. Moss noted, this is someone
3 from The Arlington Group talking about what they're doing here,
4 as part of this effort. And what it says is:

5 "I am organizing heavy hitters to do video
6 clip messages to the American public to
7 promote our efforts. Newt on board (emphasis
8 social fabric). Requests out to Meese (plea
9 to legal community), levin (plea to country),
10 Dobson (plea to Christians comm), Pastor
11 Garlow (plea to all pastors). Mike
12 Judge/Colin Hart (UK) warning of what will
13 happen if apathy steps in and what UK now
14 faces. And the House with Blunt Rep Pence,
15 Senator Burr for plea to elected officials."

16 **MS. MOSS:** Your Honor, I would again just note, these
17 statements as to what The Arlington Group are supposedly doing
18 or not doing are out-of-court statements being offered for the
19 truth of the matter asserted.

20 It hasn't even been established that these are
21 efforts. My understanding is, they were also involved in the
22 ballot initiatives in other states. And so to what extent this
23 is even pertinent or applicable to California, I don't think
24 has been established. And Ms. Snow, the author of this
25 document, is not here for us to question to -- to get the

1 context and to cross-examine her about the statement.

2 **THE COURT:** Well, it is a document that was evidently
3 sent to Mr. Prentice. It certainly would reflect his state of
4 mind. And, therefore, I think it is admissible. It's in.

5 **MR. DUSSEAULT:** Thank you.

6 Your Honor, the last document we have on the campaign
7 messages group, I don't believe there will likely be any issue
8 because this is actually one that's on their Schubert list,
9 that they intend to use. But it's Exhibit 2150. This is an
10 actual flier from the campaign itself, that was produced by the
11 defendant-intervenors to us.

12 Seems to be clearly admissible as campaign material.
13 And I don't understand what the basis would be to object.

14 **MS. MOSS:** There is no objection. I don't know if
15 that was on our list or if we just overlooked it.

16 **THE COURT:** Very well. 2150 is admitted.

17 (Plaintiffs' Exhibit 2150 received in evidence.)

18 **MR. DUSSEAULT:** Then, Your Honor, the last group of
19 documents, which I think I can do very quickly -- we have a
20 final set of binders on this group of documents -- is documents
21 that relate to subjects of testimony that we have already had
22 in the trial but are not currently in evidence, that we had
23 hoped we could just move in by agreement, but we have
24 disagreement over.

25 Now, Your Honor, the first two of these documents

1 that we hoped to admit into evidence are Exhibits 1675 and
2 1676. And these are two statements of the American
3 Anthropological Association, on the issue of race.

4 We believe, Your Honor, there's no dispute between
5 the parties that these are, in fact, true and correct copies of
6 official statements of the American Anthropological Association
7 on the subject of race.

8 And I would submit, Your Honor, that this issue is
9 directly relevant to this case because of an argument and a
10 line of questioning that the other side has been making that
11 somehow sexual orientation is some undefinable minority status;
12 whereas, the -- something like race is quite clear and defined.

13 And what this document -- both these documents do is
14 address what anthropologists recognize as the complexity of the
15 concept of race. And we would note that that doesn't include
16 protected status being afforded to members of racial minority
17 groups.

18 **THE COURT:** Ms. Moss.

19 **MS. MOSS:** Your Honor, I don't have down that these
20 were on the list of what was reviewed. But looking at them
21 quickly -- that was provided to us for review. But looking at
22 them quickly now, we think that the Court could take judicial
23 notice of them. So we wouldn't have an objection to that
24 extent.

25 We think it probably would have been more appropriate

1 for an expert to speak to them. But they can be taken judicial
2 notice of, certainly.

3 **THE COURT:** Very well. I think that's correct. And
4 therefore, the Court will take notice of 1675 and 1676.

5 **MR. DUSSEAULT:** And what I'd like to do, then, very
6 briefly, Your Honor, is publish Exhibit 1675, and draw the
7 Court's attention to a couple of passages.

8 Chris, if we can start with the very first paragraph,
9 "In the United States."

10 (Document displayed)

11 And the two sentences to which I want to draw the
12 Court's attention are:

13 "In the United States, both scholars and the
14 general public have been conditioned to
15 viewing human races as natural and separate
16 divisions within the human species based on
17 visible physical differences. With the vast
18 expansion of scientific knowledge in this
19 century, however, it has become clear that
20 human populations are not unambiguous,
21 clearly demarcated, biologically distinct
22 groups."

23 On the second page, if we could publish the paragraph
24 beginning, "At the end."

25 (Document displayed.)

1 And here the American Anthropological Association
2 says:

3 "At the end of the 20th century, we now
4 understand that human cultural behavior is
5 learned, conditioned into infants beginning
6 at birth, and always subject to modification.
7 No human is born with a built-in culture or
8 language. Our temperaments, dispositions,
9 and personalities, regardless of genetic
10 propensities, are developed within sets of
11 meanings and values that we call culture.
12 Studies of infant and early childhood
13 learning and behavior attest to the reality
14 of our cultures in forming who we are."
15 And then, finally, to the last substantive paragraph,
16 beginning, "How people."

17 (Document displayed)

18 And here the American Anthropological Association
19 says:

20 "How people have been accepted and treated
21 within the context of a given society or
22 culture has a direct impact on how they
23 perform in that society. The racial
24 worldview was invented to assign some groups
25 to perpetual low status while others were

1 permitted access to privilege power and
2 wealth. The tragedy in the United States has
3 been that the policies and practices stemming
4 from this world view succeeded all too well
5 in constructing unequal populations among
6 Europeans, Native Americans, and peoples of
7 African descent. Given what we know about
8 the capacity of normal humans to achieve and
9 function within any culture, we conclude that
10 present-day inequalities between so-called
11 racial groups are not consequences of their
12 biological inheritance but products of
13 historical and contemporary social, economic,
14 educational, and political circumstances."

15 **THE COURT:** Very well.

16 **MR. DUSSEAULT:** Your Honor, the next two documents
17 that we'd seek to move into evidence are 2566 and 2581. If we
18 could just start with -- let me start with 2581, Your Honor.

19 And, Your Honor, these are documents that we obtained
20 from a website called the "kamenypapers." But each of the
21 underlying documents can be found in the Library of Congress,
22 and is admissible evidence under the ancient records exception.

23 And this first one is a communication to the Pride
24 Foundation, in which the Treasury is denying an application for
25 tax exempt status for a group that seeks to further the rights

1 of gay and lesbian people.

2 And we would submit, Your Honor, that this document
3 is admissible and is relevant to the issues of the history of
4 discrimination that gay and lesbian people have faced, and also
5 to the question of relative political power.

6 **THE COURT:** This is a document from 1974?

7 **MR. DUSSEAULT:** That's true.

8 **THE COURT:** And you're characterizing this as an
9 ancient document?

10 (Laughter)

11 **MR. DUSSEAULT:** Don't shoot the messenger, Your
12 Honor. I think it's the rules of evidence that say 20 years or
13 more.

14 (Laughter)

15 **THE COURT:** Very well. Ms. Moss.

16 **MS. MOSS:** Your Honor, the hearsay objection aside,
17 the source of these, as he noted, is a website. It may be that
18 these are obtainable from the Library of Congress. I don't
19 know.

20 What they have given us is something that's a
21 printout from a website. There is no way to verify. I don't
22 know this website.

23 They haven't put anybody up there to explain where
24 the -- the individual who controls this website obtained these
25 documents. So there's no way to know that they are in fact

1 authentic copies of what would be in the Library of Congress.
2 And, for that reason, we would object that the authenticity has
3 not been established.

4 **THE COURT:** Would the Library of Congress maintain a
5 document such as this?

6 **MR. DUSSEAULT:** Apparently so, your Honor.

7 And to be clear, the underlying document, we are not
8 suggesting that the website page, which is intended to show
9 where we got it, is in the Library of Congress.

10 **THE COURT:** Well, you did not obtain the IRS letter
11 from the Library of Congress.

12 **MR. DUSSEAULT:** Your Honor, Mr. Olson is reminding me
13 that we did actually, anticipating this concern, go and make
14 sure that we could obtain it from the Library of Congress; that
15 this document can be obtained from the Library of Congress.

16 The copy that we had included on our exhibit list was
17 one that we obtained from the website, but we have researched
18 this.

19 And perhaps what we could do, your Honor, is admit it
20 into evidence subject to a qualification --

21 **THE COURT:** Well, I will accept counsel's
22 representation and on that basis, it probably would be well to
23 verify that. But what lawyers say in making factual
24 representations to the Court, the Court assumes the accuracy of
25 those statements and holds lawyers accountable.

1 So based upon your representation that this is
2 available from the Library of Congress, the letter dated
3 October 8, 1974 to the Pride Foundation of San Francisco from
4 the Internal Revenue Service will be admitted. So that portion
5 of 2581 one will be admitted.

6 **MR. DUSSEAULT:** Thank you.

7 (Plaintiffs' Exhibit 2581, 10/8/1974 letter received
8 in evidence.)

9 **MR. DUSSEAULT:** And then if we could publish the
10 letter and on the page numbered beginning "Based on the
11 foregoing."

12 (Document displayed)

13 **MR. DUSSEAULT:** What I would read at this point, your
14 Honor, is from the letter denying tax exempt status to the
15 Pride Foundation. It says:

16 "Based on the foregoing, we feel that your
17 activities are advancing the unqualified and
18 unrestricted promotion of the alleged
19 normalcy of homosexuality. Thus, we conclude
20 that your activities carry a serious risk of
21 contributing to a more widespread development
22 of homosexual tendencies among certain
23 segments of the public and a consequent
24 increase in the general prevalence of what is
25 still generally regarded as deviant sexual

1 behavior. As such, your activities are
2 contrary to public policy and are, therefore,
3 not charitable."

4 And the second document, your Honor, is Exhibit 2566,
5 your Honor.

6 And Exhibit 2566, your Honor, is also from the same
7 website and we can also represent that it's obtainable from the
8 Library of Congress. And I apologize for the quality of the
9 print, especially on the first page.

10 But what this document is, it's from the United
11 States Civil Service Commission and it is a document written in
12 1966 explaining the government's policy against having gay and
13 lesbian individuals employed in Civil Service.

14 And we would move the document into evidence under
15 the same terms and reasoning as the prior document.

16 **THE COURT:** Well, based on your representation that
17 this is document to be found in the archives of the Library of
18 Congress and is, therefore, an official government record, 2566
19 will be admitted.

20 (Plaintiffs' Exhibit 2566 received in evidence.)

21 **MR. DUSSEAULT:** Thank you, your Honor.

22 Now, your Honor, the final group of documents that I
23 have to address is a larger number --

24 **THE COURT:** Is there any particular portion of the
25 United States Civil Service Commission letter dated

1 February 25, 1966 that you wish to draw the Court's attention
2 to?

3 **MR. DUSSEAULT:** Yes, your Honor. Give me one moment.

4 **THE COURT:** And what is being admitted in 2566, as
5 with 2581, is simply the government letter, rather than the
6 Kameny papers portion of the documents or portions of the
7 exhibit.

8 **MR. DUSSEAULT:** Yes, your Honor.

9 Your Honor, on -- and, again, I apologize for the
10 quality of the copy. On page two of the exhibit, of particular
11 note is where, in explaining the policy, the author talks
12 about:

13 "Considerations that encompass the types of
14 deviant sexual behavior engaged in whether
15 isolated, intermittent or continuing acts.
16 The age of the particular participants, the
17 extent of promiscuity, the aggressive and
18 persistent character of the individual's
19 participation" --

20 **THE COURT:** Keep your voice up.

21 **MR. DUSSEAULT:** Thank you. Sorry. I'm looking very
22 closely at the page.

23 "...the recency of the incidents."

24 And then it goes on here, your Honor.

25 But what I think is particularly noteworthy in this

1 document is it essentially justifies the policy by denying the
2 concept of a homosexual as a person or individual and, rather,
3 focuses on the conduct as a justification and says because this
4 is talking about conduct, it's a sufficient basis to exclude
5 people from working for the government.

6 **THE COURT:** Very well.

7 **MR. DUSSEAULT:** Your Honor, the final category of
8 documents I seek to move in is a slightly larger number, and I
9 thought what might be helpful is to describe generally what it
10 is.

11 It's a couple of groups of data that we believe are
12 relevant to understanding some of the testimony, particularly
13 for Professor Badgett and some of the questions that she was
14 asked about Europe and other areas.

15 You may recall, your Honor, that counsel for the
16 defendant-intervenors brought in in cross data from Europe that
17 we hadn't seen or hadn't been disclosed to us before, because
18 they don't have to disclose their cross documents, and asked
19 some questions about those things.

20 And what we have done is collected some additional
21 data that we think would be helpful to have in the record so
22 that when we are arguing from the testimony of the experts, the
23 actual underlying data is also part of the record.

24 So Plaintiff's Exhibits 2823 through 2829 in your
25 binder, your Honor, are examples of data from Europe coming

1 from something called Statistics Netherlands, which is, I
2 believe, the exact same source that the defendant-intervenors
3 relied on for their cross-examination, and this is simply
4 additional data that we think would be helpful to have in the
5 record.

6 So I would seek to move into evidence Plaintiffs'
7 Exhibit 2823 through Plaintiffs' Exhibit 2829.

8 **THE COURT:** Can you represent that these came from
9 the official website of the government of the Netherlands?

10 **MR. DUSSEAULT:** Yes, your Honor. Yes.

11 **THE COURT:** Ms. Moss?

12 **MS. MOSS:** I'm trying to find which exhibit it is,
13 your Honor.

14 I think we have no objection to most of these, but I
15 think there is one exhibit, and I believe it is 2829, that
16 deals with birth rates -- or maybe it was non-parental birth
17 rates. That was not something I think was introduced with
18 Dr. Badgett, so I don't think it's appropriate. It doesn't go
19 to anything that they testified to.

20 The marriage statistics are -- we don't have an
21 objection to the marriage and partnership registration
22 statistics.

23 **MR. DUSSEAULT:** Your Honor, I'm seeking help from my
24 team to see if we can figure out which is the birth rate
25 document.

1 **THE COURT:** 2829, it appears.

2 (Discussion held off the record
3 amongst defense counsel.)

4 **MR. DUSSEAULT:** And, your Honor, we believe that the
5 defendant-intervenors did, in fact, raise the issue of
6 non-marital birth rates in their cross-examination.

7 **THE COURT:** I believe that is correct.

8 And there being no objection to 2823 through 2828,
9 they are admitted.

10 (Plaintiffs' Exhibits' 2823 through 2828 received in
11 evidence)

12 **THE COURT:** And to the extent that there is an
13 objection to 2829, it is overruled and 2829 is admitted. These
14 do appear to be government statistics.

15 (Plaintiffs' Exhibit 2829 received in evidence)

16 **MR. DUSSEAULT:** Thank you, your Honor.

17 And then two other documents of data I don't think
18 we'll need to spend much time on because they're from the
19 defendant-intervenors Exhibit list, DIX-1836 and DIX-2627.

20 **THE COURT:** DIX--- oh, I'm sorry. It's DIX.

21 **MR. DUSSEAULT:** Yes, at the end, your Honor. 1836
22 and 2627 are the last two tabs in your binder.

23 Again, this is data about divorce rates --

24 **THE COURT:** I have in the binder 1836, but 26- --

25 **MR. DUSSEAULT:** You do not have 2627 in the binder?

1 **THE COURT:** Is that a PX-2627 or a DIX?

2 **MR. DUSSEAULT:** Give me one moment, your Honor.

3 (Discussion held off the record

4 amongst defense counsel.)

5 **MR. DUSSEAULT:** Your Honor, to the extent it was
6 omitted from the binders we have handed out, that was
7 inadvertent. I can show it to Ms. Moss and pass a copy up to
8 your Honor.

9 **THE COURT:** Very well.

10 (Whereupon, document was tendered

11 to the Court.)

12 **MS. MOSS:** We have no objection to these exhibits,
13 your Honor.

14 **THE COURT:** That would appear to solve that problem.

15

16 (Plaintiffs' Exhibits 2627 and 1836 received in
17 evidence)

18 **MR. DUSSEAULT:** And, your Honor, the final documents
19 in this category are Plaintiffs' Exhibit 2345 and 2346.

20 **THE COURT:** 25- --

21 **MR. DUSSEAULT:** 2345.

22 **THE COURT:** And?

23 **MR. DUSSEAULT:** And 2346.

24 And these, your Honor, are documents from the Center
25 for Disease Control national data regarding health statistics.

1 2345 pertains to national marriage and divorce rate
2 trends from 2000 to 2007; and 2346 marriage rates by state,
3 1990, 1995 and 1999 through 2007.

4 And, again, your Honor, I think the issue of marriage
5 and divorce rates is data that's relevant to the issues we are
6 talking about given some of the arguments that
7 defendant-intervenors are making.

8 **MS. MOSS:** We would say we think it would be
9 appropriate for the Court to take judicial notice of these.

10 **THE COURT:** Well, these are --

11 **MR. DUSSEAULT:** They are governmental records, your
12 Honor.

13 **THE COURT:** They are governmental records and,
14 therefore, I think they are admissible.

15 (Plaintiffs' Exhibits 2345 and 2346 received in
16 evidence)

17 **MR. DUSSEAULT:** So, your Honor, that concludes my
18 presentation. If I could make two final notes.

19 One is -- as someone said earlier, plus whatever is
20 on this note that I was just handed.

21 (Discussion held off the record
22 amongst defense counsel.)

23 **MR. DUSSEAULT:** There's one issue that I wanted to
24 raise, your Honor, which is that we received for the first time
25 about 100 additional documents last night about 11:30 p.m. We

1 haven't had a chance to look at whether there is anything in
2 that that we wanted to move in and I didn't want to upset what
3 order I did have in this presentation by trying to deal with
4 that. So we would certainly reserve any right we may have as
5 to those very-late produced documents.

6 Lastly, it appears there may be one document that I
7 may need to clear up and, also, your Honor had asked for some
8 direction about the admissions. If, perhaps, we could take our
9 morning break and I could come back and close that loop, I'll
10 be done.

11 **THE COURT:** That sounds like a good idea. We will
12 take until five minutes of the hour.

13 **MR. DUSSEAULT:** Thank you, your Honor.

14 (Whereupon there was a recess in the proceedings
15 from 10:38 a.m. until 11:02 a.m.)

16 **THE COURT:** Very well, Mr. Dusseault.

17 **MR. DUSSEAULT:** Thank you, your Honor. Thank you for
18 the break. I think I have two items that I can wrap up very
19 quickly.

20 The first is, your Honor had asked if we could direct
21 your Honor's attention to particular admissions that were of
22 importance and what I would suggest is the following. Since we
23 owe your Honor some sub-exhibits on other issues where we have
24 identified excerpts, we would suggest that we submit along with
25 those what we would call 693-A, that would identify what

1 portions of exhibits we are particularly directing the Court's
2 attention to.

3 If that's acceptable to your Honor, we will do that.
4 If you would rather have it written out before we close, we
5 will do our best to walk through it.

6 **THE COURT:** Well, I think that's acceptable, subject
7 to, of course, any amplification --

8 **MR. THOMPSON:** Yes, no objection.

9 **THE COURT:** (Continuing) -- or clarification that the
10 defendants wish to offer.

11 **MR. DUSSEAULT:** And then the last point I have been
12 asked by my team to raise, I mentioned the hundred documents
13 that we received last night.

14 We also received last night at 11:30 a privilege log
15 with 7500 documents listed. And I'm told that about 1500 of
16 those have been on a prior privilege log, but about 6,000 are
17 documents that are being described to us for the first time
18 ever. And we wanted to simply raise that matter to the Court
19 and identify the fact that if we have issue with whether those
20 are truly privileged and we wind up fighting over that and
21 giving them -- in getting those documents, there may be a need,
22 even after we rest, to introduce some of those withheld
23 documents into evidence.

24 **THE COURT:** I had thought that the magistrate's order
25 had required production to be completed a week ago, is that not

1 correct?

2 **MR. DUSSEAULT:** Production, yes, but the privilege
3 log, I believe, is what we are now getting -- and there's
4 documents described that because they are claiming a First
5 Amendment privilege, we have never seen.

6 **MS. MOSS:** Yes, your Honor. We had until yesterday
7 to produce the privilege log. So after we finished and
8 completed our production, we went ahead and then put together
9 this privilege log, which was -- we did a notice of filing and
10 a motion to file it under seal. And we produced under the
11 protective order, attorneys' eyes only, to the other side a
12 non-redacted version of the protective order.

13 **THE COURT:** Did the magistrate give you until
14 yesterday to produce the privilege log?

15 **MS. MOSS:** Yes, your Honor.

16 **THE COURT:** Okay. I think that the privilege log
17 should be due when the documents are due, but if that's what
18 the magistrate did and you are complying with it, well, then
19 that's fine.

20 **MS. MOSS:** And I'd also like to clarify, there was a
21 small number of documents that were produced, I think it was 14
22 or 15 documents, and it was simply ones that in finalizing the
23 privilege log, we determined should not have been on there and
24 so, of course, in due diligence produced them to the other
25 side.

1 **MR. DUSSEAULT:** And, your Honor, our point would
2 simply be, to preserve our position, that if there were
3 documents produced for the first time last night or described
4 to us under a privilege log for the first time last night,
5 there may be a need to come to your Honor even after we rest
6 and present documents that were not available to us in
7 sufficient time to use.

8 **THE COURT:** Well, I assume under these circumstances
9 the defendants will not object to a motion to reopen based upon
10 this additional production.

11 You may very well contest whether these documents
12 should be produced or not -- or should be introduced or not,
13 but I wouldn't think you would be in a position to argue that
14 the plaintiffs are precluded from attempting to reopen if
15 necessary.

16 **MS. MOSS:** We would not have an objection, provided
17 that if it was ultimately determined that some of these
18 documents were not privileged, that if they did come into
19 evidence, we would have the opportunity to respond as well.

20 **THE COURT:** Very well.

21 **MR. DUSSEAULT:** I'm sure we can deal with the
22 mechanics of it.

23 **THE COURT:** Very well.

24 **MR. DUSSEAULT:** Thank you then, your Honor. I will
25 hand over the reigns to Mr. Boies.

1 **THE COURT:** Very well. Mr. Boies?

2 **MR. BOIES:** Purely ceremonial, your Honor.

3 Subject to the qualifications that have already been
4 expressed, the plaintiffs rest.

5 **THE COURT:** Very well. Mr. Thompson?

6 **MR. THOMPSON:** Yes, your Honor. The
7 defendant-intervenors would like to call Professor Kenneth
8 Miller to the stand.

9 **WHEREUPON:**

10 **KENNETH MILLER,**
11 called as a witness for the Defendant herein, having been first
12 duly sworn, was examined and testified as follows:

13 **THE WITNESS:** I do.

14 **THE CLERK:** Thank you. Please have a seat.
15 State your name, please.

16 **THE WITNESS:** My name is Kenneth P. Miller.

17 **THE CLERK:** And spell your last name.

18 **THE WITNESS:** M-I-L-L-E-R.

19 **THE CLERK:** And your first name?

20 **THE WITNESS:** K-E-N-N-E-T-H.

21 **THE CLERK:** Thank you, Mr. Miller.

22 **MR. THOMPSON:** And, your Honor, we would like to
23 start with a bit of housekeeping.

24 We have a list of exhibits that were materials that
25 the professor relied upon and we sought plaintiffs' consent to

1 move them into evidence, and we have been told they have no
2 objection. I have a list I would like to tender to the Court,
3 if I may.

4 **THE COURT:** Very well. Thank you Mr. Thompson.

5 (Defendants' Exhibits 176, 350, 372, 171, 358, 449,
6 463, 450, 464, 465, 172, 466, 254, 253, 321, 1973,
7 213, 245, 573, 143, 145, 170, 447, 333, 462, 147,
8 466, 451, 434, 433, 455, 456, 304, 1080, 461, 469,
9 470 received in evidence)

10 **MR. THOMPSON:** And in addition, I think that tender
11 may obviate the need for using this binder very much, but may I
12 approach and hand out one binder?

13 **THE COURT:** By all means.

14 **MR. THOMPSON:** Thank you, your Honor.

15 (Whereupon, binder was tendered
16 to the witness.)

17 **DIRECT EXAMINATION**

18 **BY MR. THOMPSON:**

19 **Q.** Professor Miller, where did you attend college?

20 **A.** I attended college at Pomona College.

21 **Q.** And after college, where did you attend graduate school?

22 **A.** Immediately after college, I went to law school at Harvard
23 Law School.

24 **Q.** And after graduating from Harvard Law School, did you
25 practice law?

1 **A.** Yes, I did.

2 **Q.** With which firm did you practice upon graduation?

3 **A.** I practiced with the firm of Morrison and Foerster.

4 **Q.** And for how long did you practice with Morrison and
5 Foerster?

6 **A.** I was with the firm full time for five years. I was
7 originally hired in the Los Angeles office of Morrison and
8 Foerster, spent two years there in the litigation department.
9 Then when the firm opened a Sacramento office, I was one of the
10 three lawyers that went to open the firm there, and I was there
11 for about three years in Sacramento.

12 And then after I left full-time employment with the
13 firm, I was also with the firm on a contract basis for a couple
14 of years as well.

15 **Q.** And what sort of cases did you work on while you were in
16 the Sacramento office?

17 **A.** In the Sacramento office we were doing some regulatory
18 work, represented a number of clients, including San Francisco
19 airport, other major corporate clients that had business before
20 the state government.

21 **Q.** Did there come a time when you went back to graduate
22 school again?

23 **A.** Yes.

24 **Q.** And what further degree did you pursue?

25 **A.** I pursued a PhD in political science.

1 Q. And at what university?

2 A. At the University of California, Berkeley.

3 Q. And when did you receive your PhD?

4 A. In 2002.

5 Q. What is your current position?

6 A. I'm an associate professor of government at Claremont
7 McKenna college.

8 Q. Is that a tenured position?

9 A. Yes, it is.

10 Q. And before receiving tenure, what was your position?

11 A. For six years I was an assistant professor in the
12 government department at that college.

13 Q. And have you had any teaching positions before you arrived
14 at Claremont?

15 A. For one year I was a visiting assistant professor -- this
16 is immediately before I went to Claremont -- at the University
17 of San Francisco.

18 Q. And what activities do you perform in connection with your
19 position in the department of government at Claremont?

20 A. So like most faculty members, I have a range of
21 activities. I have active research work that I do. I'm
22 also -- I have a full-time teaching load.

23 I do various -- I serve on various committees at the
24 college, and I'm also the associate director of a research
25 institute at the college.

1 Q. What is the name of that research institute?

2 A. The Rose Institute of State and Local Government.

3 Q. And what do you do in connection with your working at the
4 Rose Institute?

5 A. The Rose Institute studies state and local politics,
6 mainly in California, but, also, in other states. I supervise
7 a lot of the research, particularly in the areas of
8 redistricting, fiscal analysis of state and local governments
9 as well.

10 Q. What courses do you regularly teach at Claremont?

11 A. On a regular basis I teach introduction to American
12 politics. I also think every year teach a class in California
13 politics.

14 I -- every year that I've been there I have also
15 taught a senior seminar, for seniors in the government writing
16 honors theses. Almost every year I teach an undergraduate
17 class in constitutional law, which would be either national
18 powers or civil rights and civil liberties.

19 Q. Now, in your course on California politics, what subjects
20 do you cover?

21 A. We cover a range of topics relating to state government,
22 starting with the founding of the state back in 1850, the
23 original constitution, up through the progressive era and the
24 introduction of initiative referendum and recall in the state
25 100 years ago.

1 Then I fairly quickly move up to the 1960's, the Pat
2 Brown era, as governor, and talk about the professionalization
3 of the state legislature.

4 We are moving at that point into the institutions of
5 state government, which are distinctive in California, with a
6 term limit legislature, a powerful initiative process, the
7 state judiciary and the executive branch with its separately
8 elected officers.

9 In addition, I cover a lot of material about the
10 change in demographics of California, and how that's affected
11 the political makeup of the state, the incorporation of racial
12 and ethnic minorities into the political process, as well as
13 the partisan shift of the state from being essentially a 50/50
14 Republican and Democratic state, to a majority Democratic
15 state.

16 And then, finally, I have the students look at
17 particular policy issues, either the state budget or other
18 policy issues and they do in-depth research projects on those
19 issues.

20 **Q.** In the California politics course you teach, to what
21 extent, if any, do you address Proposition 8?

22 **A.** In my section where I'm looking at state institutions,
23 direct democracy and courts, I have for the last several years
24 done a unit on Proposition 8, the relationship between
25 Proposition 8, Proposition 22, in re marriage cases and the

1 conflict between the people and the courts over the definition
2 of marriage in California.

3 So it's at least two, three courses in the class,
4 which is a fairly large chunk of the syllabus.

5 **Q.** And in your a class on California politics to what extent,
6 if any, do you address California's domestic partnership laws?

7 **A.** In connection with that discussion I just described, I
8 offer the domestic partnership laws as the legislature's
9 contribution to this controversy over legal recognition of
10 same-sex couples. And so we definitely talk about the original
11 domestic partnership law in 1999 and how it was augmented over
12 time.

13 **Q.** And in your class on California politics, do you address
14 the role of gays and lesbians in the California political
15 landscape?

16 **A.** Yes, we do, in a couple of different ways. One is in the
17 context of this controversy over marriage in California. And,
18 also, more broadly, when we're discussing the coalitions that
19 support the two political parties in the state with gays and
20 lesbians being an important coalition partner for the
21 Democratic party in the state.

22 **Q.** Do you address the political power of other minority
23 groups in your class on California politics?

24 **A.** Yes. As I mentioned, we discuss the incorporation of
25 various minority groups into the political process, the

1 transition, especially for immigrants to becoming citizens, and
2 then the additional steps of getting registered and voting and
3 participating in the political process. There's literature on
4 that that I have the students read and we discuss that in
5 class.

6 **Q.** All right. Now, on your -- in your American politics
7 course, to what about extent, if any, do you discuss the
8 political power of minorities in the United States?

9 **A.** For as long as I have been teaching this class, a central
10 theme of it has been the issue of racism in the United States
11 going back to prior to the founding of the constitution, the
12 institution of slavery, the debates over slavery in the
13 original constitution.

14 The period leading up to the Civil War, the *Dred*
15 *Scott* decision, the Civil War that followed, Abraham Lincoln's
16 speeches in this area.

17 The post civil rights -- I mean, the post War
18 reconstruction amendments, and then throughout the period of
19 segregation up through the civil rights movement, all the way
20 up to President Obama.

21 So it provides sort of a trajectory showing how a
22 particular group in our society faced discrimination and was
23 able to achieve civil rights over a period of time.

24 **Q.** And to what extent, if any, do you address prejudice
25 against African-Americans in your course on American politics?

1 **A.** It's a central theme of what I have just described.
2 Oftentimes I have assigned a book or a portions of a book
3 called *Simple Justice* by Richard Kluger and that certainly
4 addresses the issues of prejudice against African-Americans.
5 The book is a discussion of the *Brown versus Board of Education*
6 case, but it goes back to the origins of slavery in the United
7 States and it traces the history of discrimination against
8 African-Americans in the United States up to and even after the
9 *Brown versus Board* decision.

10 **Q.** And to what extent, if any, do you teach in your course on
11 American politics about the political power of gays and
12 lesbians today?

13 **A.** In particular, when we're talking about political
14 coalitions in the state and the two-party system and how the
15 parties form coalitions, we discuss gays and lesbians as being,
16 again, an important part of the -- an increasingly important
17 part of the Democratic coalition in the United States.

18 **Q.** Now, you also mention that you perform scholarly research
19 and writing. What is the main focus of your scholarly
20 research?

21 So this goes back to my time as a graduate student at
22 Berkeley. The central focus of my research from then until the
23 present has been direct democracy and the initiative process,
24 in particular in California and in other states.

25 And in that original work as a graduate suitability I

1 applied what I consider to be appear Madisonian critique of
2 direct democracy and the disadvantages, in my view, that it had
3 compared to representative government. And I wrote a couple of
4 articles at that time, which were on that theme and it was also
5 informed -- it informed my dissertation that I wrote at
6 Berkeley. That was in 2002 that I filed my dissertation, and
7 the articles were in, approximately, that period, 2001 or so.

8 But I have continued to be interested in this problem
9 of direct democracy in a constitutional system and I wasn't
10 fully satisfied that I had really gotten as much to the nub of
11 the problem as I would like to.

12 So after I finished my dissertation and PhD, I
13 decided to have that be my continuing research focus as a
14 scholar. And so in the years since, I have done -- I have
15 greatly expanded my research in this area.

16 I now have a data base which I have collected that
17 has information on all voter-approved initiatives in all 24
18 states that have the initiative process -- not just California,
19 but the other states -- from the beginning origins of the
20 initiative process in the early 1900's until the present.

21 And based on that research and a lot of historical
22 research going back to the progressive era, I started to sort
23 of modify my views a little bit from where they had been as a
24 graduate student. In particular, I had a -- have a somewhat
25 more favorable view of direct democracy in my work at this

1 point, and I now see it as a way in which the people can
2 exercise popular sovereignty in our constitutional system.

3 The other thing that I have come to conclude is that
4 direct democracy, which provides an emphasis on popular
5 sovereignty has often come into conflict with the courts or the
6 judicial power going all the way back to the progressive era.

7 **THE COURT:** Perhaps you should tender the witness
8 before if he begins opining.

9 **MR. THOMPSON:** Yes, your Honor. We will just do a
10 few more questions on his background before we get into
11 substance.

12 **BY MR. THOMPSON:**

13 **Q.** What is the name of your current book on the subject?

14 **A.** Okay, yeah. My book is called *Direct Democracy in the*
15 *Courts*, which was published by Cambridge University Press in
16 August of 2009.

17 **Q.** Does that book address Proposition 8?

18 **A.** Yes, it does.

19 **Q.** And you've also written a book, *The New Political*
20 *Geography of California*, is that right?

21 **A.** Yes, I have.

22 **Q.** And, briefly, what's the general thesis of that book?

23 **A.** The book is a collection of chapters. It's one of these
24 things, it's an edited volume and I was one of the three
25 editors of the volume, and we had various different

1 contributors who were looking at critical change in California
2 from a geographic perspective, geographic as well as
3 demographic perspective.

4 The main thesis of the book is that California
5 shifted from a predominant north/south partisan divide with the
6 north being more liberal and the south more conservative, to an
7 increasing east/west partisan divide with the eastern part or
8 inland part more conservative and the coastal region more
9 democratic. And overall the state has become increasingly
10 democratic over the last generation.

11 So that the book, in various different ways, explains
12 that change, both at the statewide and local level.

13 **Q.** And when was that book published?

14 **A.** I believe that was in 2008. The book was published by
15 Berkeley Public Policy Press, which is an imprint of the
16 Institute of Governmental Studies at U.C. Berkeley.

17 **Q.** To what extent, if any, have your journal articles focused
18 on the political issues relating to the political power of gays
19 and lesbians?

20 **A.** Well, a recent journal article I wrote for a French
21 journal on American politics focused on the Proposition 8
22 campaign and my analysis of some of the reasons why Proposition
23 8 was unable to pass even in a state that elected Barack Obama
24 in 2008.

25 **Q.** All right. And have you given any presentations at

1 conferences that relate to the political power of gays and
2 lesbians?

3 **THE COURT:** Proposition 8 passed? Did not pass?

4 **MR. THOMPSON:** Oh, I'm sorry. One of the reasons
5 Proposition 8 passed. I was mistating. Thank you, your Honor.

6 **THE COURT:** I think maybe we understood what he
7 meant.

8 **MR. THOMPSON:** Thank you, your Honor.

9 **BY MR. THOMPSON:**

10 **Q.** And so have you given any presentations at major
11 conferences on issues relating to the political power of gays
12 and lesbians?

13 **A.** Yes, I have.

14 **Q.** And please describe them briefly?

15 **A.** Okay. This was -- I have presented twice at the annual
16 meeting of the American Political Science Association, which is
17 the largest meeting of political scientists in the United
18 States.

19 The first time was in 2005. I was on a panel. This
20 was following the *Goodridge* decision in Massachusetts and there
21 were a number of panelists that were analyzing the probable
22 impact of that, of that decision. And I presented a paper on
23 the *Goodridge* decision and its probable impact at that
24 conference.

25 The second time was last year in Toronto, another

1 meeting of the A.P.S.A., and I presented -- well, I was
2 actually on a round table discussion with a number of scholars
3 who focused on the question of the relationship between courts
4 and direct democracy in the controversy over same-sex marriage
5 in the United States.

6 **Q.** Are on the editorial board of any journals?

7 **A.** Yes. I'm on the editorial board of the *California Journal*
8 *of Politics and Policy*, which is, again, based at U.C.
9 Berkeley.

10 **MR. THOMPSON:** Your Honor, we would tender Professor
11 Miller as an expert in the field of American politics and
12 California politics.

13 **THE COURT:** Voir dire, Mr. Boies?

14 **MR. BOIES:** Yes, your Honor.

15 Although I think I would not dispute that the witness
16 is an expert in some aspects of that very broad field, my
17 concern is that from looking at the expert report, that he may
18 be asked to opine on things like the political power of gays
19 and lesbians, with respect to which I think no foundation has
20 been laid for his expertise.

21 So one of the things that I wonder is whether I could
22 ask through the Court for counsel to proffer what expert
23 opinions, the basic expert opinions he expects to elicit.
24 Because if it is within the area that he has described that
25 supports his expertise, I would have no objection. If it is

1 outside, I would like to voir dire.

2 **THE COURT:** Very well. Mr. Thompson?

3 **MR. THOMPSON:** Yes, your Honor. We think the
4 political power of gays and lesbians is a subcomponent of
5 American politics and California politics. So, certainly,
6 Professor Miller is prepared to speak to that, since he teaches
7 classes and has written books on it.

8 **THE COURT:** Very well then. Do you wish to voir dire
9 the witness with respect to that subject?

10 **MR. BOIES:** I do, your Honor.

11 Good afternoon, Professor Miller --

12 **THE COURT:** Not yet. It's still morning.

13 **MR. BOIES:** Still morning. It's been a long morning.

14 (Laughter.)

15 **VOIR DIRE EXAMINATION**

16 **BY MR. BOIES:**

17 **Q.** Good morning, Professor Miller. We haven't met. My name
18 is David Boies and I represent the plaintiffs.

19 Have you written any peer-reviewed articles dealing
20 with the power of gays and lesbians?

21 **A.** I guess it would depend on your definition. I believe
22 that the --

23 **Q.** My definition of what?

24 **A.** Of what the -- the power of gays and lesbians.

25 I would say, yes. I would say that the article that

1 I described of the French journal dealing with Proposition 8
2 dealt certainly with the power of gays and lesbians.

3 **Q.** Other than the French article that you have referred to,
4 have you written any peer-reviewed articles relating to the
5 power of gays and lesbians?

6 **A.** I can't say that I have any other peer-reviewed articles,
7 no.

8 **Q.** Okay. Now, let's focus on that French article. In that
9 French article, what did you say about the power of gays and
10 lesbians?

11 **A.** Well, one thing I said is that Proposition 8 lost -- I
12 mean, Proposition 8 won. So the gays and lesbians lost the
13 election. And so to me that's, as I described in the article,
14 that's certainly an outcome that goes to the comparative
15 political power of gays and lesbians.

16 **Q.** That would be something that suggests they did not have
17 political power, correct?

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

19 **Q.** Let me put it differently.

20 That is not something that suggests that they do have
21 political power; is that fair?

22 **A.** No, I don't think that's fair.

23 **Q.** So your argument in the journal was that gays and lesbians
24 had political power because Proposition 8 lost; is that what
25 are saying?

1 **A.** No. I don't think -- that was not my conclusion in the
2 article.

3 **Q.** Okay.

4 **A.** The article spoke about the campaigns on both sides,
5 including a very strong campaign by the No On 8 side.

6 **Q.** In this French article, did you put forth any description
7 or discussion of the political power of gays and lesbians other
8 than whatever political power you may infer from the fact that
9 they campaigned against Proposition 8 and lost?

10 **A.** I believe I talked to some extent about the coalition
11 on -- that supported the gay rights side.

12 I talked about the role of President Obama in saying
13 that he opposed Proposition 8. And so, certainly, I think that
14 was -- these were factors that went to political power and
15 powerlessness.

16 **Q.** Other than this article that you have just described, have
17 you undertaken any independent scientific research in an
18 attempt to analyze the political power of gays and lesbians?

19 **A.** I've done a lot of work looking at ballot measures that
20 affect gays and lesbians. So not just Proposition 8, but,
21 also, Proposition 22, Amendment 2 in Colorado, Proposition 6 in
22 California, and all these are centrally -- I mean, I think this
23 is a central issue in this case, is whether gays and lesbians
24 are able to exercise power in the direct Democratic context.

25 So, yes, my work has been importantly focused on that

1 topic.

2 **Q.** And is that work in which you describe the political power
3 of gays and lesbians recorded in any writings other than this
4 French article, any peer-reviewed articles other than this
5 French article?

6 **A.** Yes. It's in -- it's in my book, which was peer-reviewed
7 by Cambridge University Press. There were peer-reviewers of
8 that book, certainly the manuscript of that book. And there is
9 a lot in that book about the political power of gays and
10 lesbians.

11 **Q.** Do you hold yourself out as an expert on the extent of
12 discrimination against gays and lesbians?

13 **A.** Yes, I think that outcomes go to the issue of
14 discrimination. If gays and lesbians are able to achieve
15 positive outcomes in the political process, then that would
16 affect or it would be evidence, one could draw inferences about
17 their ability to overcome discrimination.

18 **Q.** My question is not so much right now what you conclude but
19 you hold yourself out to be an expert in the history and
20 existence or non-existence of discrimination against gays and
21 lesbians, is that correct?

22 **A.** I would say less so about the history, but more so about
23 the present level of discrimination, the ability of the gay and
24 lesbian movement to overcome discrimination, to achieve their
25 political goals.

1 And I think I can say that I believe that I'm an
2 expert on that question, yes.

3 **Q.** On the expert -- on the question of whether gays and
4 lesbians experience discrimination today, are you an expert on
5 that, in your view?

6 **A.** In my view, yes, I think so.

7 **Q.** Okay. Are you an expert as to whether gays and lesbians
8 have experienced discrimination over the last 50 years?

9 **A.** I would say that that has than been a focus of my
10 research --

11 **Q.** I'm simply asking you, sir, whether you hold yourself out
12 at an expert in that or not?

13 **A.** Well, I would say in the course of this work as an expert
14 in this case I have learned more about it for sure, and I think
15 that I can probably write an article on this topic at this
16 point.

17 But I haven't written on it before. I think that my
18 expertise is more in the contemporary period, as opposed to
19 what you described as 50 years ago.

20 **Q.** What would you say were the most important academic
21 writings on the subject of discrimination against gays and
22 lesbians today.

23 **A.** So my area of work where I'm most familiar with literature
24 goes to legal writings. And so I would say work by Dan
25 Paniella, about Professor Eskridge --

1 Q. Say again?

2 A. Professor Eskridge.

3 Q. Say again?

4 A. Professor Eskridge. Susan Mezzie. These would be some
5 people that I would say would be important scholars in this
6 area.

7 Q. And you would recognize those three people as important
8 scholars in this area whose work that you would rely on, is
9 that correct?

10 A. I think they would be important scholars in this area.

11 Q. Now, with respect to the question of political power of
12 gays and lesbians, is your expertise on that limited to the
13 present time?

14 A. I wouldn't say that it's -- I'm not holding myself out as
15 an expert on the full history of the gay and lesbian rights
16 movement. I have read about it and so I -- I think I have a
17 view of the trajectory of the movement, based on what I have
18 read.

19 But I would say that -- it's fair to say that my --
20 the deeper knowledge is on the more contemporary period, say,
21 from the 1970's forward.

22 Q. For example, at your deposition you were not aware of what
23 the Mattachine Society was, were you?

24 A. I could not recall what that was at that time.

25 Q. Have you researched that since?

1 **A.** I did take a look and did some further investigation and
2 learned the Mattachine Society, yes, as being founded by Harry
3 Hay around 1950 and being an important early gay rights
4 organization.

5 **Q.** And did it play a particular role in the 1970's, the area
6 that you said that you were an expert in?

7 **A.** Well, yeah. The -- there are different iterations of this
8 society. It was founded first in Los Angeles and then had
9 other organizations, and --

10 **Q.** All I was asking is whether it played a particular
11 important role in the 1970's, which was a period that you said
12 you were you had expertise in.

13 Answer that question "yes" or "no."

14 **A.** I believe that did, yes.

15 **Q.** But, nevertheless, that is something that you were
16 familiar with at the time you did your expert report, correct?

17 **A.** That's something I've learned about and read about more
18 extensively since then.

19 **Q.** And at your deposition you were not aware of whether the
20 general social survey, when they began asking respondents
21 whether they were gay or lesbian, correct?

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

23 **Q.** And would you explain for the record what a general social
24 survey is?

25 **A.** Okay. This is a important major survey that political

1 scientists do of -- to get information about various questions,
2 public opinion and so forth.

3 Q. And at the time of your deposition you didn't know who
4 Alan Spear was, did you?

5 A. That's correct.

6 Q. And you didn't know who Elaine Noble was, correct?

7 A. That's correct.

8 Q. Now, since your deposition, have you discovered who those
9 people were?

10 A. No, I haven't done further investigation on those.

11 Q. You don't know that Alan Spear was the first openly gay
12 man elected to state office?

13 A. I -- I did not know that, no.

14 Q. And you didn't know that Elaine Noble was the first openly
15 gay woman elected to state office?

16 A. I did not know that, no.

17 Q. And that they were so elected in 1976 than 1975
18 respectfully?

19 A. Again, I didn't know their names, no. I knew that openly
20 gay people were first elected to office in the mid-1970's.

21 **MR. BOIES:** Your Honor, we would object to his
22 qualification as an expert in the areas of discrimination
23 against gays and lesbians or in gay and lesbian political power
24 outside of the particular area of initiatives.

25 In the area of initiatives, we think he has been

1 qualified as an expert; but outside of that area, he has not
2 published any peer-reviewed articles. He has not done any
3 research. He is not recognized as an expert in the field. He
4 doesn't even know many of the key facts and people involved.

5 **THE COURT:** It seems to me the witness's
6 qualifications to offer opinion testimony with respect to
7 American politics and California politics, in particular, is
8 not disputed.

9 Implicit in that area of expertise is knowledge of
10 the influence and power of particular groups in American and
11 California politics. And I think it's, therefore, appropriate
12 that he can include in his area of expertise testimony having
13 to do with the role of gays and lesbians in American and
14 California politics.

15 I don't understand that the defendants are offering
16 the witness as an expert in the history of discrimination
17 against gays and lesbians.

18 **MR. THOMPSON:** Correct, your Honor. We are not.

19 **THE COURT:** So to the degree that the witness's
20 testimony spills beyond what he is being offered for and
21 testifying concerning the history of American and California
22 politics and the role of various groups within it, I think I
23 will admit the testimony and weigh that testimony in accordance
24 with what is brought out in direct and cross-examination.

25 So you may proceed, Mr. Thompson.

1 **MR. THOMPSON:** Thank you, your Honor.

2 And at this point I would like to publish
3 demonstrative number one on the screen.

4 (Document displayed)

5 **DIRECT EXAMINATION RESUMED**

6 **BY MR. THOMPSON:**

7 **Q.** And, Professor Miller, what are in the key determinants of
8 political power?

9 **A.** Political power is multi-faceted. It has a lot of
10 different factors that can contribute to power, and I would
11 just list a few of them.

12 One would be, certainly, money; access to lawmakers;
13 the size and cohesion of a group; the ability to attract allies
14 and form coalitions; and the ability to persuade.

15 **MR. THOMPSON:** All right. And I would like to
16 publish demonstrative two.

17 (Document displayed)

18 **BY MR. THOMPSON:**

19 **Q.** And could you explain what is the relative importance of
20 money in the American political system?

21 **A.** I think any political scientist would tell you that money
22 is a critical asset for achieving political power.

23 If you just look at the *Citizen United* case in recent
24 days, the strong reaction by both sides about the changing
25 rules about how money can be used in politics demonstrates

1 clearly that money is an important factor in the political
2 process.

3 Specifically, with respect to elections, either
4 candidate elections or ballot measure elections, money allows a
5 group to be heard; to be able to get out their message to the
6 electorate and to the voters, who make the ultimate decisions.

7 **Q.** And what, if anything, does the Proposition 8 campaign
8 demonstrate about the ability of gays and lesbians to raise
9 money in support of their political goals?

10 **A.** It was striking to me the amount of money that was raised
11 on both sides of the election of Proposition 8. \$43 million
12 were raised and spent by the opponents of Proposition 8, which
13 exceeded very large contributions and expenditures by the No On
14 8 campaign -- I'm sorry, by the Yes On 8. I'm going to get
15 this right yet.

16 **Q.** Now, with respect to your data base that you have
17 collected at the Rose Institute of all the initiatives that
18 have been held in the United States, how many groups have
19 raised more than \$43 million as part of a balloted -- ballot
20 initiative campaign?

21 **A.** Well, it's exceptionally rare. There is no other social
22 issue that's ever involved this kind of money. There has been
23 a few measures involving regulatory issues; Indian gaming,
24 things like that, that have been in this neighborhood or even
25 larger.

1 But for a social issue where there's not sort of a
2 corporate interest on one side or the other that's basically
3 funding the campaign, this is exceptional.

4 **MR. THOMPSON:** And I would like to publish
5 demonstrative three.

6 (Document displayed)

7 **BY MR. THOMPSON:**

8 **Q.** And what is the significance of access to lawmakers?

9 **A.** Again, political scientists would all agree that having
10 access to lawmakers is an important resource for a group, for
11 any group, particularly a minority group. That's, in part,
12 because powerful lawmakers, they have -- time for them is a
13 scarce resource. There's a lot of people who want time with
14 them and so they have to make decisions about how to spend
15 their time, who to give time to.

16 So just getting access in -- where there's a scarce
17 resource, demonstrates that the group has some form of
18 political power.

19 Additionally, access is important because it raises
20 the visibility of the group's issue that they are promoting.
21 If they can get access to the legislature, then they're able to
22 increase the visibility of their issue.

23 I would say third, access is important because it
24 gives the group distinctive ability to persuade the lawmaker.
25 If the -- if the group is shut out, doesn't have an ability to

1 get a meeting with a lawmaker, then it's more difficult to make
2 that group's case. And so access facilitates persuasion.

3 The fourth thing I would say is maybe not as well
4 recognized, but it's partly based on my time studying this and
5 actually working in a couple of legislatures, is that lawmakers
6 have incredible political networks. And if you are an interest
7 group that wants to promote your agenda, getting access to the
8 lawmakers will sometimes facilitate your ability to get
9 connected to other people in that lawmaker's political network
10 and to form a coalition.

11 **Q.** How would that work?

12 **A.** Well, the lawmaker would -- if the lawmaker was
13 sympathetic to the group's objectives, then the lawmaker might
14 say, Well, you should probably -- so, for example, if the gays
15 and lesbians had a particular legislative agenda and they
16 needed to build a larger coalition, the lawmaker was
17 sympathetic, the lawmaker might also have alliances with unions
18 or other groups, and so the lawmaker could set up meetings,
19 make introductions and those sorts of things.

20 **MR. THOMPSON:** I would like to publish demonstrative
21 number four.

22 (Document displayed)

23 **BY MR. THOMPSON:**

24 **Q.** How, if at all, does the size and cohesion of a group
25 affect its political power?

1 **A.** Starting with size. Size is, obviously, an advantage to a
2 group. If a group has larger numbers, and that can be
3 translated into larger number of votes -- and in Democratic
4 majoritarian process, the closer you can get to a majority is,
5 obviously, to your advantage.

6 And that's -- there is a little bit of a caveat about
7 that because if your group is not cohesive -- it can be large,
8 but it can be internally divided as to what its objectives are.
9 So cohesion in addition to size are important assets in
10 attaining political power.

11 **Q.** And for minority groups, to what extent, if any -- because
12 they have by definition a small size -- do they have to rely on
13 coalition partners?

14 **A.** Well, I would say in the American political system, which
15 is pluralistic and you have lots of interest groups, again,
16 this is sort of a Madisonian view of American politics with
17 multiplicity of groups or factions in the society.

18 Basically everybody has to form coalitions and make
19 alliances in order to achieve their political goals. If you
20 are a minority group, particularly a smaller minority group,
21 then coalition building and forming alliances becomes even more
22 important to your attaining your goal's objectives.

23 **MR. THOMPSON:** I would like to publish demonstrative
24 five.

25 (Document displayed)

1 **BY MR. THOMPSON:**

2 **Q.** And ask you: Which groups if any are allied politically
3 with gays and lesbians today?

4 **A.** Based on my analysis of recent political history and the
5 way things work, I would say that the Democratic party over the
6 last decade certainly has become a strong ally of the LGBT
7 rights move in California and, also, nationally.

8 The second important ally for gays and lesbians have
9 been elected officials at all levels of government, from
10 Congress and the White House, all the way down to local
11 governments, state legislatures as well.

12 A third group has been organized labor. And as I
13 examined this, I was struck by the extent to which organized
14 labor as coalesced as a strong ally of the LGBT rights
15 movement, particularly around this area of recognition of
16 same-sex relationships.

17 A fourth group is corporations. And this is
18 increasingly true. The evidence suggests that major
19 corporations are becomingly increasingly allied with the LGBT
20 rights movement.

21 I guess this is the fifth, important ally of gays and
22 lesbians have been newspapers. I have done a systematic
23 investigation of California newspapers, but also national
24 newspapers like the *New York Times* have been important allies
25 of gays and lesbians in the LGBT rights movement.

1 Another asset can be celebrities, because they can
2 provide -- they can garner media attention for the group's
3 interests and provide positive associations for the group.

4 Next would be churches and faith-based religious
5 organizations. These groups are often organized and they can
6 get volunteers to help on political campaigns. And so if you
7 have alliances with churches and faith-based organizations,
8 that can be an important asset for you in attaining political
9 power.

10 And, finally, another group would be professional
11 associations of physicians, doctors, others who can be
12 important allies in the political process as well.

13 **Q.** Let's look at each of those allies one at a time.

14 **MR. THOMPSON:** And I would like to publish
15 demonstrative six.

16 (Document displayed)

17 **BY MR. THOMPSON:**

18 **Q.** And ask you: How powerful is the Democratic party in
19 California today?

20 **A.** Again, this was part of my work on that book *The New*
21 *Political Geography of California*. I looked deeply at this
22 issue and traced how the political balance in the state has
23 shifted from basically a 50/50 situation in 1980 where
24 Republicans and Democrats were comparable politically in terms
25 of their power in the state.

1 That's really changed in the last generation, so that
2 the Democratic party in California is the dominant political
3 party in the state.

4 There's a few statistics that would provide evidence
5 for that.

6 One is voter registration. The most recent
7 statistics I found were from the Secretary of State's office in
8 February of 2009. Democrats were 45 percent of registered
9 voters, 45.5 percent of registered voters in California, where
10 Republicans had dropped to 31.1 percent of the electorate. The
11 balance is either small parties or declined to state. But
12 that's a major gap between Democrats and Republicans in voter
13 registration.

14 A second measure would be elected officials in the
15 state. If you look at the state assembly, the current --
16 actually, this has changed a bit. There has been a couple of
17 elections so that the -- we are at 49 to 29 Democrats to
18 Republicans with one Independent and one open seat. So that's
19 still a very -- it's a large gap between Democrats and
20 Republicans in the State Assembly.

21 In the State Senate, there are 25 Democrats and 15
22 Republicans, a gap of 10 legislators. So the Democrats don't
23 have quite a two-thirds majority in the state legislature, but
24 it's a substantial majority and there's -- there's no
25 filibuster rule or anything like that in the state legislature.

1 If the Democrats want to pass something through the
2 legislature, which the exception of the state budget which
3 requires a two-thirds vote, they are basically able to do
4 anything they want legislatively.

5 At the state constitutional officer level, there are
6 eight separately elected state constitutional offices in
7 California. Five of those eight are currently held by
8 Democrats, from -- the lieutenant governorship is vacant now
9 that John Garamendi has gone to Congress, but the Attorney
10 General, Secretary of State, Treasurer, Controller, the
11 Superintendent of Public Construction -- I think I'm getting
12 those all -- those are all held by Democrats.

13 In the United States Congress, the Congressional
14 delegation from California, which was again a 50/50 -- I think
15 it was 22 to 21 in 1980, Democrat to Republican, there has been
16 a major shift toward the Democratic party. Today 34 of our 53
17 House members from California are Democrat, as well as for many
18 years now both senators, U.S. Senators, Barbara Boxer and
19 Dianne Feinstein are Democrats.

20 And, finally, I would note that in the last
21 presidential election, President Obama won 60.95 percent of the
22 statewide popular vote. That's the largest popular vote
23 percentage in any election by any candidate since 1936 whether
24 FDR won in a landslide election.

25 So this is showing that there's -- really, this is a

1 blue state is the way I would put it.

2 (Document displayed)

3 **Q.** Now, turning demonstrative seven, to what extent, if any,
4 does the Democratic party in California support the political
5 goals of gays and lesbians?

6 **A.** So the Democratic party in its public statements -- the
7 California democratic in its public statements has come out
8 strongly in fair enough of LGBT rights.

9 In its 2008 party platform the California Democratic
10 party said:

11 "We take pride in and celebrate our diversity
12 and work to foster the common values and
13 commitments that unite all people, regardless
14 of their age, cultural heritage, national
15 origin, disability, socioeconomic status,
16 gender, race, sexual orientation or views on
17 religion."

18 The platform went on to say that it pledges:
19 "To fight for all people to live with dignity
20 and equality. California Democrats will
21 support non-discrimination and equality for
22 lesbian, gay, bisexual and transgender people
23 in all aspects of their lives. We support
24 the LGBT community in its quest for the right
25 to legal marriage."

1 Q. Now, beyond the platform, what other recent statements, if
2 any, has the Democratic party made in support of the political
3 goals of gays and lesbians?

4 A. Notably after Proposition 8 was passed in November of
5 2008, the California Democratic Party adopted a resolution --
6 this was in April, April 26, 2009 -- it was titled "Support
7 Same-Sex Couples In Their Right to Marry By Repealing
8 Proposition 8."

9 And the resolution read as follows:

10 "Therefore be it resolved that the California
11 Democratic Party stands in solidarity with
12 same-sex couples and their fight to retain
13 the right to marry by joining with them in
14 urging the voters of the State of California
15 to repeal Proposition 8 within the next two
16 years should it be upheld by the Supreme
17 Court."

18 And by that they meant the California Supreme Court.

19 (Document displayed)

20 Q. All right. Now, turning to demonstrative eight, to what
21 extent have elected officials in California been political
22 allies of gays and lesbians?

23 A. Okay. I can run through the eight statewide elected
24 officials.

25 Starting with Governor Schwarzenegger. I would

1 characterize Governor Schwarzenegger as being an ally of the
2 LGBT community. Now, that's -- when we talk about allies, it's
3 not necessarily on every issue at every time, but on many
4 issues, and increasingly so, the governor has supported the
5 LGBT rights movement.

6 He signed LGBT rights legislation, including most
7 recently legislation which recognized same-sex marriages from
8 other states.

9 Other evidence of his support for the LGBT rights
10 movement is that he opposed the Federal Marriage Amendment. He
11 also opposed Proposition 8.

12 And in this litigation the governor to defend
13 Proposition 8 against the plaintiffs' constitutional challenge.

14 **Q.** Now, who plays a role in controlling access to the
15 governor of California?

16 **A.** The most important gatekeeper would be the governor's
17 chief of staff. That's true in most gubernatorial
18 administrations, and it's true here as well.

19 **Q.** And who is the governor's chief of staff?

20 **A.** The governor's chief of staff is Susan Kennedy.

21 **Q.** And what is your opinion about whether she is an ally of
22 the gay and lesbian political rights?

23 **A.** Ms. Kennedy is, herself, an openly lesbian person and she
24 is, I would guess, a strong advocate of LGBT rights and she has
25 made that clear in public pronouncements as well.

1 Q. Now, with respect to the most recent lieutenant governor,
2 to what extent, if any, was he an ally of gays and lesbians?

3 A. John Garamendi, a long-time elected official in
4 California, former lieutenant governor, now a member of
5 Congress, was clearly an advocate of LGBT rights. He endorsed
6 legislative efforts to make California marriage laws gender
7 neutral, and he also opposed Proposition 8.

8 (Document displayed)

9 Q. All right. And turning to demonstrative number nine, what
10 is your opinion about the level of support that Attorney
11 General Jerry Brown has showed toward the political goals of
12 gays and lesbians?

13 A. So the attorney general, the former governor, potential
14 future governor of California, is in my view a strong ally of
15 the LGBT rights movement.

16 One of the leading LGBT rights organizations in
17 California, Equality California, has recognized the governor --
18 or the Attorney General's support for its movement.

19 The director of Equality California, Greg Kors
20 stated.

21 "Equality California is extremely
22 appreciative of the Attorney General's
23 continued leadership in opposition to
24 Proposition 8 and in support of ending
25 discrimination against lesbian, gay, bisexual

1 and transgender LGBT Californians. The time
2 has come for all elected leaders to follow
3 Jerry Brown's example and stand up for
4 equality for all Americans, regardless of
5 sexually orientation or gender identity.
6 Equality California will continue our
7 position of not endorsing or supporting any
8 candidate for any level of public office who
9 does not completely and unequivocally support
10 total equality for our community."

11 **Q.** Now, what is your opinion to the extent which, if any,
12 Secretary of State Bowen has been an ally of the gay and
13 lesbian political community?

14 **A.** Against, I would say that the Secretary of State has been
15 a notable ally of the community. She has asserted so herself
16 in a 2007 letter recognizing LGBT pride month. The secretary
17 of state wrote:

18 "I am proud to stand with you in the
19 continued fight for equal rights under the
20 law as your secretary of state, as I stood
21 with you at every turn during my 14-year
22 tenure in the legislature on civil rights
23 issues."

24 **Q.** All right. And turning to demonstrative 10.

25 (Document displayed)

1 **Q.** What level of support, if any, has the treasurer shown to
2 the political goals of gays and lesbians?

3 **A.** So, the current state treasurer, Bill Lockyer, former
4 two-term attorney general, former state legislator, has become
5 a strong ally of the LGBT rights movement.

6 In 2003 he endorsed the landmark domestic partnership
7 law, which was enacted by the legislature. He opposed
8 Proposition 8. He made monetary contributions to the No On 8
9 campaign.

10 And when he was running for treasurer, Equality
11 California's executive director Greg Kors wrote:

12 "Bill scored a perfect hundred percent on our
13 candidate questionnaire and we are confident
14 that he will be a hard-working advocate for
15 civil rights and quality for all in the
16 treasurer's office."

17 **Q.** And with respect to the controller, what level of support,
18 if any, has he shown to the political goals of gays and
19 lesbians?

20 **A.** John Chiang, the state controller, is also considered a
21 strong proponent of LGBT rights. The National Gay and Lesbian
22 Task Force stated that:

23 "Chiang has been a steadfast ally of LGBT
24 people throughout his career in public life.

25 An opponent of Proposition 8, he has spoken

1 out for marriage equality for committed
2 same-sex couples through pride season and
3 throughout the year."

4 Q. Turning to demonstrative 11.

5 (Document displayed)

6 Q. What is your opinion that --

7 MR. BOIES: Your Honor, I'm going to object on the
8 grounds that all that's being done is using these
9 demonstratives as leading questions. What's happening is he's
10 putting up a demonstrative. The witness is essentially reading
11 it into the record.

12 MR. THOMPSON: Your Honor, these are not "yes" or
13 "no" questions. This is consistent with what Professor Badgett
14 did and this is the witness -- I'm happy to refer to the
15 documents in the binder, your Honor. I thought this would be a
16 more efficient way to quickly move, and we are making very good
17 progress, I'm happy to say.

18 THE COURT: Well, I wouldn't want to interfere with
19 your progress. You may proceed.

20 (Laughter.)

21 MR. THOMPSON: Thank you, your Honor.

22 BY MR. THOMPSON:

23 Q. So just to quickly round out the picture, Professor, with
24 respect to the superintendent of public instruction, to what
25 extent, if any, has he been an ally of the gay and lesbian

1 political rights movement?

2 **A.** Jack O'Connell, the superintendent, has been a strong
3 ally. Evidence for that was he was on television commercials
4 advocating the defeat of Proposition 8.

5 **Q.** All right. Now, turning to demonstrative 12.

6 (Document displayed)

7 **Q.** How much support, if any, is there in the California
8 legislature for the goals of gays and lesbians?

9 **A.** I think it's fair to say that it's striking, the degree of
10 support for the LGBT rights movement by the California
11 legislature over the past decade, particularly in the
12 legislature's majority Democratic caucus.

13 **Q.** And which was the first state in the union to have an
14 official caucus for openly LGBT state legislators?

15 **A.** California was the state to do that. It was -- there have
16 been eight members of the LGBT caucus over time and there are
17 currently four members of that caucus.

18 **Q.** All right. And turning to demonstrative 13.

19 (Document displayed)

20 **Q.** How supportive are leading local officials in California
21 of the political goals of gays and lesbians?

22 **A.** So there are many local officials who have publicly
23 supported the LGBT rights community -- or the LGBT community
24 and rights for that community.

25 Most notably is the mayor of this city, San Francisco

1 Mayor Gavin Newsome, who is a nationally-recognized advocate of
2 same-sex marriage and the rights of gays and lesbians.

3 The second largest city in America, Los Angeles, has
4 a mayor, Antonio Vallairagosa, who has been a strong advocate
5 of LGBT rights. He publicly opposed Proposition 8 and made a
6 monetary contribution of \$25,000 to the No On 8 campaign.

7 And another example we have seen in this case was the
8 mayor of -- the Republican mayor of San Diego, Jerry Sanders,
9 who clearly publicly is an ally of the LGBT community.

10 **Q.** All right. And turning to demonstrative 14.

11 (Document displayed)

12 **Q.** To what extent, if any, have local governments supported
13 the political goals of gays and lesbians?

14 **A.** So, evidence of this would be advocating legislation that
15 would promote domestic partner benefits or same-sex marriage or
16 both.

17 And a number of governments, including the city and
18 county of San Francisco, cities of Berkeley, Cloverdale, Davis.
19 If you go through the state, it would include in the south, San
20 Diego. In the Los Angeles area, you've got West Hollywood,
21 Long Beach. And so throughout the state many city governments
22 and county governments have supported LGBT rights publicly.

23 **Q.** All right. Very well. And turning to demonstrative 15.

24 (Document displayed)

25 **Q.** To what extent, if any, do gays and lesbians have allies

1 among California's federal representatives?

2 **A.** Again, as I mentioned, many of the California's federal
3 elected officials are supportive of LGBT rights. These would
4 include our two U.S. senators, Senator Barbara Boxer and Dianne
5 Feinstein. House Speaker Nancy Pelosi is also an ally of the
6 LGBT rights movement.

7 **Q.** All right. And turning to demonstrative 16.

8 (Document displayed)

9 **Q.** I would like to shift gears and you had mentioned in the
10 beginning that organized labor was, in your opinion, an ally.

11 Please describe the relationship between the gay
12 rights movement and organized labor?

13 **A.** Again, as I said, I think it's striking the extent to
14 which organized labor has coalesced in support of the LGBT
15 rights movement. There is evidence for this in contributions
16 to ballot measures -- ballot measure campaigns, the No On 8
17 campaign, as well as supporting legislation in the state
18 legislature.

19 So if you look at the roster of every major liberal
20 organization in California, from the California Teachers
21 Association, one of the most powerful interests in the state,
22 the Service Employees International Union, public employees
23 unions as well as private sector unions. AFL/CIO, the
24 Teamsters, the Farmworkers. Basically every major labor
25 organization I can think of has come out publicly in support of

1 the LGBT rights movement.

2 **Q.** All right. And turning to demonstrative 17.

3 (Document displayed)

4 **Q.** How else, if at all, has organized labor supported the
5 rights of gays and lesbians?

6 **A.** Just to take a couple of examples I just mentioned. The
7 California Teachers Association, which has over 340,000 members
8 and is widely considered by people who study California
9 politics to be one of the most powerful interest groups in the
10 state, has promoted same-sex marriage in California. They
11 donated -- the union, out of union dues, donated 1.3 million to
12 the No On 8 campaign. And after the election, they also filed
13 an amicus brief seeking invalidation of Proposition 8.

14 In addition, another large and influential union in
15 California, the California State Council of the SEIU, the
16 Service Employees International Union, donated \$500,000 to the
17 No On 8 campaign and, also, supported same-sex marriage
18 legislation in the legislature and signed an amicus brief
19 seeking the invalidation of Proposition 8.

20 **Q.** All right --

21 **A.** So those would be two examples of major unions in
22 California.

23 **Q.** All right. Now, turning to demonstrative 18.

24 (Document displayed)

25 **Q.** You mentioned newspapers. Please describe the level of

1 support, if any, for the political goals of gays and lesbians
2 among newspapers?

3 **A.** Okay. In connection with my expert report, I looked at
4 the editorial endorsements of the 23 largest newspapers in
5 California by circulation. And of those 23, 21 of the 23
6 endorsed a No On 8 position.

7 Two of the -- the remaining two out of the 23 did not
8 take a position one way or the other.

9 So there was no major newspaper in California that
10 took the Yes On 8 position.

11 And just to mention some of the most major ones, the
12 *Los Angeles Times*, the *San Francisco Chronicle*, the *San Jose*
13 *Mercury News*. These were major urban newspapers in the sort of
14 the more liberal areas of the state.

15 But if you also look at a place like the *Orange*
16 *County Register*, not necessarily known as a liberal newspaper,
17 also came out in opposition to Proposition 8.

18 **Q.** All right. And turning to corporations. How would you
19 describe the relationship between major corporations and the
20 political goals of gays and lesbians?

21 (Document displayed)

22 **A.** I would say that this is another striking development over
23 the past decade or more, which is to say that major
24 corporations have internally in their own employment practices
25 and, also, in their engagement in public policy issues have

1 become increasingly allied with the LGBT rights movement.

2 So evidence of that would be reports put out annually
3 by the Human Rights Campaign, the nation's largest LGBT rights
4 organization. They have done extensive work analyzing the
5 policies and practices of the nation's largest corporations. I
6 think the 2010 survey looked at 590 of these large corporations
7 and they rated them on a number of measures, as to whether they
8 were supportive or not of the LGBT community and LGBT rights.

9 The findings of that report, called the Corporate
10 Equality Index, in 2010 were that 305 of these major
11 corporations achieved a 100 percent rating on this
12 organization's survey. Ninety-nine percent of these employers
13 provide employment protections on the basis of sexual
14 orientation, and another category that was part of the criteria
15 was that -- the extent to which corporations were advocating on
16 behalf of LGBT rights in communities in the political process.

17 The report found that major employers, quote:

18 "Stepped forward in unprecedented ways,
19 including steadfast support for marriage
20 equality in California."

21 **Q.** All right. And let's talk about that specifically; about
22 what corporations did in response to Proposition 8.

23 And turning to demonstrative 20.

24 (Document displayed)

25 **Q.** How did Google respond to Proposition 8?

1 **A.** Okay. Google, which is, as everyone knows, the world's
2 largest internet company and one of the most important
3 businesses in the State of California, typically doesn't take
4 positions on controversial political questions.

5 But prior to the vote on Proposition 8, Sergei Brin,
6 the co-founder of Google, issued a message on the Google blog
7 that urged a no vote on Proposition 8.

8 **Q.** And what about Silicon Valley more generally? What
9 position did they take on Proposition 8?

10 **A.** Okay. Shortly after Google took the stand, other Silicon
11 Valley major players, including Yahoo, Cisco, eBay, sort of the
12 Who's Who of Silicon Valley, the leaders of those organizations
13 formed an organization and came out publicly in opposition to
14 Proposition 8.

15 In October, just about a week before the election,
16 the end of October, they issued a full page ad in the *San Jose*
17 *Mercury News* which read as follows:

18 "As Silicon Valley leaders, we are committed
19 to equality and fairness. We are opposed to
20 Proposition 8 because it would change our
21 state constitution to take away rights from
22 one group of people. Vote no on Proposition
23 8 on November 4th."

24 **Q.** Okay. And turning to the next demonstrative.

25 (Document displayed)

1 Q. To what extent did these words of corporate leaders
2 translate into action?

3 A. So if you conceded action to include making major
4 political contributions, that would be one certainly.

5 If you look at contributions to gay rights
6 organizations, the list of major corporate contributors to
7 Equality California as just one example among many, would
8 include major co-conspirators, such as AT&T, Time Warner Cable,
9 Clear Channel, Kaiser Permanente, Southern California Edison.
10 So this is not just tech companies. This is a wide range of
11 major corporations that do business in California, made
12 contributions according to the Equality California website
13 totaling \$5,000 to \$250,000 or above.

14 Q. Okay. Now, to what extent, if any, has the entertainment
15 industry supported the political goals of gays and lesbians?

16 A. So I would say -- I think it's fair to say that the
17 entertainment industry generally, although maybe not
18 100 percent, has supported the LGBT rights movement. But
19 certainly as an industry, it's been in my view supportive.

20 Some evidence of this is that corporations and
21 individuals in the industry made major financial contributions
22 to the No On 8 campaign or have otherwise supported the
23 movement for same-sex marriage. Some of those people
24 include -- or organizations include Lucas films, David Geffen,
25 Steven Spielberg, Kate Capshaw, Brad Pitt, Ellen Degeneres,

1 Steven King, Michael King and Mr. Reiner, as well.

2 **MR. THOMPSON:** Your Honor, we have come to a logical
3 stopping point. I'm happy to keep going, if the Court would
4 like, but I notice it's getting close to the lunch hour.

5 **THE COURT:** I think it is. All right. Why don't we
6 take until 10 minutes after the house and we will resume then
7 with further examination of Mr. Miler.

8 **MR. THOMPSON:** Thank you, your Honor.

9 **THE COURT:** Very well.

10 **MR. THOMPSON:** Your Honor, I do apologize. There is
11 one thing I wanted to raise. We thought it might facilitate
12 the Court's review of the pink and the yellow. We have next to
13 the pink specified the page and line number that we contend we
14 are designating counter to.

15 In other words, the pink and the yellow don't tell
16 you what were we are designating against. So next to each
17 pink, we have written, Here is the page and the line number
18 that we are countering to. And we thought that would
19 facilitate the Court's review. And if there is no objection,
20 we would like to hand that up.

21 **THE COURT:** I assume no objection, Mr. Boutrous?

22 **MR. BOUTROUS:** No objection, your Honor. What color
23 is it?

24 **MR. THOMPSON:** I'm not sure.
25

1 (Whereupon, document was tendered
2 to the Court.)

3 **THE COURT:** All right. Very well. I will see you at
4 10 minutes after 1:00.

5 (Whereupon at 12:13 p.m. proceedings
6 were adjourned for noon recess.)

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P R O C E E D I N G S

JANUARY 25, 2010

1:13 P.M.

THE COURT: Mr. Thompson, you may continue your examination of the witness.

MR. THOMPSON: Thank you, Your Honor.

And we'd like to publish the next demonstrative.

(Document displayed)

DIRECT EXAMINATION RESUMED

BY MR. THOMPSON:

Q. Professor, what level of support have progressive religions provided to the political goals of gays and lesbians?

A. If we look at progressive religious communities, they have been increasingly supportive of LGBT rights and the rights of same-sex marriage.

Evidence of this would be the California Council of Churches, which is an umbrella organization that includes many faith-based organizations, churches, throughout the state.

And many of those denominations supported -- that -- that organization, in which these denominations are part, supported same-sex marriage and opposed Proposition 8.

Some examples of member organizations include the African Methodist Episcopal Church, the Christian Church, Church of the Brethren, the Greek Orthodox Church, the Presbyterian Church USA, the United Church of Christ, the

1 United Methodist Church.

2 This is not an exhaustive list. It's some of the
3 members of that organization.

4 **Q.** What role, if any, did these organizations play in the
5 Prop 8 campaign?

6 **A.** Well, the member organizations as well as the umbrella
7 organization, many of them were active in the attempt to defeat
8 Proposition 8. And that was evidenced by phone banking and
9 sending out direct mail and other activities, as well as
10 various contributions that they made to the campaign.

11 So I would say that the progressive religious
12 organizations were actively involved in the opposition to
13 Proposition 8.

14 **Q.** In addition to Proposition 8, what if anything have these
15 progressive religions done to support the political goals of
16 gays and lesbians?

17 **A.** Well, California Council of Churches has a lobbying arm.
18 And they have worked within the California legislature to
19 promote legislation in favor of LGBT rights. And including
20 Senator Leno's bill, AB43, to seek to end the ban on same-sex
21 marriage in California.

22 They also -- the organization also filed an amicus
23 brief in the case in the California Supreme Court, challenging
24 Proposition 8 after the election.

25 **Q.** All right. What is your understanding of the intensity of

1 support for same-sex marriage among progressive religious
2 groups?

3 **A.** I think there might be a range. But I think,
4 increasingly, among many progressive religious organizations,
5 there's a -- they've come to the conclusion that this is a
6 social justice issue, a civil rights issue. And it's
7 consistent with their view of the religious faith, that it's
8 important to advocate on behalf of LGBT rights and the rights
9 of same-sex marriage.

10 Some of the denominations that I listed there are
11 somewhat internally divided on this question, and there's
12 debates internally within these churches.

13 I think increasingly you are seeing, among
14 progressive religious organizations, increasing support for
15 LGBT rights.

16 And so there's a high level of intensity in many of
17 these organizations, in they see this as -- some of them see
18 this as their primary work, that this is a major issue of the
19 day, and they want to advocate on behalf of gays and lesbians.

20 **THE COURT:** Excuse me. Mr. Thompson, let me ask, of
21 those denominations that are described in the demonstrative --

22 **THE WITNESS:** The prior one.

23 **MR. THOMPSON:** Let's go back to 23, please.

24 (Document displayed)

25 **THE COURT:** In the first group, do all of those

1 religious denominations perform same-sex marriages?

2 **THE WITNESS:** Looking through the list, no, not all
3 of them do. Some of them -- so, the California Council of
4 Churches is an umbrella organization --

5 **THE COURT:** Which ones do and which ones do not?

6 **THE WITNESS:** Uhm, I would have to take a closer look
7 at that.

8 I believe that the United Church of Christ does.

9 The United Methodist Church is internally divided on
10 this question. And I think they've had retired United
11 Methodist pastors who perform that -- same-sex marriages.

12 I don't know exactly the status for the Episcopal
13 Church, at this point. There has been some recent developments
14 in the Episcopal Church. So I would have to take a closer look
15 at that.

16 But you have a situation where, oftentimes, in
17 California the local denominations and structures of these
18 organizations may have a view on this which is more progressive
19 and liberal than the national or global communion, for example,
20 with Anglicanism.

21 So I would say within California, all these groups
22 have joined the California Council of Churches. California
23 Council of Churches has taken public positions on these issues
24 in favor of LGBT rights and same-sex marriage.

25

1 **BY MR. THOMPSON:**

2 **Q.** Okay. And turning to demonstrative 24, how does the level
3 of religiosity in California compare to other states?

4 **A.** So, this is information from the Pew Research Center.
5 They have done surveys of well-respected organization.

6 And, according to their research, California is one
7 of the ten least religious states in the United States, with
8 over 20 percent of the population, in these surveys, claiming
9 to have no religious affiliation; and a third of Californians
10 saying they seldom or never attend religious services.

11 So I think it's fair to say California is a more
12 secular, less religious state than most of the United States.

13 **Q.** And turning your attention to professional associations,
14 to what extent if any do gays and lesbians have political
15 allies among prominent professional associations?

16 **A.** Uhm, I think it's again fair to say that most of the major
17 professional associations have increasingly allied with the
18 LGBT rights movement and with gays and lesbians.

19 Some examples would be associations of psychologists,
20 psychiatrists, university professors, and bar associations,
21 both national and local bar associations.

22 **Q.** Now, with respect to university professors, how if at all
23 can university professors have an impact as political allies?

24 **A.** Uhm, well, in my experience, professors function in a
25 number of different arenas. One is their teaching function.

1 So they're obviously communicating a perspective on these
2 matters to their students. And that's -- that's a major, I
3 think, role in which persuasion can have a fact -- an effect in
4 making social change.

5 Professors also are often public intellectuals, where
6 they will write opinion pieces or testify before legislative
7 bodies, or so forth.

8 And many professors, both at the state and national
9 level, move in and out of government service themselves. So
10 many go on to serve in, for example, the Administration, and
11 will come back to academy after that.

12 **Q.** Very well. And legal organizations, how if at all can
13 they be political allies for a group?

14 **A.** So lawyers in general are very active in the political
15 process. They oftentimes will run for office themselves, serve
16 in office, be in appointed positions.

17 They also serve as a gate-keeping function for the
18 judiciary. All judges have been lawyers at one time. So
19 that's a gate-keeping function.

20 They also, through the American Bar Association, give
21 ratings for judicial appointments. And so these professional
22 associations have important function in shaping policy or
23 public policy-making arena, as well.

24 **Q.** All right. Now, we have talked about allies. I would
25 like to turn your attention to another determinative political

1 power which you identified, which is persuasion. How if at all
2 does persuasion play as a determinant of power?

3 **A.** Okay. So persuasion, by which I would mean the power of
4 ideas, which is different than the power of contributing money
5 or the power of coercion. The power of one -- one's ideas is,
6 in my view, an important factor that can be brought to bear in
7 gaining political power.

8 And so you have an idea, and you're able to persuade
9 a person in power that your idea is -- should be acted on. And
10 your ability to persuade that lawmaker is critical in the
11 initiative process. That's basically what you've got, your
12 ability to persuade voters of your position on an issue.

13 So, in many different ways, persuasion, the power of
14 one's ideas, is critical in that political process.

15 **Q.** Well, can you provide an example of when the persuasive
16 force of a group's ideas led to political outcome that was
17 favorable to the group?

18 **A.** Uhm, I think one classic example would be the civil rights
19 movement for African Americans, where this was a group that was
20 seen historically to have very little political power, which
21 was in my view correct.

22 And so there was a challenge for how that group could
23 achieve power in the political system. And one of the primary
24 instruments that this movement used was the power of ideas
25 that -- being able to persuade the American people that the

1 norm of equality which Americans deeply hold as a core value in
2 the norm of fairness was being violated in their case. So they
3 were able to make that case through persuasion of lawmakers and
4 the general public, of their case.

5 And so I think the norm of equality is something that
6 can be used in a persuasive way to convince lawmakers of the
7 rightness of your claim.

8 **Q.** All right. Now, we've talked about determinates of power.
9 I would like to switch gears and ask you about the indicia of
10 power.

11 And what success if any have gays and lesbians had in
12 electing candidates of their choice?

13 **A.** Okay. So I'm going to focus on California. And the
14 evidence is that, in this state, there's been increasing
15 success of the LGBT movement in being able to endorse
16 candidates that win elections in California.

17 Some evidence of that would come from Equality
18 California, which regularly sort of assesses the level of
19 progress they've had in, basically, electing candidates of
20 their choice.

21 From the last statewide election posted on the
22 Equality California website, said -- noted that Californians,
23 quote:

24 "Voted into the legislature and top state
25 offices 95 percent of the candidates endorsed

1 by Equality California's Political Action
2 Committee, EQCA PAC. The EQCA PAC endorsed
3 62 candidates for the legislature and state
4 offices. A total of 59 of those candidates
5 prevailed in yesterday's election, including
6 newly-elected Lieutenant Governor John
7 Garamendi, Secretary of State Debra Bowen,
8 Controller John Chiang, Treasurer Bill
9 Lockyer, and Attorney General Jerry Brown."

10 **Q.** How much of a price did the political figures who voted in
11 favor of the same-sex marriage bill pay in the most recent
12 election?

13 **A.** Again, according to Equality California and other sources,
14 all of the 23 incumbents who ran for reelection in the
15 legislature after that vote on same-sex marriage won
16 reelection.

17 So to answer your question, there was no political
18 price, in terms of their reelection, that they paid for that
19 vote.

20 **Q.** All right. Now, turning to California legislative
21 victories, how successful if at all have gays and lesbians been
22 in gaining political victories in the California legislature?

23 **A.** Okay. I have reviewed a range of legislation over time,
24 to protect the rights and interests of gays and lesbians. And
25 over the course of the past decade and more, there have been

1 laws enacted by the California legislature prohibiting sexual
2 orientation discrimination in a range of different areas.

3 So those include employment, housing, public
4 education, and labor organizations, with respect to adoption,
5 foster care, public contracting, insurance, state-funded
6 programs and business services.

7 And these are -- these are just some of the
8 highlights of many different legislative victories that have
9 been achieved in the California legislature, protecting the
10 rights of gays and lesbians.

11 Some other examples would be the hate crimes law,
12 punishment for hate crimes committed on account of sexual
13 orientation; the recognition, as we've said, of domestic
14 partnerships in California, in a series of different victories
15 leading up to the broad domestic partner protections that we
16 have in California today.

17 And, altogether, I've identified over 50 legislative
18 victories for the LGBT community in the California state
19 legislature.

20 **Q.** Now, what is the history of legislation relating to the
21 legal recognition of same-sex couples in California?

22 **A.** So, after the passage of Proposition 22 in 2000, which
23 declared by statute in the Family Code that only marriage
24 between a man and a woman is valid or recognized in California,
25 the California legislature, nevertheless, in two separate

1 bills, both authored by Mark Leno, adopted laws that would make
2 marriage gender neutral in California; basically, attempting to
3 reverse the outcome of Proposition 22.

4 In both instance, Governor Schwarzenegger vetoed
5 those bills. In his veto owe messages he said -- and I think
6 it's been borne out by opinion of the California Supreme
7 Court -- that under the rules, constitutional rules for the
8 initiative process in California, the legislature cannot amend
9 or repeal initiatives adopted by the voters.

10 And so, nevertheless, there was a strong showing in
11 the legislature for changing California's marriage laws, to
12 make them gender neutral or to allow for same-sex marriage.

13 **Q.** When were -- when was the recognition of same-sex couples
14 first achieved as a legal matter in California?

15 **A.** The first domestic partnership law was in 1999. And it
16 protected and gave benefits for domestic partners in
17 California. That was the first of a series of domestic
18 partnerships bills that worked their way through the
19 legislature.

20 **Q.** And when were the first local laws?

21 **A.** At the local level, the City of Berkeley, in 1984, passed
22 this state's first municipal domestic partnership ordinance.
23 The next year, the city of West Hollywood followed with a
24 comparable ordinance. And in the next 15 years, 18 other
25 municipalities, local governments, passed domestic partnership

1 laws.

2 **Q.** And what did AB849 pertain to?

3 **A.** 849, if I'm remembering the number correctly, I think that
4 was the -- one of the bills to allow for same-sex marriage in
5 California to pass through the legislature.

6 **Q.** All right. And how much support did that bill receive
7 from various groups?

8 **A.** If you -- if you look at the bill analyses that are
9 prepared in the legislature, there's a list of organizations
10 that publicly support and oppose bills pending in the
11 legislature.

12 And AB849, which was again one of the bills by then
13 Assemblyman Mark Leno, received support from 224 organizations,
14 including labor union groups, civil rights groups, local
15 governments and other organizations.

16 **Q.** And what was the ultimate fate of that bill?

17 **A.** As I noted, Governor Schwarzenegger vetoed the bill on
18 constitutional grounds.

19 **Q.** Now, how do you respond to the argument of
20 Professor Segura, that gays and lesbians are vulnerable to the
21 initiative process?

22 **A.** Okay. This is, again, my area of primary study and
23 interest. And I've looked at this pretty closely over time,
24 and have developed some pretty well-settled views over time, as
25 well.

1 And it is true that in 2000 and 2008, the LGBT rights
2 movement and gays and lesbians lost ballot measure contests
3 with respect to the definition of marriage in California.

4 The first one, Proposition 22, was to codify the
5 definition of marriage as being between a man and a woman. As
6 I said, Proposition 8, as we know, was to reinstate that
7 definition in the California Constitution.

8 So those are the two times in California where a
9 clearly-defined issue that gays and lesbians took a position on
10 affected them, they were unsuccessful in -- in the initiative
11 or direct democracy context.

12 However, California's -- California voters have not
13 used the initiative process, nor the popular referendum, to
14 repeal or limit the legislature's other broad expansions of
15 LGBT rights. Those that I've just described in some detail, as
16 well as the state's very broad domestic partnership law in its
17 latest iteration in 2005.

18 So it cannot be said that those legislative victories
19 were stripped away by the vote efforts through the initiative
20 process.

21 **Q.** Well, let's say we go back further in history. What is
22 your understanding of the historical examples of when ballot
23 initiatives have come up in California that directly affect the
24 rights of gays and lesbians?

25 **A.** Okay. There have been a number. Probably, most notable,

1 was Proposition 6, in 1978, which was also known as the Briggs
2 Initiative.

3 This measure, by its terms, would have allowed public
4 schools to fire teachers, teachers aides, school
5 administrators, or counselors found to be advocating, imposing,
6 encouraging or promoting homosexual activity or -- publicly or
7 indiscreetly engaging in said acts, as publicly and
8 indiscreetly engaging in said acts.

9 **Q.** What was the vote on that measure?

10 **A.** Okay. So there was a contested campaign. And after the
11 election, there was a successful mobilization against
12 Proposition 6. And the vote was decisive. It was 58 percent,
13 "no" on Proposition 6.

14 **Q.** In the 1980s, which ballot measures if any directly
15 affected the rights of gays and lesbians?

16 (Document displayed)

17 **A.** So these were three measures that were -- directly
18 affected people affected -- infected by HIV virus.

19 And the first one was Proposition 64, in 1986. A
20 follow-up measure was Proposition 69 in 1988. Both of these
21 measures -- I think they were put on the ballot by Lyndon
22 LaRouche -- sought to make persons with HIV subject to
23 quarantine and isolation.

24 The voters decisively rejected both of those
25 measures. The first vote, in 1986, was 71 percent "no" vote.

1 The second vote was a 68 percent "no" vote.

2 **Q.** All right. And, more recently, what efforts if any have
3 there been with respect to California's domestic partnerships,
4 in terms of initiatives that might pertain to those?

5 **A.** I should say, before I talk about domestic partnerships,
6 there was another ballot measure in the 1980s. That was
7 Proposition 102, which would have required doctors of blood
8 banks and other persons to report persons suspected of having
9 the HIV virus. So this was, again, seen as being
10 discriminatory against persons with HIV, and especially by the
11 gay community. And the voters rejected that measure by, again,
12 a large 65.6 percent vote.

13 And so just to summarize the initiatives, those are
14 the only three other ones in California that have been on the
15 ballot that directly affect LGBT persons, and the California
16 voters have rejected decisively all those three measures.

17 **Q.** Now, what examples if any can you provide of measures that
18 would have directly affected the rights of gays and lesbians
19 but never made it to the ballot?

20 **A.** Okay. I describe there was success in the legislature by
21 the LGBT community in attaining domestic partnership laws. And
22 there were conservatives in the public who certainly opposed
23 that legislation.

24 And there was the potential, certainly, if the
25 public -- if the conservatives thought that the public would

1 support either a repeal through the popular referendum process
2 or initiative to repeal those domestic partnership benefits,
3 they could have gone to the ballot and done that. But there
4 was no ballot measure to repeal domestic partnership benefits
5 in California.

6 **Q.** All right. Now, I'd like to switch gears and ask you some
7 questions about developments in other states.

8 And what is the status of hate crimes legislation in
9 the United States today?

10 **A.** Uhm, so, at the state level, there have been 30 states
11 that have adopted hate crimes legislation. That's setting
12 aside the recent federal legislation.

13 But at the state level, there's independently 30
14 states have adopted the state level hate crime legislation.

15 **Q.** What is the status of employment discrimination
16 prohibitions on the basis of sexual orientation?

17 **A.** Okay. This is an area where you have to look at both the
18 state level and also the local level.

19 At the state level, 21 states have adopted, across
20 the board, employment protections against discrimination on the
21 basis of sexual orientation in employment.

22 Another nine states have adopted -- in addition to
23 the 22, another nine states have adopted protections against
24 sexual orientation discrimination in public employment.

25 And, then, in addition to those states, there have

1 been at the local level many city and county governments that
2 have adopted nondiscrimination laws, as well.

3 **Q.** Are those inside or outside of the 21 states that have
4 statewide prohibitions?

5 **A.** In addition to the 21 states with the statewide
6 prohibitions, these are outside. And that's 75 additional
7 states -- additional local governments in those states without
8 statewide laws in this area, have adopted local ordinances to
9 that effect.

10 **Q.** To what extent if any are there legally enforceable
11 contractual guarantees against employment discrimination on the
12 basis of sexual orientation?

13 **A.** Okay. As I mentioned, many major corporations, as part of
14 their employment policies and practices, have employee
15 handbooks where they prohibit discrimination in employment on
16 the basis of sexual orientation.

17 And in many states there are enforcement provisions
18 that require those employee-based protections be enforced,
19 those contractual protections be enforced in court.

20 **Q.** All right. And what is the status of state employee
21 domestic partnership benefits?

22 **A.** So, according to a survey by the Human Rights Campaign,
23 over 20 states have adopted state employee domestic partnership
24 benefits, at this point.

25 **Q.** In recent years, how have openly-gay politicians fared at

1 the ballot box?

2 **A.** This is another example where I see sort of a trajectory
3 of increasing success and power by the LGBT-rights movement.

4 There is an organization called the Gay and Lesbian
5 Victory Fund, which monitors these things. Not only keeps
6 track of how many gay and lesbian -- openly gay and lesbian
7 candidates are running for office, but also promotes their
8 candidacies.

9 In 2008, that organization reported that 80 out of
10 111 openly-LGBT candidates were elected to office. And last
11 year -- this was at the time the report was issued -- at least
12 49 out of 79 openly-LGBT candidates were elected to office.

13 **Q.** What prominent examples of openly gay and lesbian
14 individuals being elected to office can you provide?

15 **MR. BOIES:** Your Honor, I'm going to object. This is
16 outside the scope of his expert report. It is also information
17 that he did not know at the time of his deposition.

18 I mean, at the time of his deposition he didn't know
19 what the antidiscrimination laws were if any in these states.
20 He didn't know how many people had been elected. He didn't
21 know who had been elected. He didn't know any of the
22 information that he's now reading off these charts.

23 So I think that it is objectionable on the grounds
24 that it is not part of his report. And under Rule 26, I think,
25 it is not admissible.

1 **MR. THOMPSON:** Your Honor, I would respond by saying,
2 certainly, we would cheerfully stipulate that he didn't know
3 the election results in 2009.

4 I asked Professor Segura about the 2009 election
5 results. And I think to have the most recent information that
6 Professor Segura's already testified to is relevant.

7 And, in addition, I reject the characterization that
8 he did not have any opinions about the extensiveness of these
9 laws.

10 **MR. BOIES:** Your Honor, I'm not talking about the
11 2009 laws. I'm talking about the laws that existed at the time
12 his deposition was taken. The anti-discrimination laws. He
13 didn't know what they were. He didn't know what states had
14 them. He didn't know whether they protected gay and lesbian
15 people as well as they protected other minorities.

16 This is all stuff that he has developed since --

17 **THE COURT:** Is this not a matter that you can take up
18 on cross-examination?

19 **MR. BOIES:** It is, Your Honor. It is, Your Honor.
20 On the other hand, we've had an awful lot of objections about
21 Rule 26. And I do think that this goes beyond the scope. But
22 I agree I can take it up on cross.

23 **THE COURT:** All right. Very well. Proceed,
24 Mr. Thompson.

25 **MR. THOMPSON:** Thank you, Your Honor.

1 **BY MR. THOMPSON:**

2 **Q.** Now, let's shift gears and talk about developments at the
3 national level.

4 How do you respond to Professor Segura's argument
5 that gays and lesbians are politically powerless at the
6 national level?

7 **A.** In my view, that's an incorrect assessment. I believe
8 that gays and lesbians do have power at the national level.

9 **Q.** Please describe recent events in Congress that pertain to
10 your opinion.

11 **A.** So, one important event would be the passage in Congress
12 this last year of the Matthew Shepard Hate Crimes Act. That's
13 something that has been a priority of the LGBT community for
14 some time. And this was enacted over some strong opposition in
15 Congress by the Congress this past year. And to me that's a
16 demonstration of political power by the LGBT community.

17 **Q.** All right. And what other legislation if any would you
18 point to that reflects political power of the LGBT community?

19 **A.** Okay. So, again, what I'm describing is what I would call
20 and consider to be upward trajectory of power in these areas.

21 So a number of priorities for the LGBT community is
22 to repeal the Don't Ask, Don't Tell restriction on military
23 service, to repeal the Defense of Marriage Act. And there have
24 been the Employment Non-Discrimination Act, as well, as another
25 important priority.

1 In each of these areas, there's been increased
2 Congressional support for these legislative objectives. And so
3 if you look at, beginning with the -- the Hate Crimes Act, that
4 was legislation that was adopted this past year. The Domestic
5 Partnership and Benefits and Obligations Act of 2009 is another
6 important one, as well.

7 So, in each of these cases, there has been increasing
8 co-sponsorships. The legislation is moving. In addition,
9 you've got commitments from the leadership of Congress to move
10 forward in these areas, and from the president of the
11 United States to support them.

12 So on these top priorities of the LGBT community,
13 there's evidence that there is increasing political power by
14 that community.

15 **Q.** Well, let's focus on President Obama. What if anything
16 has President Obama done in response to the political goals
17 sought by gays and lesbians?

18 **A.** So, the first important act he did in this area was to
19 sign the Matthew Shepard bill. There's a major signing
20 ceremony at the White House.

21 He's also appointed openly gay and lesbian members of
22 his administration. He -- to important positions.

23 He has had a major address of the Human Rights
24 Campaign, this past year. He again asserted his support for
25 the LGBT community, and made some commitments about his

1 willingness to support their political objectives and his
2 commitment to, for example, Don't Ask, Don't Tell during his
3 administration.

4 So these are a few. Some other ones are proclaiming
5 Gay Pride Month. So in his first year in office, the president
6 has given evidence of support for the LGBT community.

7 Now, I understand that some members of the community
8 are -- they don't believe that he has given as much support as
9 they think he should. But I think by an objective standard we
10 would have to say that the President has given significant
11 support to the LGBT-rights movement.

12 **Q.** What is your opinion about the level of support that
13 speaker Nancy Pelosi has extended to the LGBT-rights movement?

14 **A.** Again, I would say that she is an ally of the movement.
15 She has consistently supported legislation to protect the
16 rights of LGBT persons. And the passage of the Matthew Shepard
17 Act was another example of the speaker being able to move the
18 bill through the House of Representatives.

19 **Q.** Okay. Now, I would like to switch gears and ask you about
20 trends and trajectories of political power.

21 In the aftermath of Proposition 8, what was the
22 reaction of some of the leading same-sex marriage advocates in
23 California, to the trends in public opinion in this area?

24 **A.** Okay. So, obviously, the proponents of same-sex marriage
25 were highly disappointed by the outcome of Proposition 8. But

1 there were some in the movement who said, We have to step back
2 a little bit and look at the progress that we've made.

3 And one of them was Senator Mark Leno. In an
4 interview, Senator Leno said, quote:

5 "We picked up 18 points of support for
6 marriage equality on November 4th.

7 Proponents of Proposition 8 lost 18 points of
8 support. The identical 14 words that were on
9 Proposition 8 were on the ballot in
10 Proposition 22 in 2000. We lost by 22 points
11 in 2000. So in just eight years we've turned
12 the dial so that we lost by just four
13 percentage points. Our success is in that 18
14 points, and they're never getting that back.
15 It's only moving in the right direction.
16 What an uncommon phenomenon to be battling
17 this war and to know without a doubt or
18 debate that we will win."

19 **Q.** Now, please, describe trends in public opinion relating to
20 support for the political goals of gays and lesbians.

21 **A.** To put it in general terms, I would say that the public
22 has demonstrated increasing support for political objectives of
23 LGBT persons.

24 And that can be measured in a number of different
25 ways, with respect to legal recognition of same-sex

1 relationships, for employment nondiscrimination. On a wide
2 range of issues, the polling data indicates increasing public
3 support for nondiscrimination and for protection of the rights
4 and interests of LGBT persons.

5 **Q.** What has the policy institute of the National Gay and
6 Lesbian Task Force Foundation found in this regard?

7 **A.** Okay. This was their analysis of the American National
8 Election Studies data in 2000. This is, again, a major
9 LGBT-rights organization.

10 And in a report analyzing the -- the National
11 Election Studies data, that organization found that:

12 "Public attitudes toward three key gay and
13 lesbian rights issues have undergone a
14 striking liberalization over the past decade.
15 Public support for adoption rights, the
16 rights of gays and lesbians to serve in the
17 military, and sexual orientation
18 nondiscrimination laws has increased
19 substantially."

20 And that was in 2000, and there is no evidence that
21 that trend has diminished over time.

22 **Q.** And we've talked today some about political power.

23 What is your definition of political powerlessness?

24 **A.** So, this definition is drawn from the Supreme Court's
25 decision in Cleburne, from 1985. And by that definition,

1 political powerlessness indicates no ability to attract the
2 attention of the lawmakers.

3 **Q.** What is your opinion about the appropriateness of the
4 Supreme Court's use of that test?

5 **A.** Well, this was --

6 (Mr. Boies stands.)

7 **THE COURT:** Sustained.

8 (Laughter)

9 **BY MR. THOMPSON:**

10 **Q.** What is your bottom-line conclusion about whether gays and
11 lesbians have the ability to attract attention of lawmakers in
12 California?

13 **A.** In my view, the evidence that we've just gone through and
14 discussed indicates that gays and lesbians have the ability to
15 attract the attention of lawmakers in California.

16 **Q.** And what is your bottom-line conclusion as to whether gays
17 and lesbians have the ability to attract attention of lawmakers
18 nationally, at the federal level?

19 **A.** Again, surveying the evidence, it is my opinion that gays
20 and lesbians have the ability to attract the attention of
21 lawmakers at the federal level, as well.

22 **MR. THOMPSON:** Your Honor, no further questions.

23 **THE COURT:** Very well.

24 Mr. Boies, you may cross-examine.

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

1 African Americans, correct?

2 **A.** That's correct.

3 **Q.** And would support rights for Native Americans, correct?

4 **A.** That's correct.

5 **Q.** Now, despite all those allies, Proposition 8 did pass,
6 correct?

7 **A.** Yes, it passed.

8 (Laughter)

9 **Q.** Now, do you have a -- do you have an opinion as to
10 whether, if the California legislature and the California
11 governor were able to do so, that they would have enacted
12 legislation that permitted gay and lesbian marriage?

13 **A.** Well, the legislature voted to that effect. And so my
14 view is that, most likely, they would have done it if they had
15 the constitutional ability to do so.

16 The governor has indicated that he supports same-sex
17 marriage. So under those circumstances, it would seem so.
18 But, again, it's somewhat a hypothetical because we don't
19 actually know. We were operating under one set of rules, and
20 would have to speculate a little bit as to what the outcome
21 would be were it not for Prop 22.

22 **Q.** Yes. And it may be that because of that you don't have an
23 opinion on the issue. But what I'm doing is, I'm asking you,
24 as somebody who has been brought into this court as an expert
25 by the defendants, whether you have an opinion as to whether in

1 the absence of Proposition 8 and the absence of Proposition 22,
2 there would be legal gay and lesbian marriage in California
3 today?

4 **A.** I -- I think it's easier to answer for the legislature
5 than for the governor. I think for the legislature it's pretty
6 clear that the legislature would. This legislature would enact
7 gender-neutral marriage laws in California.

8 For the governor, it's a little harder to say. But
9 given his public statements in support of same-sex marriage, I
10 think it's probably fair to say that he would have signed that
11 legislation.

12 **Q.** Okay. Now, is it -- is it fair to say that you've gotten
13 a lot more information about this area than you had at the time
14 your deposition was taken?

15 **A.** I've done further investigation of these matters in the
16 past six weeks. Yes, that's true.

17 **Q.** For example, at your deposition, you did not know how many
18 states had laws prohibiting discrimination on the basis of
19 sexual orientation in employment, housing and public
20 accommodations, correct, sir?

21 **A.** Uhm, part of the problem in my answer to that question was
22 I didn't know what the definition that the questioner was
23 using, whether he was speaking about statewide legislation, or
24 whether that could include local legislation as well.

25 As I indicated on my direct examination, there are

1 many states that do not have statewide protections, but have
2 local municipalities and local governments that provide
3 protection in those areas.

4 **Q.** Sir, let me direct your attention to page 197, of your
5 deposition, which is at tab 1 of your binders.

6 **A.** I'm sorry, which tab is it?

7 **Q.** 1.

8 **A.** I don't have tab 1. I've got binder 2 and 3.

9 **Q.** We will get you tab 1.

10 **A.** Thank you.

11 Okay. And which page is it?

12 **Q.** Page 197, line -- lines 18 to 23:

13 **"QUESTION:** I was asking about protection
14 from discrimination on the basis of sexual
15 orientation. And to be more specific, I'll
16 say in employment, housing, public
17 accommodations.

18 **"ANSWER:** Okay. Phrased that way, I haven't
19 done an investigation and couldn't say."

20 Did you give that testimony under oath, sir?

21 **A.** Yes, I did.

22 **MR. THOMPSON:** Your Honor, for the rule of
23 completeness, I would like to provide the context of the prior
24 question and answer, where he was asked on line 7:

25 "In how many states has the state legislature

1 not enacted a law protecting gays and
2 lesbians from discrimination on the basis of
3 sexual orientation sexual orientation?

4 And he answered:

5 "I would be surprised -- again, I'm not
6 prepared to make conclusions on the
7 legislation of all the 50 states, but given
8 what I know about the advancement of things
9 like adoption laws, domestic partnership
10 laws, marriage in some states, I think it
11 would be like -- be unlikely that there are
12 more than half the states where there are no
13 protections for gays and lesbians. But,
14 again, I would like to take a closer look."

15 **BY MR. BOIES:**

16 **Q.** And you had not taken that closer look at the time of your
17 deposition, correct, sir?

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

19 **Q.** And, indeed, going back to the question and answer
20 immediately before what your counsel just read, going back to
21 line 22 on page 196:

22 **"QUESTION:** In how many states is there no
23 state law providing for protection from
24 discrimination on the basis of sexual
25 orientation?

1 **"ANSWER:** I think that was already asked and
2 answered, as I recall.

3 **"QUESTION:** I may have forgotten your answer.
4 You don't know the number?

5 **"ANSWER:** I don't know the number, yeah."

6 **A.** I apologize you're going to have to point me, again, to
7 the line that we're at.

8 **Q.** Line 22, page 196.

9 **A.** Okay.

10 **Q.** Did you give that testimony under oath at your deposition,
11 sir?

12 **A.** I wasn't following you, so I'm going to have to read it
13 through again. I'm sorry.

14 **Q.** Sure. Page 196, line 22.

15 **A.** Yes.

16 **Q.** Do you have that?

17 **A.** Yes, I do.

18 **Q.** (As read)

19 **"QUESTION:** In how many states is there no
20 state law providing protection from
21 discrimination on the basis of sexual
22 orientation?

23 **"ANSWER:** I think that was already asked and
24 answered, as I recall.

25 **"QUESTION:** I may have forgotten your answer.

1 You don't know the number?

2 **"ANSWER:** I don't know the number, yeah."

3 Did you give that testimony under oath at your
4 deposition?

5 **A.** That's my testimony. I -- I did have --

6 **Q.** Thank you, sir.

7 **A.** -- in my report, information about state-level protections
8 of this type.

9 Part of the problem was, I wasn't sure about local
10 nondiscrimination laws.

11 **Q.** Yes.

12 **A.** And so --

13 **Q.** And you didn't say that at the deposition, did you, sir?

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

15 **Q.** No. And, again, you do understand I'm focusing not on
16 what somebody wrote in your report or what was on those slides
17 that you read. I'm focusing on what was in your mind at the
18 time of your deposition, the answers that you gave at your
19 deposition. You understand that's what I'm asking you about?

20 **A.** Yes. And what I wrote in my report is something I
21 investigated myself.

22 **Q.** Investigated yourself?

23 **A.** Yes, I did.

24 **Q.** And you didn't go over it with counsel at all; is that
25 your testimony?

1 **A.** Not that part. I didn't discuss that part of my report
2 with counsel.

3 **Q.** What parts did you discuss with counsel?

4 **MR. THOMPSON:** Objection, Your Honor.

5 We have a stipulation in this case, entered by the
6 Court, indicating that communications between counsel and
7 expert witnesses are not to be inquired into. And this line of
8 questions is violative of the Court's order.

9 **MR. BOIES:** Your Honor, he opened the door. He was
10 the one who said, "I investigated it myself." He's the one
11 that made the assertion that this was all his work product.

12 In the absence of that, I would agree with Counsel.
13 But he can't have it both ways.

14 **MR. THOMPSON:** Well, Your Honor, he -- he made the
15 statement he had no communication, whatsoever, in response to a
16 question by Mr. Boies, who had inferred that, oh, you're
17 reading something someone else had written. So I think this is
18 inconsistent with the stipulation.

19 **THE COURT:** I think it's appropriate for counsel to
20 object to communications that the witness had with counsel.
21 But I do think the witness has also opened up the door to the
22 issue of what it is that he himself investigated and what he
23 did not personally investigate. And I believe that was the
24 tenor of Mr. Boies's question.

25 **MR. BOIES:** It was exactly, Your Honor.

1 **MR. THOMPSON:** And no objection to that, Your Honor.

2 **THE WITNESS:** I investigated everything that was in
3 my report.

4 **THE COURT:** I beg your pardon, sir?

5 **THE WITNESS:** I investigated everything that was in
6 my report.

7 **THE COURT:** Personally?

8 **THE WITNESS:** Personally.

9 **BY MR. BOIES:**

10 **Q.** Personally investigated it. For example, every statement
11 in there is something that you personally investigated; is that
12 true?

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

14 **Q.** For example, in your -- in your rebuttal report, you cite
15 a number of documents.

16 **A.** I don't have my rebuttal report in front of me.

17 **Q.** It's tab number 2.

18 **A.** Okay.

19 **Q.** And at the end you have an index of materials considered,
20 correct, sir?

21 **A.** That's correct.

22 **Q.** And were some of these materials provided you by counsel,
23 or did you find all of them yourself?

24 **A.** Uhm, most of these I found by myself.

25 **Q.** That wasn't my question, sir. Remember my question?

1 A. If you can repeat it to me.

2 Q. Sure. Were all of these materials, materials that you
3 found yourself? Or were some of them provided you by counsel?

4 A. Some of them were provided for me by counsel. I found
5 most of them myself.

6 Q. Okay. Now, would you on the index of materials
7 considered --

8 A. I'm sorry?

9 Q. On the index of materials considered --

10 A. Yeah, I have it here.

11 Q. Would you just go down -- and they are numbered, right?

12 A. Yes, they are.

13 Q. Would you go down and just circle the ones that were --
14 that you found yourself, were not provided by counsel. Just
15 circle the ones you found yourself. Circle the number.

16 A. Yes. I'm moving through this, but I'm having some
17 difficulty with some of the ones. I can't recall if I found
18 them or whether I was provided by counsel.

19 Q. Just put a question mark next to those.

20 A. Okay. (Witness complies.)

21 Okay. I have looked through it.

22 **MR. BOIES:** Thank you very much.

23 Your Honor, could counsel approach? We could both
24 approach and just take a look at what he's marked.

25

1 **BY MR. BOIES:**

2 **Q.** Let me just ask a clarifying question.

3 **A.** Yes.

4 **Q.** What does the -- the numbers 161 through 172, you have put
5 question marks next to them, and then you've drawn a line down
6 them. Can I ask you to explain what that means?

7 **A.** Yes. Most of the question marks I can't recall one way or
8 the other whether I individually found that myself or whether I
9 first received it from counsel.

10 On those, I don't remember seeing anything that said
11 Form 990 on it, that I investigated myself. And so I put those
12 as non-question marks. Those are things I did not find myself.

13 **Q.** Okay. And I think it is clear, but just to be certain,
14 where you've drawn the line around 233 through 237, that's
15 meant to mean they are all question marks?

16 **A.** Yeah. You'll be seeing more of those, as I was trying to
17 move things along.

18 **Q.** Sure. I think that's an easy way to do it, and I think
19 understandable.

20 So the 259 through 271 are question marks?

21 **A.** That should be 272.

22 **Q.** Okay. Thank you.

23 **MR. BOIES:** Your Honor, at a break we'll mark that as
24 the deposition so the record is clear.

25 **THE COURT:** Very well. That will be marked -- those

1 pages as, what, PX794A? Would that be --

2 **MR. BOIES:** Yes.

3 **THE COURT:** -- a fair designation? PX794A.

4 (Plaintiffs' Exhibit 794A marked for identification.)

5 **BY MR. BOIES:**

6 **Q.** Now, at the time of your deposition, you were not aware of
7 how many of the 10 most populace states had no state law
8 protecting gays and lesbians from discrimination on the basis
9 of sexual orientation, correct, sir?

10 **A.** I didn't know how many had statewide laws, no.

11 **Q.** And when you say you didn't know how many had statewide
12 laws, the -- let me ask you to look at page 193 --

13 **A.** Deposition.

14 **Q.** -- of your deposition.

15 **A.** Okay.

16 **Q.** And line 17 through 21:

17 **"QUESTION:** Of the ten most populace states
18 in the United States, how many have no state
19 law protecting gays and lesbians from
20 discrimination on the basis of sexual
21 orientation?

22 "I don't know the answer to that question."

23 Did you give that testimony under oath at your
24 deposition?

25 **A.** Again --

1 Q. Please begin with a yes or no answer, sir.

2 A. Well, that was my answer: Yes.

3 But, again, there's some confusion as to what the
4 term -- I had some confusion as to what the term was that
5 Mr. Goldman was using.

6 Q. Did you ask him to clarify?

7 A. Well, I think we -- we had a couple of back and forths
8 about that. And I said that I thought there were some -- if we
9 included adoption provisions, et cetera. And I wasn't quite
10 clear as to what he was referring to.

11 And I probably should have, in that -- at that moment
12 of the deposition, gone back and asked for additional
13 clarification. But, at that point, I just said I didn't know.

14 Q. Well, sir, you can -- you can look at the pages
15 immediately preceding this, if you want.

16 Is there any point on page 193 or 192, or going back
17 to 191 or 190, when you talk about adoption? You talk about
18 adoption on page 190, right? Let me read the question,
19 question at line 7 of 190:

20 "I understand that, but you just told me
21 there is no state in which there are no
22 protections for gays and lesbians. And I'm
23 asking what you have in mind. Where there
24 are no protections on the basis -- no
25 protections against discrimination on the

1 basis of sexual orientation; no hate crime
2 statutes for perceived sexual orientation.
3 What protections are there that you have in
4 mind?

5 **"ANSWER:** Well, it would include a wide range
6 of things, in terms of allowing same-sex
7 couples to adopt children. Just sort of
8 looking through the protections that are
9 available in California, on page 15 and 16,
10 this is a long list. I recognize that
11 California has broader protections than many
12 states, but I can't say with certainty, in
13 response to your question, that there's any
14 state that has no equivalent to any of these
15 protections."

16 You gave that testimony, correct?

17 **A.** Yes, I did.

18 **Q.** And then when you were asked on page 193:

19 **"QUESTION:** Of the ten most populace states
20 in the United States, how many have no state
21 law protecting gays and lesbians from
22 discrimination on the basis of sexual
23 orientation?"

24 And you said:

25 "I don't know the answer to that question."

1 There wasn't any issue about whether you were talking
2 about statewide laws or not, correct?

3 **A.** Well, in the phrasing of the question, he doesn't say one
4 way or the other.

5 **Q.** And you don't -- and you don't ask him?

6 **A.** No. I probably should have.

7 **Q.** Let me just be sure I have your testimony.

8 If the question had been: Of the ten most populace
9 states of the United States, how many have no statewide law
10 protecting gays and lesbians from discrimination on the basis
11 of sexual orientation, would you have had had an answer to that
12 question?

13 **A.** I'm not sure that I would have had an answer to that
14 question --

15 **Q.** Okay.

16 **A.** -- on the top ten.

17 When we were talking about is it more than 20, less
18 than 20, those kinds of things, that's where I had confusion as
19 to how many states had protections against discrimination. I
20 was thinking in terms of the local level as well as the
21 statewide level.

22 **Q.** And your answer here was that you didn't know the answer,
23 correct?

24 **A.** To which question?

25 **Q.** To either question. You didn't know the answer to either

1 of those questions at your deposition, did you?

2 **A.** To the questions with respect to the top ten states?

3 **Q.** Yes.

4 **A.** I did not know.

5 **Q.** Okay. And you've just gone through the materials you
6 relied on. And none of those materials provide the information
7 that is on demonstrative 33, correct?

8 **A.** I think -- I think that's incorrect.

9 **Q.** Okay. Which of the materials that you relied on provide
10 that employment discrimination prohibition is in 21 states, and
11 75 localities in remaining states have protections?

12 **A.** The 21 states is information provided by the Human Rights
13 Campaign.

14 **Q.** Where is that in your list of things relied on? Which one
15 is that?

16 **A.** Let me see if I can find it.

17 **Q.** It's tab 2.

18 Are you referring to number 195, or 196, or 194?

19 Each of which is a Human Rights Campaign --

20 **A.** I think I had it wrong. I meant the National Gay and
21 Lesbian Task Force.

22 **Q.** The National Gay and Lesbian Task Force is what you meant?

23 **A.** I'm trying to remember where I got that information about
24 the 21 states. It's in my report. That was something I
25 considered at the time. I could go back to the report, if I

1 had it here. Here it is.

2 **Q.** Your report is there. What I'm asking is where you got
3 that information.

4 **A.** It should -- should be in the report.

5 It's paragraph 99 of the report. And I was going
6 through the Human Rights Campaign website, and there's a link
7 to laws and elections. And that's where I found the
8 information about the nondiscrimination laws.

9 **Q.** And what it says here --

10 **A.** As well as other civil union laws, domestic partnership.
11 These are grouped together on the Human Rights Campaign
12 website.

13 And so there's some confusion to me as to what we're
14 talking about, because they have got these different maps of
15 the United States, with states coded by color, as to whether
16 they have particular protections for gays and lesbians.

17 **Q.** And what did you do to try to resolve that confusion?

18 **A.** Well, I noted it in my report as clearly as I could. And
19 breaking them out, I think I -- I could read it for you in 99.

20 **Q.** Well, you don't have to read number 99.

21 The question is: Do you say in 99 that there's
22 confusion?

23 **A.** No. I say:

24 "31 states and the District of Columbia have
25 adopted laws punishing hate crimes. 21

1 states and the District of Columbia have
2 adopted laws to prohibit employment
3 discrimination on the basis of sexual
4 orientation."

5 (Reporter interrupts.)

6 **Q.** To move things along, it's not necessary to read it into
7 the record.

8 **A.** Well, I'm trying to be responsive.

9 **Q.** My question --

10 **A.** Yes.

11 **Q.** You said there was confusion. Do you recall that?

12 **A.** I was confused about the question because there's various
13 different states have various different laws with respect to
14 protections on the basis of sexual orientation.

15 **Q.** Let me try to put a question that, hopefully, will not be
16 confusing.

17 You recognize that in certain states with protection
18 against discrimination against minorities, some of those states
19 do not provide protection for gays and lesbians, or provide
20 narrower protection for gays and lesbians, correct?

21 **A.** I'm sorry. I thought there might be a double negative.
22 Can you repeat that.

23 **Q.** Sure.

24 Maybe the best way to do it is to direct your
25 attention to your deposition.

1 **A.** Okay.

2 **Q.** Page 198, line 22:

3 **"QUESTION:** Do you know whether in many
4 places where laws prohibit discrimination
5 based on sexual orientation, the protections
6 are narrower than laws in the same
7 jurisdiction that prohibit discrimination on
8 the basis of race or sex?

9 **"ANSWER:** Can you define what you mean by
10 'narrower.'

11 **"QUESTION:** For example, they may cover fewer
12 forums or arenas of potential discrimination.
13 They may cover fewer actors. They may be
14 subject to broader exceptions. Those would
15 be some examples.

16 **"ANSWER:** So I haven't looked closely at
17 these other states to be able to form an
18 opinion as to whether the protections for
19 gays and lesbians in those states where they
20 are available are narrower than for other
21 minority groups."

22 Do you see that?

23 **A.** Yes, I do.

24 **Q.** And did you give that testimony under oath at your
25 deposition?

1 **A.** Yes, I did.

2 **Q.** Now, you talked about the extent to which gays and
3 lesbians had been elected to office, in your direct testimony.
4 Do you remember that?

5 **A.** Yes.

6 **Q.** And at your deposition do you recall being asked whether
7 or not gays and lesbians are underrepresented in elected office
8 nationwide?

9 **A.** I believe I was asked that, yes.

10 **Q.** And do you recall that you didn't know the answer to that
11 at that time?

12 **A.** I remember that I didn't have a good answer to give,
13 because it's a difficult question, actually.

14 **Q.** And do you have an answer for that today?

15 **A.** I can explain why it's a difficult question for me to
16 answer.

17 **Q.** No. I don't need you to explain why you don't have an
18 answer. I'm simply trying to find out if you do have an
19 answer.

20 **A.** I have an answer, yeah, I guess.

21 **Q.** Are they underrepresented today?

22 **A.** My answer is: I don't know because it's difficult to
23 figure up either the numerator or denominator, if we're
24 thinking about whether the group is -- has -- what the ratio is
25 between gays and lesbians in public office and gays and

1 lesbians in the United States.

2 **Q.** Well, sir, take California. You know that no openly gay
3 or lesbian person has ever, in the history of the state, been
4 elected to statewide office, correct, sir?

5 **A.** No openly-gay person, that's correct.

6 **Q.** Not governor, not lieutenant governor, not attorney
7 general, not senator, correct, sir?

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

9 **Q.** So in that case, whatever the denominator would be, the
10 numerator would be zero, correct?

11 (Laughter)

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

13 **Q.** Now, you talked about what you referred to as the upward
14 trajectory of gays and lesbians. Actually, you referred to it
15 as the LGBT -- LGBT community. Do you recall that?

16 **A.** In my testimony today?

17 **Q.** Yes.

18 **A.** Yes.

19 **Q.** In fact, throughout your testimony you were referring to
20 the LGBT community, correct?

21 **A.** That's correct.

22 **Q.** Is that a term that you use at all in your expert report?

23 **A.** I don't recall. I believe so.

24 **Q.** You do believe so?

25 **A.** But I would have to go back and look at it.

1 Q. Maybe when we take a break you can go back and see how
2 many times if at all you use that term.

3 Have you ever used that term in any of your academic
4 writings?

5 A. Not in my writings. In my classes I do.

6 Q. Do you ever use that term in your deposition?

7 A. "LGBT"? I don't recall.

8 Q. Let me go back to the national level.

9 You referred to Don't Ask, Don't Tell. Do you recall
10 that?

11 A. Yes.

12 Q. And gays and lesbians are still being discharged from the
13 military under the Don't Ask, Don't Tell rule, correct?

14 A. Yes. I believe it's in lesser numbers, but it's still
15 correct, yes.

16 Q. And is there any other minority in this country that you
17 can identify that is discharged from the military, when they're
18 doing a perfectly good job, because somebody discovers their
19 status?

20 A. I don't know how we would define minority in that case.

21 Q. Well, in your testimony you were talking about
22 discrimination against minorities --

23 A. Right.

24 Q. -- correct?

25 A. Right.

1 Q. Now, using "minority" the way you were using it in your
2 testimony, is there any other minority that is discharged from
3 the military, when they are doing a perfectly good job, just
4 because somebody discovers their status?

5 A. I'd have to say, I'm not aware of any.

6 Q. Okay. Now, you also mentioned the Defense of Marriage
7 Act, remember?

8 A. Correct.

9 Q. And the Defense of Marriage Act has not been repealed,
10 correct?

11 A. That's correct.

12 Q. And you would recognize that as a significant piece of
13 legislation that is against the interests of the LGBT
14 community, correct?

15 A. Yes. I would guess that the majority of LGBT community
16 would want -- would support the repeal of DOMA, yes.

17 Q. Now, indeed, you say you would guess that. As an
18 expert --

19 A. Yes.

20 Q. -- would it be your opinion that the majority of the LGBT
21 community would like to see DOMA repealed?

22 A. That's my opinion, yes.

23 Q. Now, even though you may not be an expert in the area, you
24 are aware that historically in this country there has been
25 severe prejudice and discrimination against gays and lesbians,

1 correct?

2 **A.** Yes, I'm aware of that.

3 **Q.** And since you did begin studying this in the 1970s, you're
4 aware that that discrimination had continued into the period
5 that you've actually studied, correct, sir?

6 **A.** That's correct.

7 **Q.** Now, you were asked at your deposition about the term "gay
8 bashing." Do you recall that?

9 **A.** Yes.

10 **Q.** And you said you were familiar with that term, correct?

11 **A.** Yes.

12 **Q.** And what does that mean to you?

13 **A.** Most of the times when I've heard the term, it's been used
14 to describe insults against gay and lesbian people. It can
15 also be used to describe physical violence against gay and
16 lesbian people.

17 **Q.** When did you come to realize that term could be described
18 or used to describe physical violence against gay and lesbian
19 people?

20 **A.** I think I've always known that it can be. I think it's
21 more often than not, in my experience, used to describe insults
22 than physical violence.

23 **MR. BOIES:** May I have just a moment, Your Honor?

24 **THE COURT:** Very well.

25 (Pause)

1 **BY MR. BOIES:**

2 **Q.** Let me ask you to look at page 39 of your deposition,
3 beginning on line 22.

4 **A.** Yes.

5 **Q.** (As read)

6 **"QUESTION:** Are you familiar with the term
7 'gay bashing'?

8 **"ANSWER:** I've heard that term before, yes.

9 **"QUESTION:** What is your understanding of
10 what that term means?

11 **"ANSWER:** Again, I don't know if this is a
12 dictionary definition of the term, but my
13 understanding would be, I don't think it
14 means physical violence against gays. I
15 think it means pejorative statements maybe
16 attacks against gay and lesbian persons.

17 **"QUESTION:** Can it include physical violence
18 as well?

19 **"ANSWER:** Again, it seems like it would,
20 given the term. It seems like bashing has a
21 sense of violence to it. But I guess in the
22 way I've heard it in conversation, it would
23 be it's more used for sort of verbal attacks
24 as opposed to physical attacks."

25 Did you give that testimony under oath at your

1 deposition, sir.

2 **A.** Yes, I did.

3 **Q.** Now, at your deposition, you were asked some questions
4 about prejudice against gays and lesbians, correct?

5 **A.** Yes.

6 **Q.** And you were asked these questions, and you gave these
7 answers, page 34, line 18.

8 **A.** Thank you.

9 **Q.** (As read)

10 **"QUESTION:** What academic books or articles
11 are you familiar with that deal with
12 prejudice against minority groups?

13 **"ANSWER:** I'm not thinking of titles that I
14 can name for you, yeah.

15 "You mean you can't think of any titles?

16 **"ANSWER:** No, I can't, no."

17 Did you give that testimony at your deposition?

18 **A.** Yes, I did.

19 **Q.** Now, today you are familiar with some academic books or
20 articles dealing with minority groups prejudice, correct?

21 **A.** That's right.

22 **Q.** And did that come from research that you did between your
23 deposition and today?

24 **A.** No. I think I listed a number of these authors in my
25 deposition, actually. I think I was interpreting that question

1 narrowly to be a book specifically about prejudice. I think
2 there are a lot of books that address the problem of prejudice,
3 without having that in the title, for example.

4 **Q.** Well, the question said:

5 "What academic books or articles are you
6 familiar with that deal with prejudice
7 against minority groups?"

8 Correct?

9 **A.** That's correct.

10 **Q.** Yes.

11 You believe that a law prohibiting same-sex sexual
12 conduct, intimacy between gays and lesbians, a law prohibiting
13 that would reflect prejudice against gays and lesbians?

14 **A.** Well, first of all, it's not a law I would vote for. I
15 would vote to repeal. I don't know what the law -- the
16 purposes of such a law would be. I can't think of any good
17 basis for such a law.

18 As for the definition of "prejudice," we'd have to
19 look at that more closely.

20 **Q.** Well, your definition of prejudice was given in your
21 deposition, correct?

22 **A.** I gave a definition in the deposition, yes.

23 **Q.** And your definition of prejudice is "an unfair judgment
24 against an individual or group," correct?

25 **A.** That was a general definition that I offered, yes.

1 Q. And that was your definition as a political scientist,
2 correct?

3 A. I think it's consistent with, generally, how political
4 scientists think about this problem.

5 Q. Not only was it consistent with how, generally, political
6 scientists would define it, it was your definition, correct?

7 A. It was a definition I offered.

8 Q. Yes. Using prejudice in that way, does a law that
9 prohibits same-sex sexual conduct reflect prejudice against
10 gays and lesbians as you use that term?

11 A. As being an unfair judgment? Again, I can't speak to what
12 was in the minds of the lawmakers in that instance. There
13 might have been a range of different reasons why they would
14 enact that law, which could include moral disapproval of
15 certain sexual activities. It could have had other bases.

16 And if there was no sort of supportable basis for
17 that law, then I would think it would be prejudice. But I
18 would have to know what the basis that the lawmakers offered
19 was for that bill.

20 Q. So sitting here without any more context, you can't say,
21 in your opinion, whether a law prohibiting sexual conduct
22 between people of the same sex would or would not constitute
23 prejudice, correct?

24 A. Again, that's something I wouldn't support. But I can't
25 say whether it would constitute prejudice or not, without

1 knowing more.

2 **Q.** Okay. You do recall that there was time in this country
3 where a number of states had those laws that criminalized
4 homosexual activity, correct?

5 **A.** There are sodomy laws that criminalized sexual activity
6 for both homosexuals and heterosexuals. And I -- I know that
7 those were -- there were still some of those laws in place
8 before the Supreme Court struck them down, yes.

9 **Q.** And there were laws that simply prohibited homosexual
10 activity, and did not prohibit the exact same act performed by
11 heterosexuals, correct, for states that had those laws?

12 **A.** I'm aware of at least one state, which was Texas. That's
13 my understanding of the Texas statute.

14 **Q.** And the reason you're familiar with Texas statute is, that
15 was what was involved in *Lawrence v. Texas*, correct?

16 **A.** Correct.

17 **Q.** Now, at the time that *Lawrence* was decided, how many
18 states had laws that would criminalize sexual conduct between
19 homosexuals?

20 **A.** I don't know the exact number. I know it was declining
21 after the *Bowers vs. Hardwick* decision, but I don't know the
22 exact number.

23 **Q.** Does 25 states at the time of *Bowers*, and 13 states at the
24 time of *Lawrence*, sound about right to you, sir?

25 **A.** Sounds approximately correct. Again, I don't know how

1 many were covered both heterosexual and -- activity, as well as
2 only homosexual sexual activity.

3 **Q.** But you know that all of those states criminalized
4 homosexual activities, correct?

5 **A.** Some did for heterosexual, as well.

6 **Q.** Focus on my question, sir.

7 **A.** And, yes, and some did heterosexual, as well.

8 **Q.** I'm not focusing on heterosexual right now. I'm focusing
9 on homosexual activity.

10 All of those states prohibited homosexual activity,
11 and criminalized it, correct?

12 **A.** Yes. And some did for heterosexual activity, as well. I
13 gave the answer yes.

14 **MR. BOIES:** Your Honor, can I ask that the witness
15 be --

16 **THE COURT:** Why don't you answer the question
17 directly.

18 Mr. Thompson can bring out any additional facts that
19 he thinks is necessary in order to put this answer in context.

20 Counsel is entitled to a direct answer to the
21 question.

22 **THE WITNESS:** As I said two or three times, the
23 answer is yes.

24 **BY MR. BOIES:**

25 **Q.** Now, gays and lesbians were barred from federal employment

1 for a long period of time, correct?

2 **A.** Starting after World War II, for some period of time, yes.

3 **MR. THOMPSON:** Your Honor, we are now going well
4 beyond the scope of the witness's expertise. We haven't
5 tendered him as an historical expert on the history of
6 discrimination. This was covered by Professor Chauncey.

7 **MR. BOIES:** Your Honor, I think that that objection
8 has some merit to it.

9 (Laughter)

10 **THE COURT:** Well, then, I'll sustain it.

11 (Laughter)

12 **MR. BOIES:** It was too hard for me to resist.

13 (Laughter)

14 **BY MR. BOIES:**

15 **Q.** Speaking of Professor Chauncey, Dr. Miller, have you read
16 any books by Professor Chauncey?

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

18 **Q.** You know who Professor Chauncey is; do you or not?

19 **A.** Not really, no. I know he has been a witness in this
20 case, but I haven't read his work.

21 **Q.** Do you know who Miriam Smith is?

22 **A.** No.

23 **Q.** And never read anything by Miriam Smith?

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

25 **Q.** Do you know who Shane Phelan is?

1 A. I don't recall that name, no.

2 Q. Do you know who Ellen Riegel is?

3 A. Again, I do not recall that name.

4 Q. Or Barry Tadlock?

5 A. Same answer.

6 Q. Are you familiar with a book entitled *Gays and Lesbians in*
7 *the Democratic Process: Public Policy, Public Opinion, and*
8 *Political Representation*?

9 A. I may have heard of that book, but I have not read that
10 book.

11 Q. You mentioned Professor Eskridge before. Do you recall
12 that?

13 A. Yes.

14 Q. What books if any have you read by him?

15 A. I've read part of -- I believe the name of the book is *Gay*
16 *Law* by Professor Eskridge. I have also read his *Constitutional*
17 *Law Casebook*.

18 Q. Anything else?

19 A. That's books that I can recall.

20 Q. You also mentioned a Dr. Piniella --

21 A. Yes.

22 Q. -- do you recall that?

23 A. Yes.

24 Q. What books have you read by him?

25 A. I can't recall the title of the book. He was on one of

1 the panels that I was on. And I remember reading some of his
2 work, at that point, but I can't remember the titles.

3 Q. Was it a book, or article, or paper, or what was it?

4 A. What I read was a working paper.

5 Q. Working paper?

6 A. Yeah.

7 Q. So you have never read any article by him or any book by
8 him?

9 A. I think I've read some articles by him, but I can't recall
10 the titles.

11 Q. Have you ever read any books by Mark Blasius,
12 B-l-a-s-i-u-s?

13 A. No, I have not.

14 Q. Do you know who he is?

15 A. He's a scholar, but I haven't read his work.

16 Q. Do you know what he's a scholar in?

17 A. He -- LGBT issues, I think, is he's known for.

18 Q. When did you discover that Professor Blasius was a scholar
19 in this area?

20 A. This was after my deposition. This was a name I hadn't
21 heard of, so after my deposition I took a look.

22 Q. Okay. Do you know who Urvashi Vaid is?

23 A. She's another scholar. I think she's in New York, does
24 work in this area.

25 Q. Have you ever read any of her work?

1 A. No, I have not.

2 Q. And when did you discover that she was a scholar in this
3 area?

4 A. That was the same thing. After my deposition. That was a
5 name that was mentioned, and I took a look.

6 Q. May have mentioned in your deposition, you were asked
7 about, and you didn't know who that was, right?

8 A. I may have heard her name in the past, but I couldn't
9 recall at the deposition.

10 Q. One name that you did mention at your deposition was
11 Andrew Sullivan. Do you recall that?

12 A. Yes, I do.

13 Q. What books have you read by Mr. Sullivan?

14 A. A book that I've read and I've assigned to students is
15 *Same Sex Marriage: Pro and Con: A Reader*.

16 I've read parts of *Virtually Normal*, but not the
17 whole book. *Virtually Normal*.

18 Q. Parts, but not the whole book?

19 A. That's correct.

20 Q. Would it be fair to say you read the entire book that you
21 assigned your students?

22 A. Yes.

23 Q. And that's a collection of articles and pieces, correct?

24 A. Yeah. He writes -- he's written some of the articles, and
25 he's got a range of different writers who contribute to a

1 robust discussion of this issue.

2 Q. And he's also written books himself, correct?

3 A. Yes.

4 Q. Have you read any of those books?

5 A. As I said, I've read part of *Virtually Normal*, but not the
6 whole book.

7 Q. And no other parts of any other books?

8 A. By Andrew Sullivan?

9 Q. Yes.

10 A. Not that I can recall, no.

11 Q. I'm going to ask you about another person, and I'm going
12 to spell his last name because I'm not sure I'll pronounce it
13 right. It's John D apostrophe E-m-i-l-i-o. Are you familiar
14 who he is?

15 A. Yes, I am.

16 Q. And he's a scholar in this area, correct?

17 A. That's correct.

18 Q. And have you read his books?

19 A. No, I have not.

20 Q. You do know he has written books, correct?

21 A. Yes, I do. He's a well-known scholar in this area.

22 Q. But you haven't read his books?

23 A. That's correct.

24 Q. Have you read any articles by him?

25 A. I may have. I can't recall the titles.

1 Q. Is it your opinion that one of the factors you would look
2 at in determining the political power of a minority group is
3 the extent to which that minority group is experiencing
4 discrimination?

5 A. I think that would be a factor I would look at, yes.

6 Q. And have you looked at that for what you refer to as the
7 LGBT community?

8 A. Yes, I have.

9 Q. And are there examples of discrimination against gays and
10 lesbians at the present time, within the last several years?
11 Not going back into the ancient history, but in the time that
12 you say that you're an expert in, are there examples of
13 discrimination against gays and lesbians?

14 A. So I think it's fair to say that the restricted ability to
15 serve in the military could be described as discrimination
16 against gays and lesbians, yes.

17 Q. Are there any other examples of discrimination against
18 gays and lesbians in what you refer to as the modern period?

19 A. That would certainly be the prominent one in terms of
20 legally enforced discrimination in my view, which is -- there
21 could be private discrimination, which is -- I have no way of
22 knowing how much private discrimination there is, but in terms
23 of, like you mentioned, federal employment, there was a time
24 when gays and lesbians were banned from federal employment.
25 That's been -- that's been repealed. And many other laws like

1 that which create -- official discrimination against gays and
2 lesbians has been repealed; whereas, the military situation is
3 different.

4 Q. I want to be sure I understand what you are saying. You
5 are saying that there is official discrimination, like the
6 "Don't ask, Don't tell" policy, correct?

7 A. Umm --

8 Q. That's what you refer to as official discrimination?

9 A. It's legally enforced rules that have an effect on gays
10 and lesbians, which is different than heterosexual people, yes.

11 Q. And that's what you refer to as official discrimination,
12 is that true? I'm just trying to get your word --

13 A. Maybe "legal" is a better word. It's -- or de jure. I
14 don't know how you want to describe it. Various different ways
15 to describe the same thing.

16 Q. What word is the word you use? Because I just want to use
17 your language.

18 A. Okay. "Official" would be fine.

19 Q. "Official," okay. And by official discrimination, you
20 mean discrimination that is legally enforced, discrimination by
21 the state, correct?

22 A. I think that's fair to say, yeah.

23 Q. Now, are you aware of any of what you call official
24 discrimination against gays and lesbians in this country today
25 other than the "Don't ask, Don't tell" policy?

1 **A.** I'm just trying to think of other laws or official
2 policies that discriminate on that basis.

3 Obviously, I think what you are looking at is -- you
4 know, one thing would be the DOMA policy, right, and --

5 **Q.** There you go.

6 **A.** Okay. So --

7 (Laughter.)

8 **A.** And I know that's what you're getting at, right.

9 **Q.** That would be another example, yes.

10 **A.** Okay, okay.

11 **Q.** What other examples?

12 **A.** Well, I think the DOMA policy would be something where
13 it's a question as to what the nature of the discrimination is,
14 but there is a differential treatment between same-sex couples
15 and heterosexual couples under that law.

16 **Q.** Right, yes. And what other examples of official
17 discrimination are you aware of?

18 **A.** I can't think of, at this time, any other de jure or
19 official laws that discriminate on the basis of sexual
20 orientation.

21 **Q.** Are you aware -- now, and I -- just so the question is
22 clear, are you talking now at the federal level? Is that what
23 you are talking about?

24 **A.** Yes.

25 **Q.** Now, let me shift to the state level.

1 **A.** Okay.

2 **Q.** At the state level, what official discrimination against
3 gays and lesbians are you aware of?

4 **A.** Well, the military -- I actually don't know how National
5 Guard units work, if that's considered federal or state. So I
6 would guess that there would be comparable restrictions in that
7 area.

8 In terms of other laws that would, you know,
9 officially discriminate at the state level against gays and
10 lesbians -- there might be an absence of non-discrimination
11 laws, but in terms of the government officially discriminating
12 itself on the basis of sexual orientation, again, if we're
13 looking at the institution of marriage, then the state does
14 treat heterosexual couples differently than same-sex couples.

15 **Q.** Yes. And if you are looking at adoption, some states
16 treat heterosexuals differently than homosexuals, correct?

17 **A.** That's a more complicated area of law. I think there's
18 more discretion by individual judges. I think only a couple of
19 states have statewide policies that actually restrict adoption.

20 Now, Arkansas is an example where the restriction is
21 on unmarried couples, so that could be either heterosexual or
22 same sex.

23 **Q.** Yes. But in Arkansas, they put that in at the same time
24 that they put in a law that said that gays and lesbians
25 couldn't marry, correct?

1 **A.** That's correct.

2 **Q.** So it means that because gays and lesbians can't marry, by
3 definition they are not going to be a married person, so they
4 can't adopt, correct?

5 **A.** That fact is correct, but it also applies to heterosexual
6 couples as well.

7 **Q.** Except heterosexual couples can marry, correct, in
8 Arkansas?

9 **A.** They can, yeah. But it is a restriction on them, that
10 they would have to marry in order to adopt.

11 **Q.** And gays and lesbians can't marry, so they can't adopt,
12 correct?

13 **A.** That's the current law.

14 **Q.** Now, are you aware of discrimination against gays and
15 lesbians today that does not fall into what you refer to as
16 official discrimination?

17 **A.** In terms of private discrimination, it was -- is that what
18 you are getting at?

19 **Q.** Again, let me just be sure I understand what your words
20 mean.

21 For you, private discrimination is any discrimination
22 that is not codified into law, correct?

23 **A.** That's the distinction I was drawing out, yes.

24 **Q.** Okay. Using private discrimination the way that you use
25 it, are you aware of examples of private discrimination against

1 gays and lesbians?

2 **A.** Well, I know that there's lots of cases that are brought
3 against, for example, employers for sexual orientation
4 discrimination and there are avenues for pursuing
5 anti-discrimination claims against employers.

6 So, obviously, there are cases of private
7 discrimination currently in the United States, and to some
8 extent those are -- gay and lesbian people being discriminated
9 on that basis, can get redress through administrative agencies
10 or the courts.

11 So, yes, I am aware that there is ongoing
12 discrimination in the United States.

13 **Q.** And have you tried to investigate the extent of that at
14 all?

15 **A.** Not private discrimination, no.

16 **Q.** Let me ask you to -- can we give the Williams Institute
17 binder. I'm going to ask you to look at a binder of exhibits.

18 While that's being handed out let me ask: Are you
19 familiar with the Williams Institute?

20 **A.** Yes, I am.

21 **Q.** When did you become familiar with the Williams Institute?

22 **A.** Several years ago. It's at U.C.L.A.

23 **Q.** And you just answered my next question, which was, where
24 was the Williams Institute? It's at U.C.L.A.

25 **A.** U.C.L.A., yes.

1 Q. And what does the Williams Institute do?

2 (Whereupon, binders were tendered

3 to the Court and the witness.)

4 A. I know it promotes research on issues pertaining to gays
5 and lesbians and provides funding for research in that area.

6 They may have other parts of its mission, but that's the one
7 that I'm most familiar with.

8 Q. Let me ask you to look at tab B, which is Plaintiffs'
9 Exhibit 604.

10 THE COURT: Tab what?

11 MR. BOIES: Tab B, as in boy. This is in the new
12 binder that was just handed out.

13 THE COURT: Very well.

14 BY MR. BOIES:

15 Q. And this is testimony given by R. Bradley Sears,
16 September 23, 2009, to the Committee on Education and Labor of
17 the United States House of Representatives, which I would ask
18 the Court to take judicial notice of.

19 MR. THOMPSON: No objection, your Honor.

20 THE COURT: Very well.

21 BY MR. BOIES:

22 Q. Have you ever reviewed this testimony, sir?

23 A. No, I have not.

24 Q. Do you know who R. Bradley Sears is?

25 A. I'm not familiar with him, no.

1 Q. Let me ask you to turn to the very last page. And the
2 last paragraph, after having talked about various research that
3 the Williams Institute has done says:

4 "Based on this research, as well as the
5 research I have just discussed, we conclude:

6 "One, there is widespread and persistent
7 pattern of unconstitutional discrimination
8 against LGBT state government employees as
9 well as local government employees.

10 "Two, there is no meaningful difference in
11 the pattern and scope of employment
12 discrimination against LGBT people by state
13 governments compared to what is found in the
14 private sector or in federal or local
15 government.

16 "And, three, the list of documented examples
17 that we have compiled far underrepresents the
18 actual prevalence of employment
19 discrimination against LGBT people by state
20 and local governments."

21 Do you have any reason to disagree with those
22 conclusions?

23 A. Having not done any research in this area, I don't have
24 any basis for disagreeing with those conclusions.

25 Q. Let me ask you to look at -- behind tab C, Plaintiffs'

1 Exhibit 605.

2 (Witness complied.)

3 **Q.** And this is the beginning of the report that Mr. Sears
4 referred to, and I would ask the Court to take judicial notice
5 of Plaintiffs' Exhibit 605.

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

7 **THE COURT:** Very well.

8 **BY MR. BOIES:**

9 **Q.** And you will see that the report at the bottom of this
10 first page essentially repeats what Mr. Sears had told
11 Congress; do you see that?

12 **A.** It seems to be substantially the same at least, yes.

13 **Q.** Have you ever reviewed this at all?

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

15 **Q.** Let me ask you to look at page two. And the second bold
16 headline there where it says:

17 "Courts and legal scholars have concluded
18 that sexual orientation is not related to an
19 individual's ability to contribute to society
20 or perform in the workplace."

21 Do you see that?

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

23 **Q.** Do you agree with that conclusion, sir?

24 **MR. THOMPSON:** Objection, your Honor. This is beyond
25 the scope of the witness's expertise. He is a political

1 scientist.

2 **MR. BOIES:** Your Honor, here I -- I don't think the
3 objection is well taken. One of the issues here is he says
4 that discrimination is an element of political power.

5 One of the elements of discrimination is if you're
6 treated differently, even though you are capable of performing
7 the task; that is, different treatment of like people is the
8 best way to prove discrimination, and the first element of that
9 is to prove that they are like people.

10 **THE COURT:** Well, like so many of the documents that
11 have been shown to those who have provided expert testimony in
12 this case, I think this is very much of the same vein.

13 It is a statement and it is being used in order to
14 obtain the reaction of the witness to the statement and I think
15 it's an appropriate line of inquiry, and, therefore, the Court
16 having taken judicial notice of the document, I think the line
17 of inquiry is an appropriate one and the objection will be
18 overruled.

19 **BY MR. BOIES:**

20 **Q.** Do you have the question in mind, sir?

21 **A.** I do.

22 I haven't looked closely to see if there are any
23 examples where sexual orientation would be a factor in terms of
24 the workplace. I can't think of any. So, in general, I think
25 I would not have any objection to this statement.

1 Q. Let me ask you to look next at tab D.

2 (Witness complied.)

3 Q. And this is the first chapter of the Williams Institute
4 report?

5 A. Yes.

6 Q. And we have marked each chapter with a separate exhibit
7 number.

8 But I would ask the Court to take judicial notice at
9 this time of Plaintiff's Exhibits 606, 607, 608, 609, 610, 611,
10 612, 613, 614, 615, 616 --

11 **THE COURT:** 616?

12 **MR. BOIES:** 616. 617, 618, 619 and 620, which are
13 the 15 chapters of the Williams Institute report, the
14 introduction of which has already been taken judicial notice
15 of.

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

17 **THE COURT:** Very well. And that included 608, that
18 was one of the ones you mentioned?

19 **MR. BOIES:** Yes, it was, your Honor. I think it was
20 608 through 620.

21 **THE COURT:** Very well. You may proceed.

22 **BY MR. BOIES:**

23 Q. Now, have you reviewed any portion of this report prior to
24 today, sir?

25 A. I'm sorry. How far does it go? To which tab?

1 Q. It goes through tab R, as in Robert.

2 (Brief pause.)

3 A. I don't believe I have seen any of these before today.

4 Q. Let me ask you to turn to tab Q, which is Plaintiffs'
5 Exhibit 619.

6 (Witness complied.)

7 Q. And the second paragraph on the first page?

8 A. Yes.

9 Q. After talking about how the United States Supreme Court
10 has recognized irrational discrimination as often signaled by
11 indicators of bias, and talking about unsubstantiated factors
12 not being a permissible basis for government decision making,
13 the report says, quote:

14 "This concern has special applicability to
15 widespread and persistent negative attitudes
16 toward gay and transgender minorities."

17 Do you see that?

18 A. Yes, I do.

19 Q. Do you have any reason to disagree with the report that
20 there is widespread and persistent negative attitudes toward
21 gay and transgender minorities?

22 A. Just reading the paragraph again.

23 (Brief pause.)

24 A. It's probably fair to say that that's true, although I
25 would add a caveat that I think both of those terms

1 "widespread" and "persistent" are -- especially "widespread" is
2 declining over time.

3 **Q.** But it is still -- as of the date of this report, which
4 was I think, 2009, it was still widespread and persistent,
5 correct?

6 **A.** Yeah. I think there is a scale of widespread and a scale
7 of persistent and it used to be worse and it's not as bad now.

8 **Q.** If you compare the political power of gays and lesbians
9 today with the political power of African-Americans, which
10 minority do you believe has greater political power?

11 **A.** African-Americans today?

12 **Q.** Yes.

13 **A.** Okay.

14 **Q.** Comparing gays and lesbians today with African-Americans
15 today, I'm asking which of those two minorities has greater
16 political power in your opinion?

17 **A.** Are you asking in California or nationally? Because the
18 answer might be somewhat different.

19 **Q.** Let me ask both questions.

20 First nationally. Which minority has greater
21 political power nationally?

22 **A.** Okay. I think it's somewhat difficult to make these
23 comparisons, because --

24 **Q.** We don't know.

25 **A.** We haven't defined what we mean by "political power,"

1 but...

2 (Laughter.)

3 Q. I thought that's what you were testifying about, sir.

4 A. Okay. I haven't heard your question.

5 I do have a view of it, which is what I said, which
6 is the attention to attract -- the ability to attract the
7 attention of lawmakers, yes.

8 Q. Now, using political power the way you have defined it
9 nationally, do you believe that the African-American minority
10 or the gay and lesbian minority has the greater political
11 power?

12 A. Again, that's somewhat difficult to say. I would say
13 that --

14 Q. The answer could be "yes," "no" or "I don't know."

15 A. I would have to say I don't know to that.

16 Q. Okay.

17 A. I would have to think about it more.

18 Q. Now, let me ask the question in California.

19 Do you believe that in California the
20 African-American minority or the gay and lesbian minority has
21 the greater political power?

22 A. I would say compared to the national level --

23 Q. I'm not talking about compared to the national level. I'm
24 talking about in California, okay?

25 In California today you have got a gay and lesbian

1 minority and you have got an African-American minority, right?

2 **A.** That's correct.

3 **Q.** Now, I'm asking you in California, because you brought it

4 up --

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

6 **Q.** (Continuing) -- which of those two minorities has greater

7 political power?

8 **A.** I think it's a closer call. It's a closer call in

9 California.

10 **Q.** Does that mean you don't know, but you are closer to

11 knowing?

12 (Laughter.)

13 **Q.** I just don't know what you mean by "closer call."

14 I'm asking you about California.

15 **A.** Yes.

16 **Q.** And, again, the answer might be the African-American

17 community; the answer, I suppose, could be the gay and lesbian

18 community; or the answer could be, I just don't know.

19 **A.** I think it's a complex analysis and I can't really make a

20 judgment on it one way or the other.

21 **Q.** Because you haven't made that analysis thus far, is that

22 fair?

23 **A.** Well, I have made an analysis about the gay and lesbian

24 community. I haven't done as extensive an analysis of the

25 African-American community, either nationally or at the local

1 level in California.

2 And so it's difficult to make a comparison without
3 having the same level of analysis of the two.

4 **Q.** As I understand it, what you are saying is that you would
5 need to do more of an analysis before you could answer my
6 question as to whether the gay and lesbian community or the
7 African-American community had more political power in
8 California, is that right?

9 **A.** I would need to do more analysis of the African-American
10 community, the ability of resources they have to bring to bear
11 the political process.

12 **Q.** You haven't done that, is that right?

13 **A.** I think I could say they are not powerless, that's clearly
14 true; that they have got political power both in California and
15 the United States.

16 **Q.** The African-American people?

17 **A.** Yes, they do, as well as the gay and lesbian community.

18 **Q.** Yes. I understand and I appreciate your testimony that
19 the African-American community has political power, both
20 nationally and in California.

21 You have also said, in your opinion, the gay and
22 lesbian community has political power nationally and in
23 California, correct?

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

25 **Q.** And I just want to close this off. What I was asking you

1 was to compare the political power of the African-American
2 minority with the gay and lesbian minority and I believe you
3 told me that you couldn't do that nationally, is that correct?

4 **A.** That's correct.

5 **Q.** And is it also the case that you cannot do that in
6 California?

7 **A.** I would be hesitant to make a conclusion one way or the
8 other on that, yes.

9 **Q.** And is it fair to say that you think you have done enough
10 work on the gay and lesbian community to answer this question,
11 if you had done a comparable amount of work on the
12 African-American community?

13 **A.** I think probably so.

14 **Q.** Okay. Now, in terms of what you teach and the research
15 that you have done -- I'm not talking about your testimony
16 here, but I'm talking about your work academically -- you have
17 focused much more on the African-American minority than on the
18 gay and lesbian minority, correct?

19 **A.** In my academic work before this case, I think it's
20 probably fair to say. Although I haven't really dealt with
21 ballot measures or analyzed ballot measures in as great a
22 detail as I have with respect to gays and lesbians.

23 **Q.** Now, despite all of the allies that you say the gay and
24 lesbian community has, they were unable to pass Proposition
25 8 -- they were able to defeat Proposition 8 or Proposition 22,

1 correct?

2 **A.** Yes. And I'm glad I'm not the only one who mixes it up.

3 **Q.** I'm sorry. What?

4 **A.** I'm glad I'm not the only one who mixes that up.

5 **Q.** Yes, yes. Well, thinking about all the power, I was
6 almost believing that it had failed earlier.

7 (Laughter.)

8 **Q.** Now, you have actually written about why minorities who
9 have a lot of political allies nevertheless suffer defeats in
10 the initiative process, correct?

11 **A.** I don't know if I phrased it quite in that way.

12 **Q.** Well, let's try to phrase it in your language. And in
13 that connection put aside the Williams book, just so we don't
14 have too much -- may I approach, your Honor?

15 **THE COURT:** You may.

16 **BY MR. BOIES:**

17 **Q.** And let me give you the third volume of our cross binder.

18

19 (Whereupon, binders were tendered
20 to the Court and the witness.)

21 **Q.** Do you have volume -- it's the third volume. The tabs
22 begin at 78.

23 **A.** Yes.

24 **Q.** Now, I would like to ask you to look at tab 90, which is
25 Plaintiffs' Exhibit 2865.

1 A. Okay.

2 Q. And can you identify what this is?

3 A. This is an article I wrote for a journal called *American*
4 *Politics Research*.

5 Q. And when did you write it?

6 A. It was shortly after the recall election of Governor Gray
7 Davis. So the recall was 2003. It was shortly after that.

8 Q. If you turn to the second page -- it's on the first page
9 as well. Right under the title and your name, do you see it
10 says *American Politics Research 2005*?

11 A. I see at the bottom it says "to March 2005."

12 (Brief pause.)

13 A. Oh, I see. I'm looking at the next page, 135.

14 Q. You are more precise. It was March, 2005, correct?

15 A. That's correct. That's when it was published, yeah. It
16 was probably written several months before that.

17 Q. Now, let me ask you to look at page 138.

18 (Witness complied.)

19 Q. And the second sentence of the first full paragraph --
20 it's the paragraph that's right above the paragraph that begins
21 "By contrast," do you see that?

22 A. I see the first full paragraph, "Of these three types."
23 Is that where it begins?

24 Q. Yes. And then the next sentence. The sentence that
25 reads.

1 "Sometimes called lawmaking without
2 government, Broder 2000, the initiative
3 process radically departs from the Madisonian
4 system of delegation and checks and balances
5 by substituting unfiltered direct Democratic
6 rule."

7 Do you see that?

8 **A.** Yes, I do.

9 **Q.** And that's what you wrote in late 2004, or whenever it was
10 you were writing this March 2005 article, correct?

11 **A.** Well, again, I think it was shortly after the recall
12 election, which was in 2003. And I can't remember. It would
13 have been sometime in 2004 probably that I wrote this.

14 And the answer to that question is, yes, I wrote that
15 at that time.

16 **Q.** Now, you mentioned that you were a lawyer and you had
17 published at least one article in a law review, correct?

18 **A.** Correct.

19 **Q.** And let me ask you to turn to tab 35 in Plaintiffs'
20 Exhibit 1869.

21 **MR. BOIES:** And while he's doing that, your Honor, I
22 would offer Plaintiffs' Exhibit 2865.

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

24 **THE COURT:** 2865 is admitted.
25

1 (Plaintiffs' Exhibit 2865 received in evidence.)

2 **THE COURT:** And this is tab 35 in binder --

3 **MR. BOIES:** In our Miller book.

4 **THE COURT:** I beg your pardon?

5 **MR. BOIES:** It's Volume 1.

6 **THE COURT:** This is Volume 2?

7 **MR. BOIES:** What?

8 **THE COURT:** Did you say tab --

9 **MR. BOIES:** It is Volume 2. It's Volume 2.

10 **THE COURT:** Tell me when would be a good time to an a
11 break.

12 **MR. BOIES:** This would be a good time to take a
13 break.

14 **THE COURT:** All right. We will do that. Ten
15 minutes, counsel. Be back if you can -- make it 10 minutes of
16 the hour.

17 (Whereupon there was a recess in the proceedings
18 from 3:36 p.m. until 3:49 p.m.)

19 **THE COURT:** Very well, Mr. Boies. You may continue
20 your examination of Dr. Miller.

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

22 **BY MR. BOIES:**

23 **Q.** I directed the witness's attention to tab 35, Plaintiffs'
24 Exhibit 1869.

25 And is this an article that you wrote that was

1 published in the *Santa Clara Law Review* in 2001?

2 **A.** Yes.

3 **MR. BOIES:** I would offer this, your Honor.

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

5 **THE COURT:** Very well. Plaintiffs 1869 is admitted.

6 (Plaintiffs' Exhibit 1869 received in evidence.)

7 **BY MR. BOIES:**

8 **Q.** Let me ask you to look at page nine of this article.

9 **A.** Yes.

10 **Q.** In the second full paragraph, the first sentence reads:

11 "Moreover, by limiting the opportunities for

12 opponents and other interested parties to

13 participate in the process, the initiative

14 system makes compromise and consensus

15 building less necessary than in legislature."

16 Do you see that?

17 **A.** Yes.

18 **Q.** And you wrote that, did you not?

19 **A.** I did.

20 **Q.** And, obviously, you believed it at the time, correct?

21 **A.** That was my interpretation of it at the time, yes.

22 **Q.** Do you agree with that today?

23 **A.** I still believe that's a fair statement, yes.

24 **Q.** Let me ask you to look at the last sentence of that

25 paragraph that really deals with the same subject matter. It

1 says.

2 "In allowing proponents to eschew compromise
3 and accommodation of competing interests, the
4 initiative process fosters polarization
5 rather than consensus building."

6 Do you see that?

7 **A.** Yes, I do.

8 **Q.** And you wrote that at the time, correct?

9 **A.** Yes, I did.

10 **Q.** And you believed it at the time, correct?

11 **A.** Yes, I did.

12 **Q.** Do you believe it now?

13 **A.** I think I would probably write it somewhat differently
14 now.

15 **Q.** That may always be true. The question is whether you
16 believe this to be true or not.

17 **A.** More or less, yes.

18 **Q.** Let me ask you to look next at page six.

19 (Witness complied.)

20 **Q.** The last full sentence reads.

21 "Thus, in California both initiative
22 constitutional amendments and initiative
23 statutes undermine the authority and
24 flexibility of representative government."

25 Do you see that?

1 **A.** Yes.

2 **Q.** And what did you mean there by "representative
3 government?"

4 **A.** I would have to probably go back and look a little bit,
5 but in general what I meant at this time was that initiatives
6 have the tendency -- not always the case, but have the tendency
7 of making it more difficult for the legislature to do its job;
8 for example, by locking in spending mandates or other things.
9 And so I think that's a fair characterization of my views on
10 this.

11 **Q.** Let me ask you to look next at tab 82, which is in the
12 third volume.

13 (Witness complied.)

14 **Q.** And this is a chapter that you and Professor Bruce Cain
15 wrote. The chapter was entitled "The Populace legacy:
16 Initiatives and the Undermining of Representative Government."

17 And that was published in a book titled *Dangerous*
18 *Democracy? The Battle Over Ballot Initiatives in America.*

19 Is that correct?

20 **A.** That's correct. And I believe it was published in 2001,
21 about the same time as the Santa Clara article.

22 **Q.** And let me direct your attention to the bottom of page 33,
23 and the last full sentence. It reads:

24 "We discuss how ironically direct democracy
25 can actually be less democratic than

1 representative democracy in that it fails to
2 maximize democratic opportunities for
3 refinement, informed liberation, consensus
4 building and compromise, and violates
5 democratic norms of openness, accountability,
6 competence and fairness."

7 Do you see that?

8 **A.** Yes, I do.

9 **Q.** When you were referring to "direct democracy," were you
10 referring to initiatives?

11 **A.** Yes. This was my -- this is what I call the Madisonian
12 critique of the initiative process.

13 **Q.** And let go on to page 41.

14 **THE COURT:** I assume you are moving in 2857?

15 **MR. BOIES:** Your Honor, I am. I would offer
16 Exhibit 2857.

17 **MR. THOMPSON:** No objection.

18 **THE COURT:** 2857 is admitted.

19 (Plaintiffs' Exhibit 2857 received in evidence.)

20 **BY MR. BOIES:**

21 **Q.** Let me turn to page 41.

22 The last paragraph at the bottom of the page, it
23 begins:

24 "The direct democracy mechanisms that posed
25 the greatest challenge to representative

1 government are the forms of the popular
2 initiative."

3 Do you see that?

4 **A.** Yes.

5 **Q.** And then going to the last full sentence on that page you
6 write:

7 "Initiative constitutional amendments (ICAs)
8 most seriously undermine representative
9 government because they can only be altered
10 by another constitutional amendment."

11 Do you see that?

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

13 **Q.** And those, obviously, represented your views at the time,
14 correct?

15 **A.** Yes. When I say "undermine representative government,"
16 the same way as I did in my prior answer.

17 **Q.** And defining "undermining representative government" the
18 same way you defined it in your prior answer --

19 **A.** Yes.

20 **Q.** (Continuing) -- you still believe this is an accurate
21 statement?

22 **A.** I don't think it's always the case, no. I think it can
23 be. And so this doesn't sort of clarify how frequently this
24 occurs. I think it can be the case, yes.

25 **Q.** And, indeed, I don't think you say here that it's always

1 the case?

2 **A.** No, I don't. But it's true that an initiative
3 constitutional amendment can only be altered by another
4 constitutional amendment. It could be put on the ballot by the
5 legislature, not by initiative.

6 **Q.** But it would still have to be passed by the people,
7 correct?

8 **A.** I -- if we are talking about California, yes.

9 **Q.** Yes?

10 **A.** Yes.

11 **Q.** And let me ask you to look at page 43.

12 (Witness complied.)

13 **Q.** And let me ask you to look at the paragraph that begins
14 under the heading "Undermining Democratic Opportunities."

15 **A.** Yes.

16 **Q.** You write:

17 "A well-functioning Democratic system
18 provides opportunities for refinement,
19 informed deliberation, consensus building and
20 compromise. Legislative procedures tend to
21 maximize these opportunities, whereas the
22 initiative process by its nature undermines
23 them."

24 Do you see that?

25 **A.** Yes, I do.

1 Q. And you, obviously, believed that at the time you wrote
2 it, correct?

3 A. Yes, I did.

4 Q. And does that reflect your current views?

5 A. I think there are certain circumstances in which
6 deliberation can occur in the initiative process in various
7 ways.

8 As I have done more research on the initiative
9 process, I've had -- I would modify these in certain respects,
10 this -- that particular sentence.

11 Q. What you're saying is that in some cases there could be
12 opportunities for compromise in the initiative process; is that
13 what you are saying?

14 A. I think I said informed deliberation to compromise and
15 consensus building. All of these things. There's certainly
16 opportunities in the initiative process, yes.

17 Q. Now, you have studied a lot of initiatives?

18 A. Yes, I have. 900 -- more than 900 there in okay. Now, of
19 those 900-plus initiatives, in how many of those initiatives
20 were there what you would refer to as refinement, informed
21 deliberation, consensus building and compromise?

22 A. That's difficult to say, because what I have looked at is
23 the outcome of the initiative, as opposed to really the
24 formation of it.

25 But I do know that under certain circumstances there

1 are opportunities where the proponents of initiatives will be
2 forming a coalition, for example, among various different
3 groups to put the ballot measure on the ballot. So oftentimes
4 there's compromise that goes on in the formation at the
5 proponent's stage.

6 So I just don't want to leave the impression that
7 this is always the case. The point is that the legislative
8 process builds in these things. In the initiative process it
9 can happen, but it doesn't always happen.

10 **Q.** And can you give me any indication based on your study of
11 these 900-plus initiatives, how many times it has happened in
12 history where there has been significant informed deliberation,
13 consensus building and compromise in the formulation of an
14 initiative?

15 **A.** I can only give anecdotal examples.

16 **Q.** How many examples could you give?

17 **A.** I don't know today.

18 **Q.** As you sit here now?

19 **A.** Do you want to do a few? I don't know.

20 **Q.** I'm asking you how many.

21 **A.** I don't know.

22 **Q.** Approximately how many?

23 **A.** I'd have to think about it. Maybe three or four, five, I
24 don't know.

25 **Q.** Okay.

1 **A.** That's without any serious investigation of the -- you
2 know, the drafting process of these measures.

3 **Q.** So what you are saying is that you have not done any
4 serious investigation of how these 900 initiatives were drafted
5 and came to be put on the ballot?

6 **A.** Or even, really, the campaigns for the most part. It's --
7 because I'm doing a very large study, I'm more looking at more
8 the outcomes of initiatives and then what happens to them after
9 the -- after the election.

10 **Q.** Would you agree that in a legislature and legislative
11 procedures, you have these opportunities for refinement;
12 informed deliberation, consensus building and compromise, and
13 what you are saying is that it could occur or could not occur
14 in the initiative process depending what people did?

15 **A.** Yeah. I think I should also amend the first part of your
16 statement a little bit, because this provides a somewhat
17 idealized picture of the legislature.

18 I think it's fair to say that legislatures don't
19 always provide all of those four opportunities -- or, they
20 don't always live up to that ideal of providing opportunities
21 for refinement, informed deliberation, consensus building and
22 compromise.

23 **Q.** There's no doubt that there are more opportunities in the
24 legislature than in the initiative process, correct?

25 **A.** There's lot more --

1 Q. There's a lot more opportunities for what you refer to
2 here as refinement, informed deliberation, consensus building
3 and compromise? You are not disagreeing that there's more
4 opportunity for that in the legislature --

5 A. Well, the institutional structure of the legislature is
6 set up for those four things. That's why I wrote that.

7 Q. Yes.

8 A. And the initiative process is not as structured in that
9 way.

10 Q. All right. And if there's going to be any compromise or
11 refinement or informed deliberation in the initiative process,
12 it's going to be in the formation of the proposal, correct;
13 because once it's out there, it can't be amended, right?

14 A. In terms of deliberation, a lot of deliberation happens
15 during the campaign stage of -- among the voters.

16 Q. That's "yes" or "no," correct? Voters can only vote "yes"
17 or "no" on a proposition, right?

18 A. That's correct.

19 Q. They can't amend it. They can't modify it. They can't
20 refine it, correct?

21 A. In California, at least, there is no opportunity. Once
22 the proponents put it out for signature, there is no
23 opportunity to amend the initiative.

24 The only thing they can do is pull it back and
25 redraft it and then recirculate.

1 Q. How many times has that happened in the 900 initiatives
2 you looked at?

3 A. In some state it happens a lot. In Oregon --

4 Q. In California how often has that happened?

5 A. Not infrequently.

6 Q. When was the last time it happened, where they pulled it
7 back, made a compromise and then put it back out again? Last
8 time it happened in California?

9 A. I guess probably last year --

10 Q. I'm not asking you to guess. I'm asking you to tell me.

11 A. I can't tell you the specific initiative, but I know it's
12 a frequent thing. If you go to the secretary of state's
13 website, they have different versions of a particular proposal
14 and the proponents are trying to figure out what's the best
15 version of the proposal and they throw out -- they put out
16 different versions and they have discussions among themselves.

17 So it's a frequent -- I would say in California it's
18 frequent. I can't give you a number of times it's happened.

19 Q. When was the last time in California that you know of
20 where an initiative was drafted, signatures were collected, it
21 was put out there, and then the proponents pulled it back
22 because they wanted to modify it and put out something else?

23 A. I'm trying to think of the special election in 2005. This
24 was something along those lines, but I think they actually did
25 not pull it back, or there was discussion about it, yeah.

1 Q. What I'm asking is when they did pull it back, okay?
2 That -- this just doesn't happen in California, does it?

3 A. In terms of the -- once it gets on the ballot --

4 Q. Yeah. Once they start circulating the petitions.

5 A. No, I think it does happen.

6 Q. Okay. When was the last time it happened?

7 A. I can't tell you.

8 Q. Approximately?

9 A. I don't know.

10 Q. Give me -- tell me any example that you can remember from
11 your research when that happened in California?

12 A. As I said, I can't tell you.

13 Q. Just one example?

14 A. I'm more familiar in Colorado and some other states --

15 Q. We are talking about California. I'm trying to talk about
16 California. You said you wanted to talk about California.

17 So talking about California, give me an example, if
18 you have one?

19 **MR. THOMPSON:** Your Honor, there is badgering the
20 witness. It's been asked and answered many times.

21 **THE COURT:** Objection overruled. It's
22 cross-examination.

23 (Brief pause.)

24 **BY MR. BOIES:**

25 Q. If you don't have an example, sir?

1 **A.** I don't have an example that I can give you.

2 **Q.** Okay. Let me go back to the chapter that you wrote with
3 Professor Cain.

4 For the record, who is Professor Cain?

5 **A.** It's Professor Bruce Cain, is a professor at University of
6 California Berkeley.

7 **Q.** And is he a well-regarded scholar in this area?

8 **A.** I believe so, yes.

9 **Q.** Let me ask you to look at page 45.

10 (Witness complied.)

11 **Q.** And you have a heading there that says "Violating
12 Democratic Norms," do you see that?

13 **A.** Yes.

14 **Q.** And the first sentence says:

15 "The actual operation of the initiative
16 process violates a number of norms that have
17 evolved in advanced democracies."

18 Do you see that?

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

20 **Q.** What were the norms that you were referring to there?

21 **A.** I'm trying to get the context here.

22 (Brief pause.)

23 **A.** I think it's the norms that are listed in the succeeding
24 paragraphs.

25 **Q.** And those are the norms of openness, accountability, and

1 competence and fairness, is that right?

2 **A.** That's right.

3 **Q.** Let me ask you to go back and look at your *Santa Clara Law*
4 *Review* article?

5 **A.** Can you remind me where that is?

6 **Q.** Tab 35.

7 (Witness complied.)

8 **Q.** And the first full paragraph, the first sentence --

9 **A.** Of which page?

10 **Q.** Of page 10.

11 **A.** Of page 10. The first full paragraph, beginning, "In
12 sum"?

13 **Q.** Yes. And the first sentence there reads:

14 "In sum, it is ironic that initiatives have
15 the reputation of being a more pure form of
16 democracy when the process undermines
17 democratic opportunities and violates
18 procedural guarantees observed by almost
19 every freely elected legislature in the
20 world."

21 What were the democratic opportunities and procedural
22 guarantees that you were referring to there?

23 **A.** I think with respect to the opportunities, it was what we
24 were describing in terms much consensus building, compromise,
25 deliberation, those types of things.

1 Q. And what about procedural guarantees? What were you
2 talking about there?

3 A. I'm not sure. The things like openness that you just
4 asked about.

5 Q. The four norms that we talked about?

6 A. Four norms, yes.

7 Q. Now, let me ask you to turn to tab 89.

8 (Witness complied.)

9 Q. Which is Exhibit 2864.

10 And this was an amicus brief of William Eskridge and
11 Bruce Cain to the Supreme Court of California in connection
12 with that Court's consideration of Proposition 8.

13 First, Mr. Eskridge here is the professor that you
14 have identified as an expert in the field, correct?

15 A. When we were talking about writers who do LGBT rights
16 issues?

17 Q. Yes.

18 A. Okay. That was the one.

19 Q. And Bruce Cain is the professor that you identified as an
20 expert in political science and initiatives, correct?

21 A. Yeah. He would be considered an expert in those fields.

22 Q. I want to --

23 **MR. BOIES:** Your Honor, I would ask that you take
24 judicial notice of this brief.

25 **MR. THOMPSON:** No objection.

1 **THE COURT:** Very well. 2864 is noted and will be
2 admitted for that purpose.

3 **BY MR. BOIES:**

4 **Q.** First, let me ask you to look at page four, footnote two.
5 It says:

6 "At present 30 states have state
7 constitutional bars to marriage for same-sex
8 couples, all of them adopted by popular
9 initiatives."

10 Do you see that?

11 **A.** Yes.

12 **Q.** Can you confirm that from your own knowledge, sir?

13 **A.** I believe that's an incorrect statement.

14 **Q.** That is an incorrect statement?

15 **A.** Yes.

16 **Q.** All right. How many states have constitutional bars to
17 same-sex marriage, as you understand it?

18 **A.** I believe it's about that number, 30 or so.

19 **Q.** About 30?

20 **A.** About 30.

21 **Q.** And how many of those have been adopted by popular
22 initiatives?

23 **A.** I believe it's 10, something in the neighbor of that.

24 **Q.** Ten?

25 **A.** I believe it's 10.

1 Q. And how were the other 20 adopted?

2 A. I might not have the numbers exactly right, 10 and 20.

3 But I think most of them were adopted by the legislature

4 putting a constitutional amendment on the ballot and the voters

5 approving the amendment, the DOMA amendment.

6 There are not 30 states in the United States that

7 have -- in the initiative process.

8 Q. Let me see if I understand what you are saying.

9 You are saying that the 30 states have constitutional

10 bars to same-sex marriage; do you agree with that part?

11 A. I do agree with that.

12 Q. What you are saying is that -- you are saying they weren't

13 adopted by popular initiatives.

14 First, all of these 30 state constitutional bars were

15 presented to the people for a vote; do you agree with that?

16 A. That's correct. That's typically true of states; that in

17 order to amend the constitution, you need a popular vote.

18 Q. And would you agree that every time the issue of whether

19 to permit or bar same-sex marriage has been presented to a

20 popular vote, the result has been a bar on same-sex marriage?

21 A. No.

22 Q. You would not agree with that?

23 A. I would not.

24 Q. Okay. When was there a different result?

25 A. I'm forgetting the year, but it was in Arizona.

1 Q. What happened there?

2 A. The voters defeated a DOMA amendment.

3 Q. And Arizona doesn't have same-sex marriage, right?

4 A. No, it does not.

5 Q. And what are you saying was defeated?

6 A. There was an initiative put on the ballot by citizens, an
7 initiative constitutional amendment, and it was -- it would
8 have limited marriage to between a man and a woman, and I think
9 it maybe had some other provisions, and it was defeated by the
10 voters in a general election.

11 Q. Is there any other example that you have?

12 A. I believe in Colorado there were a couple of options, and
13 the voters approved one and rejected the other. And those are
14 the only --

15 Q. Are you talking about number -- about Colorado two; is
16 that what you are talking about?

17 A. I'm talking a marriage amendment in Colorado. I think
18 they are on the same ballot though. So it's a different
19 situation than Arizona.

20 Q. I want to get your testimony.

21 In Colorado were the voters presented with a question
22 of whether or not to permit same-sex marriage?

23 A. Yes, they were.

24 Q. And what was the vote --

25 A. I believe it --

1 Q. (Continuing) -- to permit it or not to permit it?

2 A. It was to not permit.

3 Q. Okay. Now, let me take Arizona, okay?

4 A. Yes.

5 Q. Is Arizona the only example that you have where the voters
6 voted not to bar same-sex marriage?

7 A. As I said, Arizona voters voted not to bar same-sex
8 marriage and then --

9 Q. My question to you --

10 A. Let me finish the answer.

11 In Colorado I believe there were two options, and the
12 voters rejected one and adopted the other.

13 Q. But in Colorado you already said the voters voted to bar
14 same-sex marriage, correct?

15 A. Yes, they did.

16 Q. Okay. Now, what I was asking you about was any state that
17 voted not to bar same-sex marriage; do you understand?

18 A. Yeah. I -- I guess --

19 Q. Can you give me an example?

20 A. Maybe the confusion in Colorado was there were two
21 options. They voted no on one and yes on the other, okay?
22 That's my understanding of the Colorado situation.

23 **THE COURT:** Was that in Colorado or Arizona?

24 **THE WITNESS:** No, in Arizona -- Arizona in one
25 year -- and I'm forgetting the year, whether it was -- I think

1 it was '06 -- voted no on a state initiative constitutional
2 amendment to limit marriage between a man and a woman. It was
3 a close vote.

4 The legislature then put a legislative constitutional
5 amendment on the ballot. I believe that was in '08 and the
6 voters approved that.

7 **THE COURT:** The legislature did what?

8 **THE WITNESS:** The legislature put a DOMA, Defense of
9 Marriage Amendment on the ballot, and the voters approved it in
10 Arizona. That was following the rejection in the prior
11 election cycle.

12 **MR. BOIES:** Let me just clarify that for the Court,
13 okay?

14 **BY MR. BOIES:**

15 **Q.** First we talked about Colorado and Arizona.

16 **A.** Yes.

17 **Q.** And we have agreed that in Colorado, the voters voted to
18 bar same-sex marriage, correct?

19 **A.** Yes, they did.

20 **Q.** Okay. Now, in Arizona the voters have now voted to bar
21 same-sex marriage, correct?

22 **A.** Yes. They approved a legislative constitutional amendment
23 that was put on the ballot by the legislature.

24 **Q.** And it passed? The people voted for it, right?

25 **A.** The second time around it passed.

1 Q. So in Arizona it took two times, right?

2 A. And I believe the text was different in the second time.

3 Q. But it still barred same-sex marriage, correct?

4 A. That's the content of the second measure, yes.

5 Q. And are you aware of any state where -- other than

6 Arizona -- where it took more than two times or took more than

7 one time, are you aware of any state other than Arizona where

8 it took more than one time for the voters to bar same-sex

9 marriage?

10 A. No.

11 Q. Now, let me ask you to look at tab 89.

12 (Witness complied.)

13 Q. This is the amicus brief by Professor Eskridge and Cain.

14 Let me ask you in this connection, to look at page

15 11.

16 (Witness complied.)

17 Q. And I want you to look at the first full paragraph.

18 A. Beginning "Proposition 8"?

19 Q. Yes. And Professor Eskridge and Cain here talk about

20 hyper amendability. Do you see that?

21 A. Yes.

22 Q. Is that a term you are familiar with?

23 A. I'm not a term I use, but I think Bruce Cain has used that

24 term before. Yes, I have seen that.

25 Q. And what does it mean?

1 **A.** I -- I believe his view is that it's too easy for state
2 constitutions to be amended. I haven't read this amicus brief
3 and so I'm not sure if that's exactly how he is using it, but
4 that's my understanding of his view on this issue.

5 **Q.** Now, he says:

6 "Proposition 8, at issue in this case, is an
7 even more troubling example of hyper
8 amenability, and Proposition 115 or perhaps
9 even Proposition 14."

10 And, first, do you know what Proposition 115 and
11 Proposition 14 are?

12 **A.** 115 was called a victims right initiative, if I'm
13 recalling correctly. And Proposition 14 -- I mean, there's a
14 lot of Proposition 14s. We repeat the numbers. But I assume
15 he is meaning the one from 1964, I believe.

16 **Q.** And that was where the people of California passed a
17 proposition that overruled legislative rules that had been
18 enacted prohibiting racial discrimination and property
19 transactions, correct?

20 **A.** That's correct.

21 **Q.** Professors Eskridge and Cain then go on to say:

22 "In contrast to Proposition 115, which
23 applied to all citizens who might in the
24 future be charged with a crime, Proposition 8
25 takes away a fundamental constitutional right

1 from just a minority. In contrast to
2 Proposition 14, where the discrimination was
3 found in the motivations of proponents,
4 discrimination is on the face of Proposition
5 8."

6 Do you see that?

7 **A.** Yes, I do.

8 **Q.** First, do you agree that the discrimination that is
9 referred to here is on the face of Proposition 8?

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

11 **Q.** Didn't you give an example earlier of laws prohibiting
12 same-sex marriage as an example of discrimination against gays
13 and lesbians?

14 **A.** I believe I said, it treated them differently.

15 **Q.** And -- the record will show what it shows, but I think I
16 was asking you for examples of discrimination.

17 Is it your testimony that you think that a law like
18 Proposition 8 is not discrimination against gays and lesbians?

19 **A.** I think what it does is it establishes marriage as between
20 a man and a woman. It has a different -- it excludes other
21 forms of marriage.

22 **Q.** And my question -- and this is, I think, can be answered
23 "yes" or "no."

24 You said that it treats gays and lesbians
25 differently, correct? You said that just a moment ago.

1 **A.** Yeah. If same-sex couples want to marry under this law,
2 they cannot do so.

3 **Q.** Right. Now, what I'm asking is whether that different
4 treatment amounts to what you, as a political scientist, refers
5 to as discrimination or not. If you have an opinion?

6 **A.** To the extent that we are saying that different -- I say
7 it's differential treatment. Whether it's legally
8 discrimination, I don't know.

9 **Q.** As a political scientist, not as a lawyer, but as a
10 political scientist, you studied discrimination, correct?

11 **A.** Correct.

12 **Q.** And is it fair to say that in the area of political
13 science, that discrimination has an understanding and people
14 know what they mean when they talk about discrimination?

15 **A.** There's different definitions. There's invidious
16 discrimination. Discrimination is discerning between -- or
17 choosing between two different things, making distinctions.
18 That's my understanding of discrimination. And some
19 discrimination is permissible and others is not.

20 **Q.** And right now I'm not asking you to make a legal judgment
21 as to whether this discrimination is legal or not legal. I'm
22 just saying it's clear that on the face of it there's
23 discrimination, right?

24 **A.** It makes a distinction between these two types of couples,
25 yes. And under that definition, discrimination is

1 discrimination.

2 **Q.** And just to tie that down, when you say "under that
3 definition," that is a definition that would be commonly used
4 by political scientists, is that fair?

5 **A.** I don't know the answer to that.

6 **Q.** It was at least used by Professor Eskridge and Cain,
7 correct?

8 **A.** Yes.

9 **Q.** And those are very highly regarded scholars in the
10 political science field, correct?

11 **A.** I don't agree with their analysis here, but they are
12 highly regarded, no doubt.

13 **Q.** When you say you don't agree with their analysis, I
14 thought you just told me that you didn't know whether the
15 definition of discrimination that you just used was or was not
16 something that was commonly used in political science. Didn't
17 you just tell me that?

18 **A.** Well, when I say I don't know that I agree with them, it's
19 that whole paragraph you read to me. There is a lot embedded
20 in there that I don't agree with.

21 **Q.** Let me try to ask you to focus on the question I'm asking
22 you.

23 **A.** I'll try.

24 **Q.** They say that the discrimination in Proposition 8 is on
25 the face of Proposition 8; that's what I'm talking about.

1 And just so we don't have to go through this again --

2 **A.** Right.

3 **Q.** (Continuing) -- you told me that Proposition 8 on its face
4 treated people differently, and under that definition of
5 discrimination, there was discriminating against them.

6 You told me that, right, just a few minutes ago?

7 **A.** It creates a distinction between the two groups, yes.

8 **Q.** Sir, I think we're going backwards.

9 What I was trying to do was get you to tell me
10 whether the definition of discrimination that you used in the
11 answer when you said, "Under that definition of discrimination,
12 it would be discrimination."

13 And I asked you then, "Is that commonly used by
14 political scientists?" And you said, "I don't know."

15 **A.** I would say political scientists use a lot of different
16 definitions of discrimination, and so I don't know whether my
17 definition -- I mean, I think it's a dictionary -- dictionary
18 definitions that draw distinctions is discrimination, and so
19 they would use that. They might have other means of
20 discrimination, depending on their research.

21 This is very common in scholarship, that people
22 define terms and they use them in various ways.

23 **Q.** Yes. And is there a definition that you have that would
24 make Proposition 8 discrimination or not discrimination? Is
25 there a definition you personally have as a political

1 scientist? "Yes," "no" --

2 **A.** Yes.

3 **Q.** -- or "I don't know"?

4 **A.** Well, okay. Let me try to move this forward, okay?

5 My view is that Proposition 8 makes distinctions. Am
6 in that sense it discriminates between these two different
7 categories, makes a distinction in terms of discriminating.

8 Whether it's invidious discrimination, that's a
9 different question.

10 **Q.** And Professors Eskridge and Cain don't address whether
11 it's invidious or not in his --

12 **A.** I think it's implied clearly in there.

13 **Q.** Here it is implied that it is invidious?

14 **A.** I believe so, yes.

15 **Q.** Let me ask you to look at page 17 of this amicus brief.

16 (Witness complied.)

17 **Q.** And at the end of the last full sentence there, they talk
18 about class legislation that takes away a fundamental
19 constitutional right from a minority that is traditionally been
20 the object of prejudice and stereotyping.

21 Do you see that?

22 **A.** Do you want to read the whole sentence once again?

23 **Q.** Sure. Let me read the whole paragraph.

24 **A.** Okay.

25 **Q.** (As read)

1 "As this Court recognized in in re marriage
2 cases, sexual orientation is a suspect
3 classification for the same reasons race and
4 sex are, and marriage is a fundamental right
5 for lesbian and gay couples just as it is for
6 interracial couples whose rights were
7 protected in *Perez v Sharp*.

8 "The on whole point of constitution,
9 according to social contract theory, the
10 founders of our nation and the terms of our
11 state constitution is to entrench guarantees
12 that all, emphasize all, citizens can count
13 on.

14 "A natural reading of article 18 in light
15 these constitutional commitments is that
16 higher hurdles must be surmounted before the
17 voters can essentially add to the
18 constitution class legislation that takes
19 away a fundamental constitutional right from
20 a minority that has traditionally been the
21 object of prejudice and stereotyping."

22 Now, my question is whether you agree that gays and
23 lesbians are a minority that has traditionally been the object
24 of prejudice and stereotyping, as the professors say here?

25 **MR. THOMPSON:** I think we are getting into the realm

1 of history, your Honor. I renew my objection.

2 **MR. BOIES:** I think this takes it up to the present
3 time, your Honor.

4 **THE COURT:** Okay. Overruled.

5 **A.** So gays and lesbians are a minority. They have been the
6 object of prejudice and stereotyping in the past.

7 And as I indicated in my direct testimony, I believe
8 that there has been a significant change in that in recent
9 areas.

10 **BY MR. BOIES:**

11 **Q.** Do you believe that gays and lesbians are still the object
12 of prejudice and stereotype, today?

13 **A.** I think like a lot of groups they are, yes.

14 **Q.** I'm sorry. Say that again?

15 **A.** I think like a lot of groups, they face some stereotyping
16 and some prejudice.

17 **Q.** Today do you believe that gays and lesbians suffer more as
18 the object of prejudice and stereotyping than do
19 African-Americans?

20 **A.** I certainly think African-Americans still face a lot of
21 prejudice and stereotyping. Again, it's a comparative
22 analysis. It would be difficult for me to do.

23 **Q.** And you've not done it?

24 **A.** I have not done it.

25 **Q.** So you don't have an opinion on that today, correct?

1 **A.** That's correct. I don't.

2 **Q.** Do you believe that gays and lesbians today are more the
3 object of prejudice and stereotyping than women?

4 **A.** Again, I think women still face a lot of prejudice and
5 stereotyping, and I haven't done a comparative analysis, no.

6 **Q.** Professor Miller, granting that women still today face a
7 large amount of prejudice and stereotyping, is it really your
8 testimony that you can't tell whether they face more or less
9 prejudice and stereotyping than gays and lesbians?

10 **A.** I think I would have to look more closely at it, actually.
11 I think there's a lot of anti-female stereotyping in our
12 society today.

13 **Q.** I'm not disputing that. I'm just pressing you on the idea
14 that in our society today women are -- or could be as much the
15 object of prejudice and stereotyping as gays and lesbians?

16 **A.** Again, I would have to take a closer look at that. I
17 haven't done that comparative analysis.

18 **Q.** Well, let me leave gays out of the equation for a moment
19 and let just talk about lesbians.

20 Would you agree the lesbians face all of the
21 prejudice and stereotyping of women generally, plus more?

22 **A.** That's a fair statement.

23 **Q.** So at least with respect to lesbians, they have got to be
24 more the object of prejudice and stereotyping than women,
25 correct?

1 **A.** Yeah, same thing.

2 **Q.** I'm sorry. What?

3 **A.** I would have the same answer, yes.

4 **Q.** Okay. Let me ask you to look at page 19.

5 (Witness complied.)

6 **Q.** Four lines from the bottom. The sentence that begins "For
7 example."

8 Here Professor Eskridge and Cain say:

9 "The proponents of Proposition 8 centrally
10 maintained that state recognition of same-sex
11 marriage would require, emphasize require,
12 schools to teach vulnerable children that,
13 quote, gay marriage, close quote, is just as
14 good as "traditional marriage."

15 That claim has no basis and it's acceptance by some
16 voters probably made the difference between the gay minorities
17 having the same rights as the straight majority and something
18 no marriage rights at all.

19 Do you see that?

20 **A.** I'm reading it. One second.

21 (Brief pause.)

22 **A.** Okay. I see the sentence, yes.

23 **Q.** Okay. Now, I take it that -- well, let me ask you: Do
24 you have an opinion as to whether -- what they say here is
25 accurate or not. I assume that you don't, but I just -- if you

1 do --

2 **MR. THOMPSON:** Objection. Beyond the scope of
3 direct, your Honor. I didn't ask the witness about the
4 campaign relating to Proposition 8.

5 **THE COURT:** I think this line of inquiry does pursue
6 the testimony that he gave on direct and, therefore, the
7 objection will be overruled.

8 **BY MR. BOIES:**

9 **Q.** Do you have an opinion as to whether Professor Eskridge
10 and Cain are correct when they say that claim has no basis and
11 it's acceptance by some voters probably made the difference
12 between the gay minorities having the same marriage rights as
13 the straight majority in having no large rights at all?

14 **A.** Yes, I have an opinion.

15 **Q.** I'm sorry. What?

16 **A.** Yes, I do have an opinion.

17 **Q.** And do you agree or disagree?

18 **A.** Umm, I think there is a basis with respect to the
19 curricular consequences of Proposition 8. And so the first
20 clause, "The claim has no basis," I don't agree with that.

21 The second clause with regard to the impact of that
22 message, is it probably made the difference between the gay
23 minorities having the same marriage rights as the straight
24 majority and having no marriage rights at all. There's a lot
25 embedded in that.

1 First of all, in terms of the message's impact on the
2 outcome of the election, I don't actually know.

3 **Q.** I'm sorry, what?

4 **A.** I don't actually know. I mean, there are a lot of
5 different messages going on in the campaign.

6 **Q.** And if you don't know, you don't know.

7 **A.** Okay.

8 **Q.** All right. As you say, they make two statements here.
9 One is that the claim that state recognition of same-sex
10 marriage would require schools to teach vulnerable children
11 that gay marriage is just as good as traditional marriage.
12 They say that claim has no basis. You say, no, I disagree with
13 that. I think I think that claim does have basis?

14 **A.** I think it could be shown to have a basis, yes.

15 **Q.** Could be shown to have a basis. Has anybody shown it to
16 have a basis that you are aware of?

17 **A.** I think the analysis that was done by the proponents of
18 Proposition 8 with respect to existing California state
19 education requirements, in terms of the curriculum in the
20 public schools and what the potential impact of the passage of
21 Proposition 8 would be had a basis.

22 I don't know if it's actually correct or not. It
23 hasn't been tested in the courts. I assume if Proposition 8
24 were passed and there was a curricular move under existing
25 state law to make this happen, then there would be challenges

1 to it.

2 So I don't know whether it actually would have
3 happened or not, but I think there was a basis for believing it
4 could have happened, yes.

5 **Q.** Okay. The second part is that that claim and its
6 acceptance made the difference in the election -- or made the
7 difference in the vote. And that's something you say you
8 don't -- do not have an opinion on, is that correct?

9 **A.** I would say it's hard to say because there were no many
10 messages in the campaign.

11 **Q.** I'm not asking you why you don't have an opinion. I'm
12 just asking you whether you have an opinion as to whether
13 that's accurate or not?

14 **A.** It said possibly made the difference, then I might be able
15 to adopt that. If it probably made the difference, then I
16 can't say.

17 **Q.** And definitely it made the difference, which is what they
18 say; you can't say that either, right?

19 **A.** They say probably made the difference.

20 **Q.** Yes, they do say "probably"?

21 **A.** So if they said definitely, I would say I disagree with
22 that. If they say probably I don't know. Possibly I would
23 agree with it.

24 **Q.** I just want to understand your logic. You said you didn't
25 know whether it made a difference or not, right? You didn't

1 know whether that was the difference in the election?

2 And when I say election, I mean vote.

3 **A.** The vote, right.

4 It was a factor out there. There was a lot of other
5 factors, and I can't -- I haven't done any polling on this. I
6 don't know anyone else who has who can say that that message
7 about the curricular -- the potential curricular impact of
8 Proposition 8 made the difference in the election which, is the
9 claim here, right?

10 **Q.** You just don't know whether that's right or not, correct?

11 **A.** I don't.

12 **Q.** Okay?

13 **A.** I think it's fair to say that if they definitely -- they
14 said it definitely made the difference, then I would have a lot
15 of reservations about that, given that there's no basis for
16 proof that I have seen, no polling data, survey data that said,
17 Why did you vote for Proposition 8?

18 **Q.** Are you aware of polling data as to why people voted for
19 Proposition 8?

20 **A.** I haven't seen any extensive polling data on that, no.

21 **Q.** You say you haven't seen any extensive -- let me ask you
22 whether you have seen any polling data on why people voted for
23 Proposition 8?

24 **A.** I'm trying to think. I certainly have seen the exit polls
25 about the vote, but I can't recall reading a poll that said,

1 "Why did you vote for Proposition 8," a large poll on that.

2 **Q.** Now you just put in "a large poll." I will get to whether
3 the poll is extensive. I will get to whether the poll was
4 large.

5 But what I'm now asking you is whether you have seen
6 any data at all as to why people voted for Proposition 8?

7 **A.** I actually think I may have, but I don't recall what it
8 is, yeah.

9 **Q.** You may recall?

10 **A.** Yes.

11 **Q.** Well, let me ask you to look at tab 78.

12 **THE COURT:** As you do that, Mr. Boies, let me ask
13 about how you are going in your examination of this witness?

14 If you can tell, it's rather warm in here and our
15 landlord shuts down the ventilation at 5:00 o'clock.

16 **MR. BOIES:** Your Honor, I will not finish by 5:00 and
17 this will be a convenient time to break.

18 **THE COURT:** Very well. Then let's do it, and we will
19 resume at 8:30 tomorrow morning.

20 (Whereupon at 4:44 p.m. further proceedings
21 in the above-entitled cause was adjourned
22 until Tuesday, January 26, 2010 at 8:30 a.m.)

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We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
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California, et al.**, were reported by us, certified shorthand
reporters, and were thereafter transcribed under our direction
into typewriting; that the foregoing is a full, complete and
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_____/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

_____/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR
U.S. Court Reporter

Monday, January 25, 2010