

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

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

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

) San Francisco, California
Defendants.) Monday
) January 11, 2010

TRANSCRIPT OF PROCEEDINGS

Reported By: *Katherine Powell Sullivan, CRR, CSR 5812*
Debra L. Pas, CRR, CSR 11916
Official Reporters - U.S. District Court

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PROCEEDINGS1
2 JANUARY 11, 2010

9:06 A.M.

3
4 **THE CLERK:** Calling civil case 09-2292, Kristin
5 Perry, et al. versus Arnold Schwarzenegger, et al.6 Can I get appearances on the plaintiffs' side,
7 please.8 **MR. OLSON:** Good morning, Your Honor.9 Theodore B. Olson, Gibson, Dunn & Crutcher, on behalf
10 of the plaintiffs.11 **THE COURT:** Good morning, Mr. Olson.12 **MR. BOUTROUS:** Good morning, Your Honor.13 Theodore Boutrous, also for the plaintiffs, also from
14 Gibson, Dunn & Crutcher.15 **THE COURT:** Mr. Boutrous, good morning.16 **MR. BOIES:** Good morning, Your Honor.17 David Boies, of Boies, Schiller & Flexner, also for
18 the plaintiffs.19 **THE COURT:** Good morning.20 **MR. DUSSEAULT:** Good morning, Your Honor.21 Chris Dusseault, of Gibson, Dunn & Crutcher, also on
22 behalf of the plaintiffs.23 **MR. GOLDMAN:** Good morning, Your Honor.24 Jeremy Goldman, from Boies, Schiller & Flexner, on
25 behalf of the plaintiffs.

1 **THE COURT:** Good morning.

2 **MR. HOLTZMAN:** Good morning, Your Honor.

3 Steve Holtzman, also Boies, Schiller & Flexner, for
4 the plaintiffs.

5 **MR. HERRERA:** Good morning, Your Honor.

6 City attorney Dennis Herrera for plaintiff-intervenor
7 City and County of San Francisco.

8 **THE COURT:** Good morning.

9 **MS. STEWART:** Good morning, Chief Judge Walker.

10 Therese M. Stewart, chief deputy city attorney, for
11 plaintiff-intervenor City and County of San Francisco.

12 **MR. COOPER:** Good morning, Mr. Chief Judge.

13 Charles Cooper, Cooper and Kirk, for the
14 defendant-intervenors.

15 **THE COURT:** Mr. Cooper, good morning.

16 **MR. THOMPSON:** Good morning, Your Honor.

17 David Thompson, of Cooper and Kirk, for the
18 defendant-intervenors.

19 **THE COURT:** Mr. Thompson, good morning.

20 **MR. NIELSON:** Good morning, Chief Judge Walker.

21 Howard Nielson, also of Cooper & Kirk, for the
22 defendant-intervenors.

23 **THE COURT:** Good morning.

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

25 Nicole Moss, with Cooper and Kirk, for defendant

1 intervenors.

2 **THE COURT:** Good morning.

3 **MR. PATTERSON:** Good morning, Your Honor.

4 Peter Patterson, also from Cooper and Kirk, for the
5 defendant-intervenors.

6 **THE COURT:** Good morning.

7 **MR. CAMPBELL:** Good morning, Your Honor.

8 James Campbell, of the Alliance Defense Fund, on
9 behalf of the defendant-intervenors.

10 **MR. RAUM:** Good morning, Your Honor.

11 Brian Raum, for the defendant-intervenors, on behalf
12 of Alliance Defense Fund.

13 **THE COURT:** Good morning.

14 **MR. RAUM:** Good morning.

15 **MR. STROUD:** Good morning, Your Honor.

16 Andrew Stroud, Stroud, Mennemeier, Glassman & Stroud,
17 on behalf of Governor Schwarzenegger, in his official capacity,
18 and on behalf of the other administration defendants.

19 Thank you, Your Honor.

20 **THE COURT:** Good morning.

21 **MS. PACTER:** Good morning, Your Honor.

22 Tamar Pachter on behalf of the California Attorney
23 General.

24 **THE COURT:** Good morning.

25 **MR. BURNS:** Good morning, Your Honor.

1 Deputy solicitor general Gordon Burns, on behalf of
2 Attorney General Brown.

3 **THE COURT:** On behalf of?

4 **MR. BURNS:** Attorney General Brown.

5 **THE COURT:** Very well.

6 **MR. KOLM:** Good morning, Your Honor.

7 Claude Kolm, deputy county counsel, on behalf of
8 defendant Patrick O'Connell, the Alameda County Clerk Recorder.

9 **MR. MARTINEZ:** Good morning, Your Honor.

10 Manuel Martinez, also for defendant Patrick
11 O'Connell, Clerk Recorder for Alameda County.

12 **THE COURT:** Good morning.

13 **MR. MARTINEZ:** Good morning.

14 **MS. WHITEHURST:** Good morning, Your Honor.

15 Judy Whitehurst, Los Angeles County Counsel's Office,
16 on behalf of Dean C. Logan, the Los Angeles County
17 Registrar-Recorder/County Clerk.

18 **THE COURT:** Good morning.

19 Any other appearances?

20 **MR. THOMPSON:** Terry Thompson on behalf of defendant
21 intervenor Hak-Shing William Tam. William Tam.

22 **THE COURT:** Good morning.

23 Any others?

24 Perhaps when we get into the next day of trial we can
25 move this process of putting appearances in somewhat more

1 expeditiously. I think it's particularly helpful, when there
2 are lots of lawyers who may not be speaking in the case, that
3 they get to enter their appearances. But maybe as we move
4 along, we can expedite that.

5 Now, I trust that you all have had a quiet and
6 restful few days since we were together on Wednesday.

7 (Laughter)

8 I can assure you, I have.

9 (Laughter)

10 Now, you probably know we received this morning an
11 order from the Supreme Court, which has stayed the transmission
12 of any audio or visual images of this case until at least
13 4:00 p.m. Eastern Time on Wednesday the 13th.

14 So the issue that consumed much of our discussion on
15 Wednesday, and that I gather has consumed much of your time in
16 the last few days, is, I think, resolved for the moment, and we
17 can just leave it in place. It clears the air.

18 There certainly are a good many issues that surround
19 this, and we will see what guidance the Supreme Court can
20 provide us on this issue.

21 There are many issues in play, as I'm sure you
22 recognize the respective role of the Judicial Conference of the
23 United States and the various Judicial Councils of the
24 Circuits, that I'm sure is an issue that is being considered by
25 the Justices of the Supreme Court.

1 But I do want to clarify a couple of points with
2 reference to this issue.

3 What the Court has contemplated and what the Ninth
4 Circuit pilot project contemplates is a posting on the Northern
5 District of California website. It is not a Google YouTube
6 posting that may be commonly understood. Rather, that service
7 is under consideration as a conduit for posting an audio and
8 visual feed pursuant to a contract that the government has with
9 that service.

10 And you may very well have observed the White House
11 website that is accessible through the YouTube Google service.
12 If you've not observed it, you should certainly do so. It's
13 completely in keeping with the appropriateness of presidential
14 statements and information being supplied by the President to
15 the public. And so that service would be used here in exactly
16 or very much the same -- the same manner.

17 I also want to report, with reference to the changes
18 in the local rules -- and to some degree I'm responsible for
19 some confusion over this. This is the change to local Rule
20 77-3, that was adopted at a court meeting. A special court
21 meeting not held for the purpose of considering an amendment to
22 Rule 77-3, but for another purpose. But it was timely because
23 it occurred a few days after the Ninth Circuit adopted the
24 pilot project that you're familiar with.

25 And the court, at that special meeting, unanimously

1 adopted the change to local Rule 77-3, and did so without
2 comment, without a comment period, because it was a conforming
3 amendment to Ninth Circuit policy.

4 And, in addition, of course, both the Ninth Circuit
5 Council and this court had very much in mind the possibility of
6 an audio and visual transmission of this case pursuant to that
7 pilot project.

8 So that amendment was made pursuant to the urgency
9 provision, which is permitted under Title 28. And it was
10 suggested that thereafter comments should be sought and
11 elicited to the rule.

12 We have frequently done that. Perhaps not
13 frequently. We have done that in the past, where a local rule
14 has been adopted either on some urgent basis or some other
15 basis thought to be appropriate, and then comment solicited
16 after the amendment. And that was done here.

17 Unfortunately, I did not ask the clerk, who posted
18 the announcement, to review that announcement with me. And so
19 the word "proposed change" did get posted on the website.

20 And, in fact, the change in the local rule was not a
21 proposed change, at all, but rather was a rule that was
22 adopted.

23 Nonetheless, we have received a very substantial
24 number of comments in response to that change. As of -- as of
25 Friday, 5:00 p.m. Friday, we had received 138,574 responses or

1 comments.

2 Now, a good many of those comments, of course,
3 related simply to the transmission of this case, and did not
4 specifically address the rule change. Some did specifically
5 address the rule change. And some, of course, mentioned both.

6 But I think it's fair to say that those that favored
7 coverage of this particular case implicitly also favored the
8 rule change which would make an audiovisual transmission of
9 this case possible.

10 And if these results are any indication of where
11 sentiment lies on this issue, it's overwhelmingly in favor of
12 the rule change and the dissemination of this particular
13 proceeding by some means through the Internet.

14 And the numbers, frankly are 138,542 in favor, and 32
15 opposed.

16 (Laughter)

17 So I think the -- at least the returns are clear in
18 this case. And we received a very thoughtful submission by the
19 Federal Bar Association, which at some point or other I would
20 like to make part of the record, simply to complete the record
21 with respect to this matter.

22 Now, there are some continuing technical issues that
23 attend the possible transmission of these proceedings over the
24 Internet.

25 Chief Judge Kozinski and the Circuit executive, Cathy

1 Catterson, worked very hard over the weekend with the court's
2 technical staff to resolve those issues.

3 One of the e-mails that I received on this subject --
4 actually, two of the e-mails that I received, one from Chief
5 Judge Kozinski and one from Ms. Catterson, were dated Sunday
6 morning, shortly after midnight. So they worked very hard and
7 very diligently, along with the court staff, to try to resolve
8 these issues.

9 Where matters stand in that regard, I don't know. I
10 have not involved myself in that part of the activity. Rather,
11 to the extent I've devoted myself to this case over the
12 weekend, it's reading your briefs and proposed findings of
13 fact, and other matters which I think are probably more
14 appropriate for me to spend time on.

15 Now, with that, I don't think, at this point, we have
16 anything more that we need or should say on this particular
17 subject, unless any of the parties have something that he or
18 she wishes to add.

19 I do think what we have gone through in this case in
20 the last few days has been very helpful. Very helpful indeed.

21 The issue of the public's right to access court
22 proceedings is an important one. I think it's highly
23 unfortunate that the Judicial Conference and the courts have
24 not dealt with this issue in the past, have not in a considered
25 and thoughtful fashion worked through the issues.

1 The briefs that you filed in the Court of Appeals and
2 in the Supreme Court deal with those issues. And that's true
3 of both sides.

4 Certainly, the concerns that the proponents have
5 raised here are concerns that should be considered, need to be
6 considered, and in due course should be given thorough
7 consideration.

8 But I think, in this day and age, with the technology
9 that's available and the importance of the public's right to
10 access judicial proceedings, it's very important that we in the
11 federal judiciary work to achieve that access consistent with
12 the means that are presently available to do that.

13 And I would commend you for the efforts that you've
14 made in bringing these issues forward, and I'm hopeful that
15 this experience will have brought these issues to the fore.
16 And maybe, finally, after some 20 years we will get some
17 sensible movement forward.

18 Now, Mr. Boutrous.

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

20 Could I address one issue? Since the stay is
21 temporary and the Supreme Court is going to be considering
22 these issues, and given the importance of the issues in this
23 case, we would request that the Court permit recording and
24 preservation of the proceedings today and through Wednesday.

25 I've heard -- having heard Mr. Cooper argue on many

1 occasions, I can't imagine why he wouldn't want his opening
2 statement preserved for the record.

3 (Laughter)

4 So the public can hear what he has to say. And same
5 goes for Mr. Olson.

6 And given the fact that this is a temporary stay, and
7 the stay order does not mention anything about restricting the
8 ability of the court to capture the images on the cameras and
9 preserve them in the event the stay is lifted and Judge
10 Kozinski issues his order, we think that would be a good
11 solution so then the materials could be posted when those --
12 those things happen.

13 **THE COURT:** Well, that's very much of a possibility
14 as presently matters stand.

15 The only transmission of these proceedings is to the
16 overflow courtroom in this courthouse. Any transmission beyond
17 that is not permitted, pending some further order of the
18 Supreme Court or the Court of Appeals, and, indeed, Chief Judge
19 Kozinski, who would be directing the pilot project.

20 I think your request is a fair one. But in the event
21 that there is no recording permitted after the issue is finally
22 settled, if a recording is made, some disposition of that
23 recording would have to be dealt with. And perhaps this is a
24 matter that we can deal with after we learn what the rule is
25 going to be in this case.

1 I would prefer to defer it until then.

2 **MR. BOUTROUS:** That's what I would propose, Your
3 Honor. That way, simply recording it now, and then the Court
4 can grapple with that issue when we find out what happens on
5 Wednesday.

6 **THE COURT:** Very well.

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

8 **THE COURT:** Mr. Cooper.

9 **MR. COOPER:** Your Honor, I very much appreciate
10 Mr. Boutrous's desire to ensure that my words are memorialized.

11 (Laughter)

12 But I do object to his proposal. I don't believe
13 that it's in keeping with -- although, at least as I read the
14 Court's order, and I only had a moment to do so, I don't
15 believe it specifically addresses this issue. But I don't
16 think it's consistent with the spirit of that order.

17 So I just want to make clear our objection to that
18 proposal. Thank you.

19 **THE COURT:** Very well. Your objection is noted.

20 Well, we have opening statements to make. And are
21 there any preliminary matters that we should address before we
22 turn to the opening statements? For the plaintiffs, for the
23 defendants, for the intervenors.

24 **MR. OLSON:** We have none. We are ready to proceed
25 when Your Honor is ready.

1 **THE COURT:** Very well. Mr. Cooper.

2 **MR. COOPER:** Your Honor, I only have a preliminary
3 evidentiary matter I would like to put on the record, for
4 purposes of preserving it. And I think perhaps that should
5 happen after the opening statements and when we get into the
6 presentation of evidence. But I wanted to alert you to that.

7 **THE COURT:** And what is that, sir?

8 **MR. COOPER:** It is to reiterate, again, for purposes
9 of preserving our objection to any evidentiary presentation
10 going to the intent and purpose of the voters in Proposition 8.

11 We have, as you know, relied from the outset on the
12 SASSO case, and its statement that the question of motivation
13 for a referendum, apart from consideration of its effects, is
14 not an appropriate one for judicial inquiry.

15 Now, we know we have lost this issue here. But I do
16 want to put this on the record, for purposes of preserving it
17 solely.

18 And I know that from the exhibits that plaintiffs'
19 counsel have provided to us that in the opening witnesses it
20 appears they plan to put this kind of evidence on, things such
21 as the ads used in connection with the Yes On 8 campaign.

22 And so I simply want to have a continuing objection,
23 if I may, to all of that evidence, so that I needn't and my
24 colleagues needn't pop up every time such information is
25 solicited, as it will be throughout the trial.

1 land, marriage is the most important relation in life, and of
2 fundamental importance for all individuals.

3 **THE COURT:** Now, does the right to marry, as secured
4 by the Constitution, mean the right to have a marriage license
5 issued by the state?

6 **MR. OLSON:** Well, to the extent that the state
7 asserts the right to regulate marriage, and it utilizes the
8 form of a license to do so, I would think that would follow.

9 **THE COURT:** Why?

10 **MR. OLSON:** I'm not sure I understand the import of
11 the question, because, as I said, it seems to me that if there
12 is a right to marry in the Constitution, and the Court upholds
13 the right to the individuals that we are representing to
14 marry --

15 **THE COURT:** Well, what you're saying is that that
16 right presumes that the state has a duty to issue marriage
17 licenses.

18 **MR. OLSON:** Well, it would have a duty to issue a
19 marriage license where it would constitutionally require it
20 under the Constitution, and that would be co-extensive with the
21 constitutional right itself.

22 It is certainly appropriate --

23 **THE COURT:** Could the state get out of the marriage
24 license business?

25 **MR. OLSON:** Yes, I believe it could.

1 It is certainly appropriate, I was about to say,
2 Chief Judge Walker, that there may be aspects of the marital
3 status that the state would be perfectly appropriate in
4 considering to regulate. Age of individuals or something like
5 that. Or the process by which it's done, or some registration
6 requirement or something like that.

7 We are not involved in this case with those types of
8 regulatory activities. But the state, it seems to me, could
9 get out of the business of licensing marriage. That wouldn't
10 be required by the Constitution.

11 What the Supreme Court has talked about is the
12 relationship itself, marriage. And that relationship has
13 consistently, throughout history, been regulated by the states
14 through the process of marriage licenses.

15 As the witnesses in this case will elaborate with
16 respect to that point, the right to marriage itself, marriage
17 is central to life in America. It promotes mental, physical,
18 and emotional health, and the economic strength and stability
19 of those who enter into a marital union. It is the building
20 block of family, neighborhood and community in our society.

21 The California Supreme Court has declared -- excuse
22 me, has declared that the right to marry is of central
23 importance to an individual's opportunity to live a happy,
24 meaningful and satisfying life, as a full member of society.

25 Proposition 8 ended the dream of marriage, the most

1 important relation in life, for the plaintiffs and hundreds of
2 thousands of Californians.

3 In May of 2008, the California Supreme Court
4 concluded that under this state's constitution, the right to
5 marry a person of one's choice extended to all individuals,
6 regardless of sexual orientation, and was available equally to
7 same-sex and opposite-sex couples.

8 In November of 2008, a few months later, the voters
9 of California responded to that decision with Proposition 8,
10 amending the state's constitution, and on the basis of sexual
11 orientation and sex, slammed the door to marriage to gay and
12 lesbian citizens.

13 The plaintiffs are two loving couples, American
14 citizens entitled to equality and due process under our
15 constitution. They are in deeply-committed, intimate and
16 long-standing relationships.

17 **THE COURT:** I gather the evidence will be that the
18 plaintiffs are not registered domestic partners?

19 What is the evidence on that?

20 **MR. OLSON:** One couple is.

21 **THE COURT:** Okay.

22 **MR. OLSON:** And we will be -- in fact, the first four
23 witnesses in the case will be the four plaintiffs. And we will
24 ask them to describe their relationship with one another, the
25 history of that relationship, and explore that very subject.

1 **THE COURT:** And what disabilities do they operate
2 under as domestic partners, as opposed to marital partners?

3 **MR. OLSON:** Well, they will describe in considerable
4 detail, Chief Judge Walker, what it means to be married, to
5 them, to their families, to their children; what is like in the
6 workplace; what it is like when they travel; what it is like
7 when they go to a doctor's office; the difference between
8 marriage and domestic partnership.

9 **THE COURT:** Well, are those differences of a legal
10 nature? That is, are these differences, to the extent there is
11 some inferior status associated with domestic partnership, is
12 that a product of state action, or is that simply societal
13 acceptance?

14 **MR. OLSON:** Well, I think the two are so closely
15 interwoven, they cannot be extracted. Because what the state
16 has done, has given a sanction to a formal relationship which
17 is part of our culture and part of society.

18 The state is labeling an individual relationship as
19 something called a domestic partnership, which has nothing to
20 do with love. And it has labeled a separate relationship,
21 which the proponents have described in papers filed with this
22 court, as a unique and special relationship reserved for
23 opposite-sex couples.

24 It means something to them. It means something to
25 society. And it means something to the State of California.

1 California has put people into categories.

2 And I was going to say a few moments later --

3 **THE COURT:** Does Proposition 8 classify people?

4 **MR. OLSON:** It does.

5 **THE COURT:** It doesn't classify individuals, does it?

6 It simply restricts marriage to opposite-sex couples.

7 **MR. OLSON:** When it does so, it classifies people
8 into separate categories.

9 And I will point out later in my statement that there
10 are now four categories of Californians under -- in connection
11 with the status of marriage. And that matters a great deal.

12 The evidence will show from the plaintiffs, and from
13 the experts that will be presented to this court, what it means
14 to be married, what it means to have the state sanction your
15 relationship, to give its official approval. Which is one of
16 the reasons why Proposition 8 was passed, and one of the
17 reasons why it's being defended so vigorously by the proponents
18 of Proposition 8, because they want that status to remain
19 special and reserved to opposite-sex couples, and to be denied
20 to same-sex couples, because there is a judgment being made.

21 And it's expressed by what California has done, that this is
22 something different, separate, unequal, and less advantageous.

23 **THE COURT:** Domestic partnerships are not limited to
24 same-sex couples, correct?

25 **MR. OLSON:** I think that's correct.

1 **THE COURT:** So it's possible that opposite-sex
2 couples could form a domestic partnership and register under
3 California law?

4 **MR. OLSON:** I haven't spent a great deal of time
5 studying that, but I suspect Your Honor has. And I'm not
6 dispute --

7 **THE COURT:** Don't count on it. But I believe that's
8 true.

9 (Laughter)

10 **MR. OLSON:** I don't imagine why -- I know nothing
11 that would suggest that it would be exclusive to same-sex
12 couples.

13 **THE COURT:** All right. So where's the discrimination
14 here?

15 If, for example, California were to get out of the
16 marriage business and simply classify everybody has a domestic
17 partner, wouldn't that solve your problem?

18 **MR. OLSON:** If California allowed people to marry
19 without a license, which is what I think is part of the import
20 of your suggestion, and said that the only thing we're
21 regulating is something called domestic partnership, and
22 everybody can do that, yes, that might mean that California is
23 treating people equally, and people can enter into
24 relationships that they call marriage, without the sanction of
25 the state, the approval of the state, all of the things that

1 goes with the government taking a position on relationships
2 based upon sex or sexual orientation. That may solve the
3 problem.

4 That will never happen. The people of California, I
5 just am reasonably confident in predicting, will not get out of
6 the business of marriage.

7 As I said, on November 8, the voters of California
8 slammed the door on marriage to gay and lesbian citizens.

9 **THE COURT:** Why won't they get out of the marriage
10 business?

11 **MR. OLSON:** Why --

12 (Simultaneous colloquy.)

13 **THE COURT:** Get out of the marriage business. That
14 would solve this problem, wouldn't it?

15 **MR. OLSON:** I think that politically it would not
16 happen. Now, I'm not offering myself as an expert --

17 **THE COURT:** As a political expert.

18 (Laughter)

19 **MR. OLSON:** -- on political science or what the
20 voters do, because I've been wrong again and again.

21 I'm just handed a note, and I don't know -- I haven't
22 researched this -- that only opposite-sex couples over 62 years
23 old can receive the domestic partnership treatment.

24 I have not researched this, and I advance it on the
25 basis of someone on our team obviously has.

1 **THE COURT:** Good authority, as it were.

2 (Laughter)

3 **MR. OLSON:** But I do not offer myself as an expert on
4 what the voters of this state or any other state will do. But
5 from what I do know of after having lived in California a long
6 time, and studied the issue of relationship and marriage in
7 connection with this case, I suspect that the people of the
8 state of California are not going to want to abandon the
9 relationship which the proponents of Proposition 8 spend
10 enormous amount of resources describing as a special
11 relationship, that means a great deal to people and is
12 important, and is so important that it must be preserved for
13 opposite-sex couples and withheld from same-sex couples.

14 **THE COURT:** Well, but the proponents argue that
15 marriage has never been extended to same-sex couples in the
16 past, and so we're simply preserving a tradition that is long
17 established and that is, indeed, implicit in the very concept
18 of marriage.

19 **MR. OLSON:** Yes. And we will offer evidence about
20 the relationship, about what the courts of the -- the Supreme
21 Court of the United States and the Supreme Court of this state,
22 and what the experts who have studied marriages have said about
23 that.

24 One of the points that I was going to make, and I
25 will make it, is that there have been restrictions on marriage

1 in the past, based upon biases towards people of a different
2 race, based upon sex. There have been restrictions on marriage
3 that treated women unequally in the relationship. That was
4 always the way it was for a while. It was always the way it
5 was in certain states, that certain people of certain races or
6 ethnicity. California treated people of an Asian descent
7 differently with respect to marriage.

8 **THE COURT:** What's the evidence going to show that
9 has happened here to raise the right to marry to such a level
10 that now the marriage of same-sex couples is entitled to equal
11 protection and due process protection? What are the facts
12 going to show?

13 **MR. OLSON:** Well, the facts are going to show that
14 the relationship -- that what the Supreme Court has talked
15 about is in the relationship of marriage, is the right of an
16 individual to privacy, association, liberty, intimate
17 relationships, and so forth, and that that -- what the Supreme
18 Court has talked about, in terms of what the relationship
19 means, isn't limited to people of opposite sex.

20 What an individual gets out of the relationship of
21 marriage -- and this is what the evidence will show from
22 experts at leading institutions from the United States and in
23 the world -- that it's the relationship between the individual
24 in the marriage situation that is valuable; and the withholding
25 of it doesn't make sense, from certain classes of individuals.

1 **THE COURT:** But what's the change that has occurred
2 to elevate this right or to change the understanding of this
3 right? What are the facts going to be?

4 **MR. OLSON:** Well, California, as I said a few moments
5 ago, in May of 2008, said that opposite -- same-sex couples
6 have the same right to marry under the California Constitution
7 as opposite-sex couples.

8 What the California Supreme Court did was pronounce
9 what the California Constitution permitted. So that what
10 California Supreme Court was saying is what the right was. And
11 it included the right of same-sex couples to marry.

12 **THE COURT:** I'm not getting at what the California
13 Supreme Court said. I'm getting at what the evidence here is
14 going to show.

15 **MR. OLSON:** The evidence here is going to show the
16 same sort of thing that the California Supreme Court and the
17 United States Supreme Court has considered when it has
18 considered marriage.

19 And you asked: What changed? What changed, what
20 changed was, the change was November of 2008, when
21 Proposition 8 was passed.

22 Because the California proposition, California
23 Constitution, up to that point, based upon the decision of the
24 California Supreme Court in May, permitted people of the same
25 sex to marry.

1 What changed was Proposition 8, which isolated gay
2 men and lesbian individuals and said: You're different. We're
3 going to withhold and take away that right from you.

4 **THE COURT:** What's the evidence here going to show
5 that Proposition 8 was motivated by an intent to discriminate
6 against gays and lesbians? The evidence, what's the evidence?

7 **MR. OLSON:** The evidence, in the first place, the
8 advertising, the ballot proposition, the -- Proposition 8
9 itself, official title of the ballot measure, in a sense, said
10 it all. "Eliminates right of same-sex couples to marry."

11 Now, discrimination, it can take various forms --

12 **THE COURT:** Wasn't that a formulation devised by the
13 attorney general?

14 **MR. OLSON:** That's not only the official title of the
15 statute, it's the way it was characterized. It was the way it
16 was characterized in the official ballot measure information
17 that's sent to every voter in the state: "Eliminate the right
18 of same-sex couples to marry."

19 There is no question, Your Honor, that what
20 Proposition 8 did and was intended to do was to take away a
21 right of same-sex couples to be in the marital relationship and
22 to confine them to domestic partnerships or some other
23 relationship. It put them in a different category. Now,
24 that's discrimination.

25 We could argue, and there will be some discussion by

1 the experts, and the plaintiffs themselves, about what they
2 heard and what they saw during the campaign for Proposition 8,
3 and how that made them feel, with respect to the things that
4 were being said about them and about their relationship.

5 I'm sure that the evidence is -- would show, no
6 matter who put the evidence on, that the individual voters may
7 have been motivated differently one way or the other.

8 They may have had religious convictions. They may
9 have had other kinds of -- the same kind of sentiments towards
10 gay men and lesbian women that have motivated people to prevent
11 such individuals from serving in the United States government,
12 from serving in the Armed Forces, from being prosecuted
13 criminally. It may have been all kinds of range of emotions.
14 But discrimination isn't in any doubt.

15 **THE COURT:** Well, but moral disapproval has never
16 been a basis to find an enactment unconstitutional; has it?

17 Local ordinance or state law preventing or
18 prohibiting the sale of intoxicating liquors would not be
19 invalid because it reflects the moral values of a community.

20 **MR. OLSON:** Well, moral values of a community, if
21 they take into consideration, as you used the phrase in your
22 very first order in this case, "immutable characteristics," may
23 have constitutional dimension.

24 The discrimination against people on the basis of
25 race, the history of the United States is full of moral

1 condemnation of other people because of their race, their sex,
2 or their ethnicity.

3 Moral condemnation is a very, very broad concept.
4 And the idea that someone is different and, therefore,
5 shouldn't be able in California to own a laundry, is something
6 that the United States Supreme Court rejected.

7 The Supreme Court of the United States, in *Lawrence*
8 *vs. Texas*, addressed that very point. The argument was by the
9 State of Texas, is: Of course we can prohibit that private,
10 intimate relationship between individuals of the same sex
11 because of moral disapproval. That was the basis advanced in
12 the United States Supreme Court with respect to the conduct
13 that was at issue there.

14 **THE COURT:** But all kinds of laws are based upon some
15 moral understanding that is commonly and widely shared. That
16 doesn't make the enactment or the law invalid, does it?

17 **MR. OLSON:** No. But it does when it has to do with
18 the person's race, a person's sex, a person's ethnicity.

19 I would submit, if it was based upon a person's
20 religion, and *Lawrence vs. Texas* and *Romer vs. Colorado*, stand
21 for the proposition that if that moral disapproval, or whatever
22 kind of disapproval it is -- because it is disapproval when you
23 are putting somebody in a different box. The California
24 Supreme Court said, denying this right to Californians made
25 them second class citizens.

1 So there's moral disapproval and disapproval. But
2 when it's based upon certain characteristics of the individual,
3 then, it cannot constitutionally be done in the United States
4 of America, under the Fourteenth Amendment to the Constitution
5 of the United States.

6 As I said just a moment ago, the California Supreme
7 Court specifically addressed this and said that, relegating
8 these individuals, preventing them from marrying a same-sex
9 partner, relegates those individuals, to use the phrase of the
10 California Supreme Court, "to second class citizenship," and
11 tells their families and them and their neighbors and their
12 co-workers that their love and their desire for a sanctioned
13 marital partnership is not worthy of recognition.

14 During the trial -- you've asked about the evidence.
15 Plaintiffs and leading experts in the fields of history,
16 psychology, economics, and political science will prove these
17 three basic fundamental points that we will be addressing
18 during the course of this trial:

19 Marriage, that relationship, culturally and as
20 sanctioned by the state, is vitally important in American
21 society.

22 Secondly, by denying gay men and lesbians the right
23 to marry, Proposition 8 works a grievous harm on the plaintiffs
24 and other gay men and lesbians throughout California, and adds
25 yet another chapter -- we will talk about the chapters in

1 American and California history -- to the long history of
2 discrimination these individuals have suffered at the hands of
3 their fellow citizens and at the hands of their government.

4 And, thirdly, that Proposition 8 perpetrates this
5 irreparable, immeasurable, discriminatory harm for no good. No
6 good reason.

7 Now, with respect to the first point, marriage, the
8 experts, the witnesses that we will present in the next few
9 days, who are from leading experts representing the finest
10 academies in the United States and throughout the world, who
11 will say what the Supreme Court and the Supreme Court of
12 California has already said about the importance of marriage in
13 society, the significant benefits that that relationship
14 between two individuals confers on couples, their families and
15 the community, proponents really cannot dispute these basic
16 facts about the value and integrity and importance of marriage.

17 **THE COURT:** If same-sex couples are permitted to
18 enter this institution, this esteemed institution of marriage,
19 doesn't that change the institution?

20 **MR. OLSON:** No, Your Honor. I am going to come to
21 that.

22 It will not damage the relationship of opposite-sex
23 couples to have the opportunity to marry. It won't change the
24 institution. It will fulfill the institution.

25 The history, a point I was just about to make, of

1 marriage has evolved. It has changed to shed irrational,
2 unwarranted and discriminatory restrictions and limitations
3 that reflected the biases, and prejudices, and stereotypes of
4 past.

5 Marriage laws that disadvantaged women or people of a
6 disfavored race or ethnicity have been eliminated. Some of
7 those changes have come from court decisions, and some of those
8 changes have come from legislative changes.

9 But those changes have not harmed the institution of
10 marriage. They have not harmed the institution of marriage.

11 The elimination of discriminatory restrictions --

12 **THE COURT:** Is the evidence going to show that
13 marriage as an institution is stronger now than it was when it
14 had these limitations?

15 **MR. OLSON:** Yes. The evidence will show and the
16 witnesses will testify that when you discriminate against
17 someone because they are Chinese, with respect to the
18 relationship of marriage, or when you discriminate against
19 someone on the basis of their race, in the institution of
20 marriage, that is wrong and that weakens the institution of
21 marriage.

22 **THE COURT:** What evidence is that?

23 **MR. OLSON:** The President of the United States,
24 today's president of the United States, if his mother and
25 father had tried to get married in Virginia before the time he

1 was born, it would have been against the law.

2 That weakens our moral fiber in this country. It
3 weakens our respect for the Constitution. And, in my judgment,
4 and I think in the judgment of the experts, and certainly it's
5 in the judgment of the United States Supreme Court in *Loving*
6 *vs. Virginia*, it weakened the institution of marriage to have
7 those types of restrictions.

8 It certainly weakened the institution of marriage
9 when women were treated differently in the marital
10 relationship.

11 The taking away of those restrictions allowed women
12 and men to have an equal relationship. And California was
13 among the leaders in removing some of those distinctions, both
14 legislatively and through court decisions.

15 The harm that is done is significant. Proposition 8
16 harmed individuals in this state who are citizens.
17 Proposition 8, as I said, had a simple, straightforward
18 purpose.

19 Now, evil -- we're not talking about evil purpose or
20 anything else. We are talking about a purpose to eliminate a
21 right that some people had under the California Constitution.

22 **THE COURT:** Well, they hadn't had that right very
23 long.

24 **MR. OLSON:** They had --

25 **THE COURT:** Doesn't that make some difference?

1 If we are talking about a long-established right, it
2 would be one thing. But this is a right which was established
3 by the California Supreme Court mere months prior to the
4 decision in the Strauss case.

5 **MR. OLSON:** The -- when the California -- the
6 California Supreme Court didn't create the right. The
7 California Supreme Court recognized the right in the California
8 Constitution.

9 And when the United States Supreme Court determines
10 that something violates the First Amendment or the Fourteenth
11 Amendment, it is recognizing and deciding, declaring, in the
12 words of *Marbury vs. Madison*, what the law is.

13 So the fact that the California Supreme Court finally
14 got around, in May of 2008, to --

15 **THE COURT:** Some people find these discoveries
16 surprising, of course.

17 **MR. OLSON:** Well, we are -- I was constantly
18 surprised by education.

19 And one of the things that I think this trial will
20 do -- and I hope that the Supreme Court allows the American
21 people to see it, because it will be an education. Attitudes
22 change when people are educated.

23 And when they learn -- if the American people could
24 see what you're going to see, from the plaintiffs themselves,
25 what that discrimination does to them every day, and what it

1 does to their families and to their relationships when they go
2 somewhere and they can't introduce the person that they love as
3 their spouse, they have to explain what in the world a domestic
4 partnership is, what that does, does maybe surprise some
5 people. Surprise in the sense that it opens people's minds to
6 the damage that we're doing when we discriminate on this basis.

7 **THE COURT:** Now, if Proposition 8 is
8 unconstitutional, can the Defense of Marriage Act be
9 constitutional?

10 **MR. OLSON:** We have not specifically addressed that.
11 And your decision in this case or the Supreme Court's decision
12 in this case will -- will certainly have an impact on that.

13 Part of what is going to be before you, and we'll
14 have to all work this through, is that one of the things that
15 distinguishes what we have in California is something that was
16 very similar to the situation in *Romer vs. Colorado*, where an
17 existing constitutional right and a -- was taken away, or
18 existing rights were taken away by an amendment to the
19 constitution.

20 So what may be decided in this case may not
21 necessarily go so broad as to take down or implicitly take down
22 the Defense of Marriage statute.

23 I think, at the end of the day, that that
24 discrimination -- my personal opinion -- and I have researched
25 this -- is that that is unconstitutional, as well. And the

1 discrimination of individuals on this basis, under our
2 constitution, based upon characteristics of individuals that
3 they do not choose to have, like race or sex or ethnicity, is
4 unconstitutional.

5 This case, at the end of the day, may not lead you
6 there. But the idea that something is -- that taking away of
7 the right to marriage is okay, no big deal, because you have a
8 right to domestic partnership, is a cruel fiction.

9 As I said, the plaintiffs will describe the harm that
10 they suffer every day because they are prevented from marrying.
11 They will describe and experts will describe -- but there is no
12 better voice to express it than the people themselves -- how
13 demeaning and insulting it can be that they are still free to
14 marry, as long as they marry someone of the opposite sex; not
15 the person that they love; not the person who is their choice.

16 And the evidence will demonstrate that relegating gay
17 men and lesbians to domestic partnerships is to inflict upon
18 them badges of inferior that forever stigmatize their loving
19 relationships as different, separate, unequal, and less worthy,
20 something akin to a commercial venture. That's what a domestic
21 partnership looks like, sounds like, feels like. Not a loving
22 union.

23 Indeed, the proponents of Proposition 8 acknowledge
24 that domestic partnerships aren't the same as traditional
25 marriage. They proudly proclaim, in the papers they filed with

1 this court -- and we don't disagree with this -- that under
2 Proposition 8, in their words, the unique and highly-favorable
3 imprimatur by the state, of marriage, is reserved to
4 opposite-sex unions. That's something special. That's
5 something important. That's something that's unique. And it's
6 highly favorable. And it's reserved to people of the opposite
7 sex, when they wish to marry.

8 This government-sponsored societal stigmatization
9 causes grave -- the experts will tell us -- grave psychological
10 and physical harms to gay men and lesbians and their families.
11 And it increases the likelihood, because we are branding them
12 as different, as inferior and as less worthy, and their
13 relationships as less worthy of recognition, it increases the
14 likelihood they will experiences discrimination and harassment.
15 It causes immeasurable arm.

16 And, sadly, to come back to a point you were making,
17 it is only the most recent chapter in our nation's history,
18 long and painful, of discrimination and prejudice against gay
19 and lesbian individuals.

20 They have been classified in this nation as
21 degenerates, targeted by police, harassed in the workplace,
22 censored, demonized, fired from government jobs.

23 It wasn't very many years ago that the president of
24 the United States said that people who were homosexuals could
25 be fired from -- or should be fired from their government jobs,

1 excluded from our Armed Forces, arrested for their private
2 sexual conduct, and repeatedly stripped of their fundamental
3 rights by popular vote.

4 Progress, Your Honor, has occurred. But the roots of
5 discrimination run deep, and their impacts spread widely. And
6 Proposition 8 perpetuates that discrimination, and it does so
7 for no good reason.

8 It singles out -- Proposition 8 singles out gay and
9 lesbian individuals alone, for exclusion from the institution
10 of marriage.

11 In California, even convicted murderers and child
12 abusers enjoy the freedom to marry. As the evidence clearly
13 establishes, this discrimination has been placed in
14 California's Constitution even though its victims, the victims
15 of this discrimination, are and always have been fully
16 contributing members of our society.

17 **THE COURT:** Are not discrimination based on sex and
18 discrimination based on sexual orientation different?

19 **MR. OLSON:** They can be different.

20 **THE COURT:** Well --

21 **MR. OLSON:** In this case, they are both -- both types
22 of discrimination is involved.

23 There is no question that there's discrimination
24 based upon sexual orientation. But it's also sex, because the
25 state is telling me, if I wish to marry the person that I love,

1 another decent citizen of California, I can marry that person
2 provided the sex of that person is right.

3 The state has decided that marriage, based upon sex,
4 is okay, that it will be recognized. This relationship based
5 upon sex won't. It's sexual orientation and it is sex.

6 And this is -- this proposition excludes gay men and
7 lesbians from the institution of marriage, even though that
8 sexual orientation to which you referred, like race, sex, and
9 ethnicity, is a fundamental aspect of their identity that they
10 did not choose for themselves. And, as the California Supreme
11 Court found, is highly resistant to change.

12 The State of California, the State of California, who
13 has this proposition in its constitution, has no justification,
14 none, for the decision to eliminate the fundamental right to
15 marry for a segment of its citizens. It offers no defense.

16 And its chief legal officer, the Attorney General of
17 California, admits that none exists; that this is
18 unconstitutional.

19 And the evidence will show that each of the
20 rationalizations for Proposition 8, invented, invented by its
21 proponents, is without merit.

22 They mention procreation. Procreation cannot be a
23 justification, inasmuch as Proposition 8 permits marriage by
24 persons who are unable or who have no intention or no ability,
25 whatsoever, to have children or produce children.

1 Indeed, the institution of marriage, civil marriage
2 in this country, has never been restricted or tied to the
3 procreative activity of those who enter into it.

4 Proposition 8 also has no rational relationship to
5 the parenting of children -- although, this is what the
6 proponents are now saying -- because same-sex couples and
7 opposite-sex couples are equally, in California, permitted to
8 have and raise children in this state.

9 The evidence in this case, from the experts, will
10 demonstrate that gay and lesbian individuals are every bit as
11 capable of being loving, caring and effective parents as
12 heterosexuals. The quality of a parent is not measured by
13 gender, but by the content of the heart.

14 And two of our plaintiffs are raising four children.
15 And they will discuss that relationship. And there is no doubt
16 in my mind that it will demonstrate, that evidence will
17 demonstrate, that passion that they have for their family and
18 the raising of their children cannot be characterized as
19 insufficient or inadequate or inferior in any way.

20 And as for protecting, the point you made earlier,
21 traditional marriage, our opponents -- you asked this question.
22 Our opponents don't know how permitting gay and lesbian couples
23 to marry would harm the marriage of opposite-sex couples.

24 And, needless to say, guesswork, speculation about
25 what might happen or what might not happen is an inadequate

1 justification for discrimination.

2 But the evidence affirmatively will show that
3 permitting loving, deeply-committed couples like the plaintiffs
4 to marry has no impact, whatsoever -- to address your
5 question -- upon the marital relationship of others.

6 When voters in California were urged -- and this will
7 come back to another point -- to enact Proposition 8, they were
8 encouraged to believe that unless Proposition 8 was enacted,
9 anti-gay religious institutions would be closed, gay activists
10 would overwhelm the will of heterosexuals people in California,
11 and that children would be taught that it was acceptable for
12 gay and lesbians to marry.

13 Parents were urged to protect our children from that
14 presumably pernicious point of view that it was acceptable for
15 a gay person to marry another gay person.

16 At the end of the day, whatever the motives of the --
17 whatever the motives of its proponents, Proposition 8
18 enacted -- and this goes back to yet another one of your
19 points -- enacted an utterly irrational regime to govern
20 entitlement to the fundamental right to marry, consisting of
21 four separate and distinct classes of citizens:

22 First, heterosexuals, including convicted criminals,
23 substance abusers, and sex offenders, who are permitted to
24 marry. And their marriage is recognized in California.

25 Second, 18,000 same-sex couples married between June

1 and November of 2008, are allowed to remain married. But if
2 they divorce or if they lose their spouse by widowhood, they
3 can't remarry.

4 And, third, thousands of same-sex couples, as of the
5 first of the year, who were married in certain other states
6 prior to November of 2008, those marriages are now valid and
7 recognized in California. People who were married someplace
8 else and came to California, their marriage are recognized.

9 But, fourth, the fourth category are the people that
10 we represent, the plaintiffs and hundreds of thousands of other
11 Californian same-sex couples who are prohibited by
12 Proposition 8 from marrying.

13 At the end of the day, there is no rational
14 justification for this unique pattern of discrimination.

15 Proposition 8 and this irrational pattern of
16 category, category, category --

17 **THE COURT:** Mr. Cooper frequently makes the point
18 that this it is really a subject from which the courts should
19 abstain, should not involve themselves; that this is an issue
20 that's being played out through the political process. We've
21 seen it play out in the last few months in the political
22 process.

23 Why shouldn't the courts stand back and let this
24 develop politically?

25 **MR. OLSON:** Because that is why we have courts. And

1 that is why we have a Constitution. That is why we have the
2 Fourteenth Amendment.

3 When individuals who may not be the most popular
4 people, who are different than we are, are treated differently
5 under the Constitution, when they are excluded from our schools
6 or when they are put in separate schools, or when they are not
7 allowed to marry because of the color of the skin of the
8 partner of their choice is different, they come to the courts.
9 And time after time the courts have addressed these issues, and
10 time after time the courts have addressed those issues
11 notwithstanding that very, very point. Leave it to the
12 political process.

13 We wouldn't need a Constitution if we left everything
14 to the political process, but if we left everything to the
15 political process, the majority would always prevail, which is
16 a great thing about democracy, but it's not so good if you are
17 a minority or if you're a disfavored minority or you're new or
18 you're different. And that's what happens here.

19 What Prop 8 does is label gay and lesbian persons as
20 different, inferior, unequal and disfavored. It says to them,
21 your relationship is not the same. And it's less approved than
22 those enjoyed by opposite-sex couples. It stigmatizes gays and
23 lesbians. It classifies them as outcasts. It causes needless
24 and unrelenting pain and isolation and humiliation.

25 We have courts to declare enactments like Proposition

1 8 that take our citizens, our worthy, loving, upstanding
2 citizens who are being treated differently and being hurt every
3 single day, we have courts to declare those measures
4 unconstitutional. And that is why we are here today.

5 **THE COURT:** Very well. Thank you, Mr. Olson.

6 Ms. Stewart, very briefly. Your intervention is with
7 respect to the impact of Proposition 8 on cities and counties
8 in the state, municipalities. What's the evidence going to
9 show in this regard?

10 OPENING STATEMENT

11 **MS. STEWART:** Thank you, your Honor.

12 Mr. Olson spoke eloquently about the California
13 Supreme Court's statement that denying marriage and relegating
14 same-sex couples to a different institution labels them second
15 class, sends the message that they are second class.

16 And what you'll hear in this case is evidence about
17 the deep links between Proposition 8 and the prejudice that
18 tells gay men and lesbians and their families that they are
19 inferior.

20 Proposition 8 both springs from prejudice --

21 **THE COURT:** Well, I'm interested in the issue on
22 which you have been permitted to intervene, and that is
23 reflected in one of the plaintiffs' proposed findings; that
24 recognizing same-sex marriage would produce a \$3 billion
25 surplus for California.

1 What's the evidence on that?

2 **MS. STEWART:** Your Honor, the evidence of the
3 economic effects of the -- of Proposition 8 will come both in
4 the form of admissions and discovery that we have gotten from
5 the state itself, as well as testimony that you are going to
6 hear from economic experts.

7 It's also going to come from testimony about some of
8 the direct effects of the prejudice that happened during the
9 Proposition 8 campaign and that reaches back to earlier
10 prejudice that Mr. Olson alluded to.

11 I want to briefly touch on what that evidence will
12 show and then on its effects.

13 Against -- the backdrop, I think, Mr. Olson
14 mentioned, and I won't go back, about the history of
15 discrimination and the demonization of gay people, and it was
16 against this backdrop that Proposition 8's proponents carefully
17 calibrated their campaign to evoke messages that Americans have
18 heard many times before. Messages that gay relationships are
19 inferior, that they are immoral, and that the gay agenda will
20 have dire consequences for non-gay people, and especially for
21 children.

22 We have heard in the campaign, and the Court will
23 hear evidence that there is a culturally triumphant homosexual
24 movement that will have -- poses a grave threat to children.

25 It will hear evidence that the campaign said gay

1 relationships are not the same as marriage and that gay
2 relationships can only imitate heterosexual relationships.

3 That gay relationships are -- that gay lives are a
4 sin and that --

5 **THE COURT:** Let's get back to the economics.

6 **MS. STEWART:** The denial of marriage is one of
7 those --

8 **THE COURT:** Where is the link between the denial of
9 same-sex marriage and injury to a municipality in the State of
10 California?

11 **MS. STEWART:** First of all, your Honor, you will hear
12 that this prejudice has caused hate crimes in the State of
13 California. Hate crimes. That prejudice and treating gay
14 people as inferior has caused hate crimes that are occurring at
15 an alarming rate for as long as the government has kept
16 statistics.

17 You'll hear about a San Diego man who was beaten
18 nearly to death in 2006.

19 You will hear about a 15-year-old boy who was shot
20 and killed in Oxnard, California late last year by another boy
21 because of his sexual orientation.

22 You'll hear about the costs that those hate crimes
23 impose on the government.

24 **THE COURT:** What's the link to Proposition 8?

25 **MS. STEWART:** Well, your Honor, you -- I was trying

1 to talk about that link, and so let me shift back to that.

2 Proposition 8 taught that gay people's lives are a
3 sin; that they can't be compared to the skin of racial
4 minorities; that it's one thing for the majority to tolerate
5 those relationships, but that they can't be recognized or
6 celebrated; that being gay is a lifestyle that can and should
7 be changed.

8 It reinforced messages that our historian will talk
9 about that have been played over and over again in American
10 history about the inferiority of gay people and about how
11 immoral and sinful a people they are.

12 That message leads to hate crimes, your Honor, and we
13 will show that link. And that hate crimes based on sexual
14 orientation not only harm the victims in a huge way, but harm
15 the government, who has to investigate and prosecute those hate
16 crimes and spend a great deal of money to do that.

17 You will hear about a boy who was emotionally and
18 physically abused by his parents when they learned that he was
19 gay, by so-called therapists who tried to convert him into a
20 heterosexual starting when he was only 14 years old. You will
21 hear about how he dropped out of school, how he left home, how
22 he sought refuge with the juvenile dependency system and relied
23 on public hospitals for healthcare that he couldn't afford.
24 You will hear that he almost -- he suffered depression and
25 self-destructive behavior and came close to throwing his life

1 away.

2 The consequences of that abuse were not borne by that
3 young man alone, although he bore them most heavily. The human
4 and economic costs were also borne by the government, the
5 juvenile dependency system, the hospitals and the other social
6 services.

7 You'll also hear about people whose employers grant
8 healthcare coverage to the spouses of their married employees,
9 but refuse to provide that coverage to the domestic partners of
10 their lesbian and gay employees.

11 Healthcare coverage, when its denied either because a
12 young man leaves his home for persecution by his family or
13 because the employers of a person in a same-sex relationship
14 will not provide coverage to their domestic partner, that
15 healthcare coverage has to be provided by someone, and county
16 governments are the healthcare provider of last resort.

17 Last year San Francisco spent \$177 million on health
18 services for the uninsured. It is very difficult to prove
19 exactly how much of that amount is related to discrimination,
20 but we know that it is a significant amount. And even a small
21 fraction of that amount means millions of taxpayer dollars that
22 could have been spent for something other than discrimination.

23 The evidence will also show that when lesbians and
24 gay men suffer from psychological distress due to the
25 discrimination and the stigmatization that they face every

1 single day, governments not only spend money to provide
2 necessary services for them in a general way, but, also, must
3 develop special programs to reach out to them and to ensure
4 that they come and that they get treated.

5 As I mentioned, when hate crimes take place, the
6 government spends money to investigate them, to prosecute them.
7 Those costs are hard to track, but even more difficult to track
8 is the cost to the victims themselves and to the businesses and
9 to the government that result when victims' injuries reduce
10 their productivity or when their fear keeps them from traveling
11 or from socializing even at the restaurants and cafes in their
12 own neighborhood.

13 When couples cannot get married and celebrate their
14 marriages in their communities, they are denied many of the
15 tangible and intangible benefits that our experts will tell you
16 marriage brings.

17 Their loss is also the community's loss. Lower tax
18 revenues and higher social service costs are borne by the whole
19 community. The community also loses the economic activity and
20 tax revenue that comes from weddings.

21 The Proposition 8 proponents are going to tell you
22 that all is well in California and America; that these
23 instances of a discrimination no longer occur and that they are
24 banned by law and, in any event, are rare; that hostility and
25 prejudice are products of a past era.

1 Tell that to the man who almost lost his life in
2 2006. Tell it to the family of the young boy who was murdered
3 in Oxnard. Tell it to the men and women who serve their
4 country in uniform, to be discharged and stigmatized because
5 they can no longer hide their lives and their loved ones from
6 their fellow soldiers. Tell it to the people in Arkansas who
7 can't adopt, and tell it to the children who cannot be placed
8 in homes because there aren't enough homes to place them in.
9 And tell it to the plaintiffs who sit before you today unable
10 to participate in this most important relationship of adult
11 life.

12 Proposition 8 comes from and perpetuates a prejudice,
13 and it's a prejudice that society not only can't tolerate, but
14 it can't afford.

15 Proposition 8 cannot stand.

16 **THE COURT:** Very well. Thank you, Ms. Stewart.

17 Before turning to Mr. Cooper, does the Governor have
18 anything that he wants to make by way of an opening statement?

19 **MR. STROUD:** The Governor, his counsel will not make
20 an opening statement, your Honor.

21 **THE COURT:** Very well.

22 How about the Attorney General? I have a question
23 for the Attorney General.

24 **MS. PACHTER:** Yes, your Honor.

25 **THE COURT:** If Proposition 8 violates the United

1 States Constitution, the position which the Attorney General is
2 taking now, how did it wind up on the ballot?

3 Isn't the Attorney General supposed to review these
4 measures beforehand and if an initiative measure is in
5 violation of the Constitution, isn't the Attorney General
6 duty-bound to prevent it from being placed before the voters?

7 **MS. PACHTER:** No, your Honor. I don't believe that's
8 true under California law.

9 The Attorney General's responsibility is to draft a
10 title and summary that describes the initiative for the purpose
11 of collecting signatures --

12 **THE COURT:** Can I have a brief on this?

13 **MS. PACHTER:** Pardon me?

14 **THE COURT:** Can I have a brief on this?

15 You say the Attorney General has no duty or
16 responsibility to review an initiative measure for its
17 constitutionality or its unconstitutionality before being
18 placed before the voters.

19 **MS. PACHTER:** That's right, your Honor. There are
20 provisions in the law for challenging, in advance of putting it
21 on the ballot, a ballot initiative. Most of those are
22 generally not decided in advance of the election under
23 prevailing precedent in California law. But we are happy to
24 present a brief.

25 **THE COURT:** As a lawyer, I was involved in a

1 pre-election challenge to an initiative measure.

2 **MS. PACHTER:** Yes. I'm sorry. I think I mis- --

3 **THE COURT:** And you say the Attorney General has no
4 responsibility to review an initiative measure for its
5 constitutionality?

6 **MS. PACHTER:** Not under the law of the initiative
7 process in California, your Honor, no.

8 The Attorney General does not have the authority
9 under state law to determine what the law is. That under
10 California law, as well as under federal law, is the province
11 of the courts.

12 **THE COURT:** Did the Attorney General take a position
13 on Proposition 8 prior to the election?

14 **MS. PACHTER:** Your Honor, I don't know the answer to
15 that question, but I do not believe so.

16 **THE COURT:** It was only after this lawsuit was filed
17 that he took that position, is that correct?

18 **MS. PACHTER:** Your Honor, I'm sorry, I don't know the
19 answer to that question.

20 **THE COURT:** It would be helpful, counsel, if you
21 could explore these issues and at an appropriate time submit --
22 submit the answers.

23 **MS. PACHTER:** We would be happy to do that, your
24 Honor.

25 **THE COURT:** Very well. I'll appreciate that.

1 Very well, Mr. Cooper.

2 OPENING STATEMENT

3 **MR. COOPER:** Good morning again, Chief Judge Walker,
4 and may it please the Court.

5 On November 4th, 2008, 14 million Californians went
6 to the polls to cast their ballots on an issue of overriding
7 social and cultural importance: Whether the institution of
8 marriage should be redefined to include couples of the same
9 sex.

10 Over 52 percent of the those Californians voted to
11 restore and preserve the traditional definition of marriage as
12 the union of a man and a woman. A definition that has
13 prevailed in virtually every society in recorded history, since
14 long before the advent of modern religions.

15 And in passing Proposition 8, California joined 28
16 sister states that have in recent years enshrined the
17 traditional definition of marriage in their constitutions, and
18 many more states and the federal government have enacted
19 clarifying statutes to the same effect. Only five states, your
20 Honor, have opened the institution of marriage to same-sex
21 couples and three of those had it imposed upon them by judges.

22 Indeed, that's how same sex marriage came to
23 California, in a highly controversial four-to-three decision in
24 which the California Supreme Court purported to apply the
25 people's will, a decision that had reversed the Court of

1 Appeals in California which had ruled to uphold the traditional
2 definition of marriage.

3 Five months later, after the California Supreme
4 Court's decision, on election day the people took the issue up
5 into their own hands and they corrected the California Supreme
6 Court's misunderstanding.

7 While the people of California have been steadfast in
8 their support for the traditional definition of marriage, they
9 have also been generous, your Honor, in extending rights,
10 benefits and protections to the state's gay and lesbian
11 population.

12 Indeed, except for the denomination of marriage for
13 same-sex relationships, gays and lesbians in California have
14 been immensely successful in obtaining their policy goals
15 through the political process.

16 As Equality California, a leading gay and lesbian
17 rights organization has explained, California has some of the
18 most comprehensive civil rights protections for gays and
19 lesbians in the nation. In addition to enacting sweeping
20 anti-discrimination protections, California has long recognized
21 same sex relationships through domestic partnerships.

22 In 1999 California became one of the first states in
23 the country to allow cohabiting adults of the same sex to
24 establish a domestic partnership. And today domestic
25 partnerships broadly grant to same-sex couples virtually all of

1 the substantive legal rights and benefits enjoyed by
2 opposite-sex married couples.

3 Indeed, Equality California and many other gay rights
4 organizations helped to write the 2003 legislation that
5 extended the rights and benefits of marriage to domestic
6 partners. And the group hailed the bill's enactment into law
7 as a tremendous civil rights victory for the LGBT community.

8 Now, your Honor, gays and lesbians have secured these
9 and many other legislative victories by mobilizing a strong and
10 growing coalition of supporters. This coalition includes the
11 state's largest daily newspapers, many of California's leading
12 corporations, Hollywood, organized labor, a number of religious
13 groups and leaders, political parties, professional
14 associations and elected officials, among many, many others.

15 In short, your Honor, the evidence will show that
16 California's gay and lesbian community has substantial
17 political power and that California is strongly supportive of
18 gay and lesbian rights, more so than perhaps any other state in
19 the country.

20 Now, against this backdrop the support of
21 Californians, not once in passage of Proposition 8, but twice
22 recently in the prior passage of Proposition 22, bespeaks not
23 ill-will or animosity toward gays and lesbians, but, rather, a
24 special regard for this venerable institution.

25 Rabbi Michael Lerner, a staunch supporter of same-sex

1 marriage, has said this:

2 "The fact is there are millions of Americans
3 who believe in equal rights for gays and
4 lesbians, but draw the line at marriage."

5 Countless people can hear themselves described by
6 these words, your Honor. Among those who have drawn that line
7 is President Obama, who said this during his presidential
8 campaign:

9 "I believe that civil unions should include
10 the same legal rights that accompany a
11 marriage license. However, I do not support
12 gay marriage. Marriage has religious and
13 social connotations and I consider marriage
14 to be between a man and a woman."

15 To be sure, your Honor, traditional marriage, as
16 President Obama noted, has ancient and powerful religious
17 connotations, as Mr. Olson also mentioned.

18 And it is true, that Proposition 8 was actively and
19 vocally supported by many from the faith community, although a
20 substantial number --

21 **THE COURT:** Mr. Olson made the point if the
22 President's parents had been in Virginia at the time of his
23 birth, their marriage would have been unlawful. That indicates
24 that there is quite a change in the understanding of people's
25 entitlement to enter into the institution of marriage.

1 And so his argument here is that we've had a similar
2 evolution or change in the understanding with respect to people
3 of the same sex entering into the marital institution, isn't
4 that correct?

5 **MR. COOPER:** Your Honor, racial restrictions were
6 never a definitional feature of the institution of marriage.
7 They were never.

8 At the time that *Loving* was decided, there were but
9 15 states or so left that included those loathsome
10 restrictions.

11 The racial restrictions were clearly a product of
12 white supremacy doctrine and were plainly violations of the
13 Equal Protection clause, the core purpose of which was to
14 eliminate racial restrictions of -- generally, but precisely
15 that kind of detail.

16 The limitation of marriage to a man and a woman is
17 something that has been universal. It has -- it has been
18 across history, across cultures, across society. The loathsome
19 restrictions based on race are of an entirely different nature,
20 your Honor.

21 **THE COURT:** What's the evidence going to show that
22 they are of a different nature; that these racial restrictions
23 are different, as a matter of fact, from the restriction
24 against same-sex marriage?

25 **MR. COOPER:** Your Honor, the evidence is going to

1 show with respect to the -- what we submit to you is the
2 central societal public purpose and state interest in
3 connection with marriage.

4 Racial restrictions -- the racial restrictions had
5 nothing to do with the definitional feature of marriage that is
6 between a man and a woman. And the purpose of the institution
7 of marriage, the central purpose, is to promote procreation and
8 to channel narrowly procreative sexual activity between men and
9 women into stable enduring unions for the purpose --

10 **THE COURT:** Is that the only purpose of marriage?

11 **MR. COOPER:** Your Honor, it is the central and, we
12 would submit, defining purpose of marriage. It is the -- it is
13 the basis on which and the reason on which marriage as an
14 institution has been universal across societies and cultures
15 throughout history; two, because it is a pro-child societal
16 institution. The evidence will show --

17 **THE COURT:** Where do the other values associated with
18 marriage come in; companionship, support? All of those things
19 that attend a marriage that have nothing to do with
20 procreation.

21 What's the evidence going to show, that those are
22 secondary, that those are secondary, those unimportant values
23 associated with marriage?

24 **MR. COOPER:** What it's going to show, your Honor, is
25 that -- is that this debate goes to the definition of marriage

1 and what its -- what its purpose is; whether it's going to be
2 effectively deinstitutionalized, the word used by the
3 scholars --

4 **THE COURT:** I was going to ask, what's the evidence?
5 You used that in your proposed findings, that extending
6 marriage to same-sex couples would, and I quote, radically
7 alter the institution of marriage.

8 Okay. What's the evidence going to show that would
9 support that finding?

10 **MR. COOPER:** Your Honor, it's going to show, and in
11 the form of our expert, David Blankenhorn. He will testify
12 that a broad consensus of leading scholars suggests that across
13 history and cultures marriage is fundamentally a pro-child
14 social institution anchored in socially-approved sexual
15 intercourse between a man and a woman. And the core need that
16 marriage, he will testify, aims to meet is the child's need to
17 be emotionally, morally, practically and legally affiliated
18 with the woman and the man whose sexual union brought the child
19 into the world.

20 Your Honor, the evidence is going to show that,
21 again, marriage is and always has been designed to channel the
22 naturally procreative sexual relationships of men and women
23 into these enduring stable unions.

24 It will show that it's good for the child because it
25 increases the chances that the child will be raised by both its

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

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

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

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

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

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

1 raised in a question to Mr. Olson, it will inevitably change
2 the institution --

3 **THE COURT:** What's the evidence going to show in that
4 regard?

5 **MR. COOPER:** The evidence is going to show, again,
6 that the debate is whether or not this institution will remain
7 a pro-child institution or in the words -- or whether the
8 gradual transformation of marriage from a pro-child societal
9 institution into a private relationship designed simply to
10 provide adult couples with what the plaintiffs say is personal
11 fulfillment.

12 The question is, your Honor, is this institution
13 designed for these pro-child reasons or is it to produce
14 companionship and personal fulfillment and expression of love?
15 Are those purposes themselves important enough to run risks to
16 the accomplishment of the pro-child purposes? The purpose
17 of --

18 **THE COURT:** What are those risks?

19 **MR. COOPER:** The risks are, your Honor, that the
20 nature of the institution will be altered; that it will be
21 deinstitutionalized; that the norms, the laws, the social
22 conventions that have given marriage its structure and that
23 have brought it into -- that brought marriage into being,
24 again, across cultures, across societies and throughout
25 history, to ensure, for the sake of raising children, that the

1 people that brought that child into the world remain together
2 to raise the child.

3 And if the institution is -- is deinstitutionalized,
4 as the scholars say, is gradually happening now and that
5 this -- the evidence will be, your Honor, that this will hasten
6 and perhaps complete that process, then Mr. Blankenhorn will
7 testify that it will likely lead to very real social harms,
8 such as, as he will testify, lower marriage rates and higher
9 rates of divorce and non-marital cohabitation, with more
10 children raised outside of marriage and separated from at least
11 one of their parents.

12 Now, the plaintiffs dispute. They dispute the
13 likelihood that these harms will result from same-sex marriage.
14 And our point, your Honor, is that they cannot prove that they
15 will not flow from legalizing same-sex marriage.

16 The same-sex marriage is simply too novel an
17 experiment at this stage to allow for any firm conclusions,
18 your Honor, about its long-term effect on traditional marriage
19 and the societal interests.

20 **THE COURT:** Excuse me.

21 **MR. COOPER:** Yes. No, please.

22 **THE COURT:** Is there any evidence from the countries
23 and states that have permitted same-sex couples to marry that
24 marriage has been deinstitutionalized or has led to lower
25 marriage rates or higher rates of divorce or greater incidents

1 of non-marital cohabitation, these other matters that you've
2 described?

3 **MR. COOPER:** Your Honor, there is evidence on this,
4 and we believe the evidence will show that these phenomenon
5 have followed and have been associated with and part of the
6 deinstitutionalization of marriage in other countries.

7 **THE COURT:** What will that evidence be?

8 **MR. COOPER:** Your Honor, I believe the evidence will
9 show that in the Netherlands marital rates have declined.
10 Rates with respect to the cohabitation of couples with children
11 have risen.

12 These are phenomenon, your Honor, that even with
13 respect to the foreign countries -- and Netherlands was the
14 first country, so I think the evidence with respect to it is --
15 has had the longest period to develop.

16 But even with respect to it, your Honor --

17 **THE COURT:** Which witness is going to speak to this?

18 **MR. COOPER:** The plaintiffs actually will have
19 witnesses who speak to this.

20 **THE COURT:** To the experience in the Netherlands?

21 **MR. COOPER:** Yes, your Honor.

22 **THE COURT:** Okay.

23 **MR. COOPER:** But my point also, your Honor, is that
24 with respect even to the foreign countries, where there is a
25 greater body of experience or at least a longer period of

1 experience, confident and reliable judgments simply cannot be
2 made.

3 And the institution of marriage is too vital to ask
4 the people of California or any other state to proceed without
5 having collected that evidence and having been able to
6 determine for themselves whether or not it, indeed, represents
7 no threat to any of the social interests that they believe are
8 important or whether, in fact, perhaps it does.

9 The people of California are entitled to await the
10 results of that experiment in those few places where it is
11 being tried. Five states very recently in this country, only
12 seven countries throughout the world, your Honor. They are
13 entitled to await the results and assess them before they make
14 a fundamental change and alteration in the traditional
15 definition of marriage.

16 **THE COURT:** You used the term in your proposed
17 findings "sexual embodiment" as distinguished from "sexual
18 orientation." What's the evidence going to show that the term
19 "sexual embodiment" means?

20 **MR. COOPER:** Your Honor, I believe that evidence will
21 show -- and I believe that evidence will show from, again,
22 Mr. Blankenhorn -- that marriage is essentially the sexual
23 embodiment of the man and the woman who form the marital union.
24 It is -- it is that sexual embodiment that defines the
25 institution.

1 It is the reality that only that naturally
2 procreative conduct will bring forward life and it is the
3 purpose of marriage, the central purpose of marriage, your
4 Honor, to ensure that when -- or at least to encourage and to
5 support and to promote that when that life is brought into
6 being, it is brought into being by parents who are together,
7 who are married, and who have taken responsibility to raise
8 that child.

9 **THE COURT:** You stated in one of the proposed
10 findings that:

11 "Extending marriage to same-sex couples would
12 increase the likelihood that bisexual
13 orientation could form a basis for a legal
14 entitlement to group marriage."

15 What's the evidence that will support that proposed
16 finding?

17 **MR. COOPER:** Your Honor, I think that is -- I think
18 that is a legal proposition founded in --

19 **THE COURT:** It sounds like a finding of fact to me.
20 That's what you propose it --

21 **MR. COOPER:** I think it flows from logical precepts,
22 your Honor; that if -- if an individual has a right to marry
23 the person of his choice, or her choice, in order to express
24 their love for that person and have a public recognition of
25 that love and to realize the personal fulfillment that comes

1 from that, if that is the overriding purpose of marriage, then
2 it -- it seems very difficult to say to someone who is a
3 bisexual -- if that individual loves two people, one person of
4 both sexes -- that that individual doesn't have -- and those
5 individuals do not have the same right to express their love
6 and have their love recognized by the state in order that they,
7 too, may achieve personal fulfillment.

8 That is a proposition that we believe that if the
9 plaintiffs are correct --

10 **THE COURT:** That would assume, of course,
11 simultaneous --

12 **MR. COOPER:** Yes. Yes, it would, your Honor. And
13 that's not a farfetched assumption in light of some modern
14 conceptions of family, as the evidence there also will show.

15 **THE COURT:** That's not unheard of amongst
16 heterosexuals, is it?

17 **MR. COOPER:** And, your Honor, the traditional age-old
18 limitation of marriage to one man and one woman is worth
19 preserving for that reason as well.

20 **THE COURT:** One of your proposed findings is:

21 "The recognition of same-sex marriage could
22 end or significantly dilute the public
23 socialization of heterosexual young people
24 into a marriage culture."

25 What's the evidence going to show on that?

1 **MR. COOPER:** Your Honor, it will show -- and, again,
2 through the testimony of Mr. Blankenhorn -- that the
3 deinstitutionalization of the institution -- of the institution
4 of marriage will hasten what we have seen with respect to that
5 institution over the years; that is, that marriage rates have
6 declined in this country. Cohabitation rates have increased.

7 To whatever extent, your Honor, the traditional and
8 overriding purpose, and that is the procreative and responsible
9 procreation purposes of marriage, are diluted and marriage as a
10 pro-child social institution is diluted or weakened.

11 The result that you suggested in that finding of
12 fact, we believe, and the evidence will show and the testimony
13 will be that that will follow, or at least that will likely
14 follow.

15 Again, your Honor, the -- the reality is that you
16 will hear nothing but predictions in this trial about what
17 this -- about what the long-term effects of adopting same-sex
18 marriage will be on the institution of marriage itself and on
19 the social purposes that it serves. You will hear nothing but
20 predictions, because it is not possible to render reliable and
21 certain judgments on these things.

22 And that, if for no other reason, is reason enough
23 for the people of California to await until confident and
24 reliable understandings can be developed on what those -- on
25 what those realities are.

1 Your Honor, in the sum, we submit to you that the
2 evidence will demonstrate that the plaintiffs' claims that
3 Proposition 8 and the traditional definition of marriage are
4 the products of animosity and that there is no legitimate
5 public policy reason for supporting the traditional definition
6 of marriage are unsupported and unsupportable.

7 In fact, your Honor, with respect to the notion that
8 this traditional definition that has been restored to
9 California law by Proposition 8 serves no good policy -- public
10 policy reason, secular public policy reason, which Mr. Olson
11 was emphatic about. Simply can't stand up to the evidence of
12 the ages.

13 It wasn't a coincidence that every society and every
14 culture throughout history has adopted, nurtured, protected
15 this institution --

16 **THE COURT:** Well, he has made the point, however,
17 that this institution has not been static; that it's evolved
18 rather dramatically in all sorts of ways.

19 What precludes this institution from evolving to
20 comprehend marriage among same-sex couples?

21 **MR. COOPER:** Your Honor, nothing precludes it. There
22 are two states where the people, or their representatives
23 anyway in this country, have embraced it and have undertaken
24 to, we would submit, experiment with this proposition.

25 It is within the permissible political and democratic

1 judgment of the people to make that change.

2 And Mr. Olson spoke movingly about the change in
3 attitudes over time. There is no question that that is true,
4 that that is true.

5 Proposition 22 in this state, the statutory measure,
6 was passed overwhelmingly. Proposition 8 was passed by a
7 substantial majority, but nothing like Proposition 22 had.

8 Attitudes do change. And the political process, not
9 you, not the members of the Ninth Circuit, and not even the
10 members -- the Justices of the United States Supreme Court are
11 here to reflect the attitudes of the American people. That's
12 what they have ballot booths for, your Honor. And so nothing
13 precludes it.

14 The question is whether anything in our Constitution
15 insists on it. Whether anything in our Constitution takes that
16 issue out of the hands of the people of California and the
17 people of the neighboring states to California and the people
18 of my home state and says, This is what the Constitution
19 demands. You have no say in it.

20 **THE COURT:** There are certainly lots of issues that
21 are taken out of the hands of the body politic and put in the
22 hands of judges to interpret the Constitution. Why isn't this
23 one of them?

24 **MR. COOPER:** Your Honor, it's not one of them because
25 the legal predicates of the plaintiffs' case are not sound.

1 **THE COURT:** The factual predicates?

2 **MR. COOPER:** No, the legal predicates, your Honor,
3 the legal predicates. We have already had our summary judgment
4 hearing, your Honor, and argued that out at great length.

5 But our legal proposition is that the Fourteenth
6 Amendment does not address and govern this issue. And does not
7 take this issue out of the hands of the democratic -- out of
8 the hands of the people in the democratic process.

9 It does not require, as it did in *Loving*, as it did
10 in *Loving*, when it said that the Equal Protection clause was
11 designed to eliminate racial distinctions. Racial distinctions
12 that, by the way, are irrelevant to any purpose of marriage.
13 The ones that I believe, and I believe the majority of
14 Californians believe to be central, or even the ones that the
15 plaintiffs believe. It's irrelevant to any purpose --

16 **THE COURT:** Didn't Mr. Olson mention other
17 restrictions or prohibitions that have been found to be
18 constitutionally infirm?

19 **MR. COOPER:** Mr. Olson mentioned, I think he was
20 referring to some of the restrictions that -- that many
21 marriage regimes have placed on the wife in that regime and,
22 yes, those have been very substantially eliminated, and nobody
23 here is going to lament that fact, your Honor.

24 Most of those -- I think California civil law
25 tradition is one that largely avoided some of the most

1 egregious oppressions of women in the marital relationship that
2 certainly tarnished the marriage restrictions of many, of many
3 states.

4 But those restrictions, your Honor, have largely
5 fallen away through the legislative process. Those, the
6 legislatures have over time, quite properly, eliminated those.

7 They -- I don't -- I don't have a brief for the
8 proposition that those restrictions could survive
9 constitutional analysis. I don't -- I don't entertain much
10 doubt that they could not.

11 But those two, your Honor, are not by any means
12 definitional features of the institution of marriage; the man,
13 woman, definition of marriage.

14 And, your Honor, the racial restriction in *Loving* was
15 at war with the central purpose of marriage as we -- as we are
16 submitting to you. You had a situation where two individuals
17 whose sexual relations would narrowly lead to procreation and,
18 yet, the state forbade those individuals from forming a marital
19 union and, therefore, from establishing the stable and enduring
20 marital relationship that the state otherwise sought to
21 promote.

22 So, your Honor, change -- the change in attitudes
23 that Mr. Olson mentioned is not a reason that the Constitution
24 has somehow changed to ordain the result he seeks. It's a
25 reason, and he has spoken eloquently to many reasons, why the

1 people of California, perhaps the people of the other states in
2 this country, should consider his arguments the next time the
3 issue is before them in the political process and the
4 democratic process.

5 Your Honor, I will sum up by saying simply this:
6 That the evidence we believe, your Honor, will demonstrate
7 again that the plaintiffs' claims that Proposition 8 and the
8 traditional definition of marriage that it restored to
9 California law, that their claims that Proposition 8 is the
10 product of animosity and that there can be no possible
11 legitimate explanation for that traditional definition of
12 marriage are unsupported and they are unsupportable.

13 The people of California were entitled to make this
14 critical decision for themselves and they have.

15 Thank you, your Honor.

16 **THE COURT:** Very well. Thank you, Mr. Cooper. I
17 believe those are the opening statements and we will take a
18 break until 10 minutes after the hour.

19 And who is taking the first witness?

20 **MR. BOIES:** I am, your Honor.

21 **THE COURT:** Very well, Mr. Boies. And your first
22 witness will be?

23 **MR. BOIES:** Mr. Jeffrey Zarrillo.

24 (Whereupon there was a recess in the proceedings
25 from 10:57 a.m. until 11:15 a.m.)

1 **THE COURT:** Very well. Mr. Boies, your first
2 witness.

3 **MR. BOIES:** Thank you, Your Honor. We call
4 Jeffrey Zarrillo.

5 **THE CLERK:** Raise your right hand, please.

6 **JEFFREY ZARRILLO,**
7 called as a witness for the Plaintiffs herein, having been
8 first duly sworn, was examined and testified as follows:

9 **THE WITNESS:** Yes, I do.

10 **THE CLERK:** Thank you. State your name, please.

11 **THE WITNESS:** Jeffrey James Zarrillo.

12 **THE CLERK:** Spell your last name is.

13 **THE WITNESS:** Z-a-r-r-i-l-l-o.

14 **THE CLERK:** And your first name.

15 **THE WITNESS:** Jeffrey is J-e-f-f-r-e-y.

16 **THE CLERK:** Thank you.

17 **THE WITNESS:** You are welcome.

18 **THE COURT:** Very well. Mr. Boise.

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

20 **DIRECT EXAMINATION**

21 **BY MR. OLSON:**

22 **Q.** Good morning, Mr. Zarrillo.

23 **A.** Good morning, David.

24 **Q.** Let me begin by asking you to tell the Court a little bit
25 about yourself. How old are you?

- 1 **A.** I'm 36 years old.
- 2 **Q.** Where did you grow up?
- 3 **A.** I grew up in New Jersey.
- 4 **Q.** And how long have you been in California?
- 5 **A.** I've been in California since 1999.
- 6 **Q.** Do you have any siblings?
- 7 **A.** I have one brother.
- 8 **Q.** Tell me about your parents. Are they married?
- 9 **A.** My parents have been married for 41 years.
- 10 **Q.** Is your brother married?
- 11 **A.** My brother has been married for just about 14 years.
- 12 **Q.** Where did you go to school?
- 13 **A.** I went to school at Brick Township High School in Brick,
14 New Jersey.
- 15 **Q.** Did you go to college?
- 16 **A.** Yes, I did. I graduated from Montclair State University
17 in upper Montclair, New Jersey, in 1995.
- 18 **Q.** Are you employed?
- 19 **A.** Yes, I am.
- 20 **Q.** What do you do?
- 21 **A.** I work for AMC Entertainment, Incorporated.
- 22 **Q.** How long have you done that?
- 23 **A.** It's the only job I've ever had, for 21 years.
- 24 **Q.** How did you start?
- 25 **A.** I started as a ticket taker, and worked my way up into

1 general manager of operations, which I currently am today.

2 **Q.** Are you gay?

3 **A.** Yes, I am.

4 **Q.** How long have you been gay?

5 **A.** As long as I can remember.

6 **Q.** How long have you been openly gay?

7 **A.** I came out in stages. I came out to some co-workers and
8 friends that I had in California when I was 25. And,
9 ultimately, came out to my friends and family in New Jersey
10 when I was just about 30.

11 **Q.** Why did it take you so long?

12 **A.** Coming out is a very personal and internal process.
13 Excuse me. You have to get to the point where you're
14 comfortable with yourself, with your own identity and who you
15 are.

16 So it was difficult where I grew up, through school
17 and peer pressure, and the things you hear, and the things you
18 see, and the things you read about with regards to the gay and
19 lesbian community, and what coming out means and that process
20 that people go through.

21 And it changes you. Ultimately, you get to the point
22 where you are comfortable with yourself, while previously, when
23 you were going through the process of deciding to come out,
24 your thought process included what other people would think of
25 you coming out. But it's not about that. It doesn't -- it's

1 not about anybody else at that time. It's about me and how I
2 felt growing up in society with the stereotypes and hate that
3 existed.

4 **Q.** Tell me a little bit about what you were referring to when
5 you talked about what you read and what you heard and the
6 stereotypes that you were faced with.

7 **A.** I think we can all remember times in school, whether it be
8 grammar school, middle school, or high school, or college --
9 and it didn't necessarily have to be about gay issues -- but
10 the peer pressure and the things that your friends and your
11 acquaintances in school said.

12 Especially when many of my friends, at the time when
13 I was going through this internal process, identified
14 themselves as straight, and were dating women and asking girls
15 to the prom and to school dances. And that was tough for me.
16 I was someone that really wanted to -- to go out for the
17 football team, but I was afraid to -- to be with men in the
18 locker room.

19 **Q.** What were some of the things that you heard and read about
20 gays and the stereotypes that you mentioned, that caused you
21 concern before you came out?

22 **MR. RAUM:** Objection. Hearsay.

23 **THE COURT:** I beg your pardon?

24 **MR. RAUM:** Hearsay, Your Honor.

25 **THE COURT:** I think it goes to the mental impressions

1 of the witness state of mind. Objection overruled.

2 **THE WITNESS:** I can remember specific times watching
3 TV. I don't recall the name of the specific After School
4 Special, but it was an After School Special about a child that
5 came out to his parents and was kicked out of his home, and
6 told by his parents that they didn't love him, not to come
7 back.

8 And I remember seeing a soap opera, called One Life
9 to Live, when I was in middle school, and there was a -- Ryan
10 Phillippe played a gay kid on the show. And it was a similar
11 situation where he found it so hard to come out in his
12 community and in his home. And he was ultimately kicked out of
13 his home by his father because his father didn't approve of
14 him.

15 **BY MR. OLSON:**

16 **Q.** Now, today you are in a committed relationship with
17 another gay man, correct?

18 **A.** Yes, sir.

19 **Q.** Tell me a little bit about that man.

20 **A.** He's the love of my life. I love him probably more than I
21 love myself. I would do anything for him. I would put his
22 needs ahead of my own.

23 I would be with him in sickness and in health, for
24 richer, for poorer, death do us part, just like vows. I would
25 do anything for him. And I want nothing more than to marry

1 him.

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

3 **A.** March will be nine years.

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

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

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

13 It's the logical next step for us.

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

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

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

23 **A.** Absolutely.

24 **Q.** How so?

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

1 friends, gathering with friends, work functions, as a married
2 individual; and to be -- to stand alongside my parents and my
3 brother and his wife, to be able to stand there as one family
4 who have all had the opportunity to take advantage of -- of
5 being married; and the pride that one feels when that -- when
6 that happens.

7 **Q.** Do you believe that if you were married, that would affect
8 the way other people who don't know you deal with you?

9 **A.** Sure.

10 **Q.** Why?

11 **A.** When someone is married, and whether it's an introduction
12 with a stranger, whether it's someone noticing my ring, or
13 something of that nature, it says to them these individuals are
14 serious; these individuals are committed to one another; they
15 have taken that step to be involved in a relationship that one
16 hopes lasts the rest of their life.

17 **Q.** Now, do you -- do you have children?

18 **A.** No.

19 **Q.** Have you thought about having children?

20 **A.** Yes, we have.

21 **Q.** Have you talked about having children, the two of you?

22 **A.** Yes.

23 **Q.** Why haven't you had children?

24 **A.** Paul and I believe that it's -- the important step in
25 order to have children would be for us to be married.

1 It would make it easier for -- for us, for our
2 children, to explain our relationship, for our children to be
3 able to explain our relationship. But, also, it would afford
4 us additional protections for our child.

5 And knowing that if we were going to enter into that
6 type of family institution, that we want to make sure that we
7 have all of the protections so that nothing could ever
8 eradicate that nuclear family.

9 **Q.** Now, you're aware that in the state of California you
10 could register with the State of California as domestic
11 partners, correct?

12 **A.** Yes, I am.

13 **Q.** Have you done so?

14 **A.** No, I have not. No, we have not.

15 **Q.** Why not?

16 **A.** Domestic partnership would relegate me to a level of
17 second class citizenship, maybe even third class citizenship,
18 currently, the way things are in California today.

19 And that's not enough. It's giving me part of the
20 pie, but not the whole thing.

21 And while it is obviously an opportunity for us to do
22 that, we hold marriage in such high regard that if we were to
23 get married, we would be saying that we are satisfied with
24 domestic partnership as a way to live our lives, but it doesn't
25 give due respect to the relationship that we have had for

1 almost nine years. Only a marriage could do that.

2 **Q.** Do you have friends who have registered as domestic
3 partners under the California state law?

4 **A.** Probably. I -- it's not something that's talked about.

5 **Q.** Do any of your friends celebrate anniversaries of
6 registering as domestic partners?

7 **A.** No.

8 **Q.** That sort of thing?

9 **A.** No.

10 **Q.** How does not being married affect you in your life? Does
11 it subject you to further discrimination?

12 **A.** Yes, it does.

13 **Q.** How so?

14 **A.** The discrimination, whether directly or indirectly, it's
15 pervasive, especially after Prop 8.

16 Prop 8 is embolden -- has emboldened other states to
17 take similar actions. And that makes it difficult. You can't
18 turn on the TV without hearing a news story. Can't log onto
19 the Internet without reading a news story about it. Can't open
20 a magazine or read a blog. It's everywhere now. Those are
21 daily reminders of what I can't have.

22 **Q.** Have you encountered instances where because you are not
23 married you were placed in embarrassing or awkward situations?

24 **A.** Yes, I have.

25 **Q.** Can you give me some examples?

1 **A.** One example is when Paul and I travel, it's always an
2 awkward situation at the front desk at the hotel.

3 There's on numerous occasions where the individual
4 working at the desk will look at us with a perplexed look on
5 his face and say, "You ordered a king-size bed. Is that really
6 what you want?" And that's certainly an awkward situation for
7 him and for us. And we -- it is. It's very awkward.

8 There's been occasion where I've had to open a bank
9 account. Paul and I had to open a bank account. And it was
10 certainly an awkward situation walking to the bank and saying,
11 "My partner and I want to open a joint bank account," and
12 hearing, you know, "Is it a business account? A partnership?"

13 It would just be a lot easier to describe the
14 situation -- might not make it less awkward for those
15 individuals, but it would make it -- crystallize it more by
16 being able to say, "My husband and I are here to check in for
17 our room. My husband and I are here to open a bank account."

18 **Q.** Are you ever confronted with situations where you're asked
19 to describe your marital status?

20 **A.** Yes.

21 **Q.** What do you do in those situations?

22 **A.** Those are very awkward situations because as an individual
23 who's very proud of his relationship and has been in a
24 committed relationship for almost nine years I proudly wear my
25 ring on my left hand to signify that. And it's very common

1 when we -- if we're out at a work function or a gathering with
2 friends, someone identifies the ring and says, "Oh, how long
3 have you been married?" Or, "What does your wife do?"
4 Questions of that awkward nature.

5 Leaving me to then have to deliver the news that I'm
6 a gay man, and my husband or my domestically-partnered friend
7 is -- works in the fitness industry. And then that sort of
8 creates additional awkwardness in the conversation.

9 **Q.** Now, assume that the State of California continues to tell
10 you that you can't get married to someone of the same sex.
11 Might that lead you to desire to get married and marry somebody
12 of the opposite sex?

13 **A.** No.

14 (Laughter)

15 **Q.** Why not?

16 **A.** I have no attraction, desire, to be with a member of the
17 opposite sex.

18 **Q.** Do you think if somehow you were able to be forced into a
19 marriage with somebody of the opposite sex, that would lead to
20 a stable, loving relationship?

21 **A.** Again, no.

22 **MR. BOIES:** Your Honor, I have no more questions.

23 **THE COURT:** Very well. Mr. --

24 **MR. RAUM:** No questions, Your Honor.

25 **THE COURT:** Cross examination?

- 1 **A.** I'm 37 years old.
- 2 **Q.** And where did you grow up?
- 3 **A.** I grew up here in San Francisco.
- 4 **Q.** Uhm, and do you have any siblings?
- 5 **A.** I do.
- 6 **Q.** How many?
- 7 **A.** I have two. I have an older sister and an older brother.
- 8 **Q.** And where do your parents live?
- 9 **A.** My father lives here in San Francisco. And my mother
- 10 lives in Santa Clara, California.
- 11 **Q.** Where did you go to school?
- 12 **A.** You want the whole run?
- 13 **Q.** Summarize it.
- 14 **A.** I went to school here at St. Anne's of the Sunset, and
- 15 then went to St. Ignatius College Preparatory for Boys, in the
- 16 City. And then I went to Santa Clara University. And then I
- 17 went to UCLA for graduate school.
- 18 **Q.** And what degrees do you have?
- 19 **A.** Uhm, the highest degree is a master of fine arts.
- 20 **Q.** Where are you employed?
- 21 **A.** Currently employed for Equinox Fitness.
- 22 **Q.** And what do you do there?
- 23 **A.** I am a manager of group fitness.
- 24 **Q.** Now, you were sitting in court when Mr. Zarrillo described
- 25 your relationship; were you not?

1 A. I was.

2 Q. And we don't have to go through again how long that's gone
3 on, but I would like you to tell me whether you would like to
4 get married, as well.

5 A. I would. Most definitely.

6 Q. Incidentally, did you try to get married here in
7 California?

8 A. We did not.

9 Q. The -- did you go to apply for a marriage license?

10 A. That we did.

11 Q. And what happened when you applied for a marriage license?

12 A. Oh, we were denied that license.

13 Q. When was that?

14 A. That was in May of 2009.

15 Q. Why did you want to get married?

16 A. There are many reasons. I think the primary reason for me
17 is because I have found someone that I love and that I know I
18 can dedicate the rest of my life to.

19 And when you find someone who is not only your best
20 friend but your best advocate and supporter in life, it's a
21 natural next step for me to want to be married to that person.

22 Q. Do you think if you were able to get married, that that
23 would in any way change your relationship with Mr. Zarrillo?

24 A. I think it would.

25 Q. In what way?

1 **A.** Being married allows us access to the language. Being
2 able to call him my husband is so definitive, it changes our
3 relationship.

4 We currently struggle, in certain circumstances,
5 about what to call each other. We both dislike "lover." You
6 know, it's just -- it's a challenge. But "husband" is
7 definitive. It's something that everyone understands.

8 There is no subtlety to it. It is absolute, and also
9 comes with a modicum of respect and understanding that your
10 relationship is not temporal, it's not new, it's not something
11 that could fade easily. It's something that you've dedicated
12 yourself to and you're committed to.

13 **Q.** Mr. Zarrillo talked about the desire to have children.
14 I'd like to ask you, what are your views about having children?

15 **A.** I would love to have a family.

16 **Q.** And why haven't you so far?

17 **A.** I think the timeline for us has always been marriage
18 first, before family. For many reasons. But, for us, marriage
19 is so important because it solidifies the relationship. And
20 it -- we gain access to, again, that language that is global,
21 where it won't affect our children in the future. They won't
22 have to say, "My dad and dad are domestic partners." Because
23 not everyone knows exactly what a domestic partnership is. So
24 by having access to that language, again, it makes it
25 definitive.

1 And beyond the language, having a marriage would grow
2 our relationship. It represents us to our community and to
3 society.

4 And by raising a family and knowing what our
5 parenting skills would be like, we would want our children to
6 be protected from any awkwardness or anything like that. We
7 would want to focus on raising our kids.

8 **Q.** Do you think your children would be at a disadvantage if
9 you were not married and if they could not describe their
10 parents as being married?

11 **A.** To a certain extent I do. I believe that children that
12 are not in a married home are just as susceptible to awkward
13 discussions, or whatever it might be, in schools, outside of
14 school.

15 So, do I believe that a marriage creates a more
16 stable home for our children? In our case, that's what we
17 believe. We need to be married before we have kids.

18 **Q.** Do you think that whether or not you're married affects
19 the relationship that you and Mr. Zarrillo have to the broader
20 community, to people that you meet and deal with?

21 **MR. RAUM:** Objection. Calls for expert testimony.

22 **THE COURT:** I think this goes, again, to the state of
23 mind of the witness.

24 **THE WITNESS:** I can safely say that if I were married
25 to Jeff, that I know that the struggle that we have validating

1 ourselves to other people would be diminished and potentially
2 eradicated.

3 I know how I felt when people have asked, "An LLC or
4 an S Corporation"? No, not my business partner. My partner."
5 A puzzled look because we're gay.

6 Unless you have to deal with that, unless you have to
7 go through a constant validation of self, there's no way to
8 really describe how it feels.

9 And I'm a proud man. I'm proud to be gay. I'm a
10 natural-born gay. I love Jeff more than myself.

11 And being excluded in that way is so incredibly
12 harmful to me. I can't speak as an expert. I can speak as a
13 human being that's lived it.

14 **BY MR. BOIES:**

15 **Q.** Now, you say you were a natural-born gay. Does that mean
16 you've always been gay?

17 **A.** As long as I can remember, yes.

18 **Q.** Have you been always openly gay?

19 **A.** I have not.

20 **Q.** When did you come out?

21 **A.** It was a gradual process.

22 I struggled with it quite a bit. Being surrounded by
23 what seemed everything heterosexual, you know, you tend to try
24 and want to fit into that. Because when you are considered
25 different from the norm, you're subject to all kinds of issues

1 and situations that you want to avoid; you shouldn't have to
2 deal with in life.

3 So as hard as you try -- and I did, I tried to
4 identify, I tried to -- I succumbed to peer pressure. I had a
5 girlfriend in high school because you needed to have one to go
6 to the prom or to go to the game, or whatever it might be.

7 So these pressures won over my being at that time.
8 So in high school I was able to confide in a few friends. And
9 I don't think it was necessarily -- well, we all think no one
10 knows, but they kind of always do. So when you do confide in
11 friends and family, they are like, "Yeah, we are just waiting
12 for you to be ready."

13 And I was never a big believer of presenting myself
14 as gay as an issue or problem. I never wanted to sit someone
15 down and say, "I have a serious thing to tell you," as if it
16 were some deep, dark secret; that it was a bad thing in my
17 life.

18 Because many times in those instances, in high school
19 and college, being gay is associated with something that's
20 undesirable. "Oh, that's gay." You know. That's me. So I'm
21 in that category now. So it's very difficult.

22 But I found friends that I trusted and family that I
23 trusted, and I was able to come out in a gradual process. And
24 I always told myself that I would come out in a way that was
25 exemplary to who I was.

1 I wasn't going to present it as a problem or
2 something that I -- even though I had struggled with it and
3 fought with it for many years, I was going to put a good face
4 to it and say, "Listen. This is my boyfriend. I'm bringing
5 him home for Thanksgiving." You know. And that would lead to
6 the discussion. And that has proven --

7 Q. I bet it would.

8 A. Huh?

9 Q. I said, "I bet it would."

10 A. Well, yeah.

11 But it was, just again, in that effort of trying to
12 identify surely who I was versus leaving any speculation that
13 it was not who I really truly was as a person.

14 Q. Have you experienced discrimination as a result of being
15 gay?

16 A. I have.

17 Q. Can you give me some examples?

18 A. One example that I remember very clearly is the first time
19 in college, with some gay friends, going to my first gay
20 establishment, like a bar or a restaurant, socially.

21 And we were in an outdoor patio. And rocks and eggs
22 came flying over the fence of the patio. We were struck by
23 these rocks and eggs. And there were slurs. And again we
24 couldn't see who the people were, but we were definitely hit.
25 And it was a very sobering moment because I just accepted that

1 as, well, that's part of our struggle. That's part of what we
2 have to deal with.

3 And it was very clear to me because I was finally
4 feeling comfortable in my skin. And it was just a constant
5 reminder of that reminder of you are still going to deal with
6 these issues.

7 More currently, discussions and amicable arguments --
8 if that's not an oxymoron -- dealing over certain rights.

9 Particularly, Prop 8 has led to a lot of discussions,
10 intense discussions, about my rights and why I should be able
11 to get married.

12 And a lot of those discussions included language
13 like, "Well, what's the big deal? Why do you care? Don't you
14 get most of the same rights, anyway?" And other emotional
15 responses like, "Well, marriage is not for you people anyway."

16 And, once again, it goes back to that place where you
17 hear that. And regardless of how proud you are, unless you've
18 experienced that moment, regardless of how proud you are, you
19 still feel a bit ashamed.

20 And I shouldn't have to feel ashamed. Being gay
21 doesn't make me any less American. It doesn't change my
22 patriotism. It doesn't change the fact that I pay my taxes,
23 and I own a home, and I want to start a family. But, in that
24 moment, being gay means I'm unequal. I'm less than. I am
25 undesirable. I have been relegated to a corner.

1 And I'm tired of living my life that way. I'm tired
2 of those constant reminders, because I don't think of myself as
3 a bad person. I don't think of myself as someone who needs to
4 be put in a corner and told that, "You're different. It's not
5 for you." It is for me.

6 **Q.** What were the circumstances when somebody said, Marriage
7 isn't for you people, or whatever it was that you said?

8 **A.** Yeah, I was paraphrasing. There was other choice words
9 that I have probably forgotten.

10 That particular incident -- incident was in traffic
11 in Los Angeles. And, as you know, that's like having coffee
12 with someone in the car next to you. So you deal with sitting
13 next to this person over and over again for many miles.

14 And I noticed that this person had a Yes On 8
15 campaign sticker on their bumper sticker. And I was like, oh
16 great. And I just thought to myself, "I just want to see who
17 this person is."

18 Because this campaign sticker had an image that was
19 disturbing to me. And it was, you know, in the middle of this.
20 And I just pulled up, and I just looked over. And I got a very
21 distinctive "What?" look back.

22 And I simply said, through my window -- my window and
23 sun roof were open. And I said, "I just disagree with your
24 bumper sticker."

25 She said, "Well, marriage is not for you people,

1 anyway."

2 And I thought, "God, do I have a gay flag on my car?"
3 Like, "What's going on? How does she even know that I'm a gay
4 individual?"

5 And I normally think that I'm pretty good at being
6 able too retort and come back with, you know, something to
7 support myself. But I was in shock.

8 I remember getting home and telling Jeff I lost
9 every -- I couldn't even respond. I was like, really? Like --
10 I don't know. I just said I disapprove. I mean, I should have
11 the right to disagree. And this person turns to me and says,
12 no, you don't have that right. Nor do you have the right to
13 get married, or nor should you.

14 And it rocks you to your core.

15 **Q.** What was the image on the bumper sticker that you said was
16 disturbing to you?

17 **A.** I remember it was a yellow -- blue-yellow-green bumper
18 sticker. And it had like an image that looked like a parent
19 and a child, like they were connected.

20 And, again, I haven't seen it for quite some time.
21 But I remember there being a child, two figures, parent/child
22 type of thing. And it just reminded me of the use of children
23 in the campaign that frustrated me and I disagreed with.

24 **Q.** When you say "the use of children in the campaign," can
25 you explain what you mean?

1 **A.** Yeah. This one's a tough one because protect the children
2 is a big part of the campaign. And when I think of protecting
3 your children, you protect them from people who will perpetrate
4 crimes against them, people who might get them hooked on a
5 drug, a pedophile, or some person that you need protecting
6 from.

7 You don't protect yourself from an amicable person or
8 a good person. You protect yourself from things that can harm
9 you physically, emotionally. And so insulting, even the
10 insinuation that I would be part of that category. So far away
11 from that category.

12 But to lump this issue into protect your family,
13 protect your children, that invokes to me that we are some sort
14 of perpetrator; that my getting married to Jeff is going to
15 harm some child somewhere. And it's so damning, and it's so
16 angering, because I love kids.

17 If you put my nieces and nephews on the stand right
18 now, I'd be the cool uncle, right. And to think that you had
19 to protect someone from me, from Jeff, from our friends and
20 from our community, there's no recovering from that. There is
21 no recovering from it.

22 And then to back it up by saying, oh, but these kids
23 will learn about you. Well, they learn about a lot of things
24 in school. So I say, be a parent. Talk to your children about
25 it.

1 But don't point your finger at me and put me in that
2 category, because I'm so far from that category.

3 **Q.** Let me show you some of the things that you may be
4 referring to.

5 **MR. BOIES:** Your Honor, at this time, I would offer
6 plaintiffs Exhibit 99, which is one of the campaign videos.
7 And I offer it subject to the reservation of objection that the
8 defendants have already reserved.

9 **THE COURT:** 99?

10 **MR. BOIES:** Yes.

11 **MR. RAUM:** Your Honor, I may be mistaken, but I don't
12 believe this is on the list as an exhibit that's going to be
13 used in connection with this witness.

14 **MR. BOIES:** It may have been on the list.

15 (Counsel confer off the record, out of hearing of the
16 reporter.)

17 **MR. RAUM:** It appears that it was identified last
18 night, for the first time.

19 **THE COURT:** What I have is, it's a
20 protectmarriage.com video entitled, "It's Already Happened."

21 **MR. BOIES:** Yes, Your Honor.

22 **MR. RAUM:** Hold on one second, Your Honor.

23 **THE COURT:** Very well.

24 **MR. RAUM:** Want to verify with Ms. Moss that we have,
25 in fact, received this.

1 (Pause)

2 **MR. RAUM:** Your Honor, to the extent it was exchanged
3 last night, it's late. It was supposed to be disclosed on
4 January 6th. We got it, if at all, last night, outside the
5 scope of your direct order in that regard.

6 **THE COURT:** The order with respect to identifying the
7 exhibits to be used with a witness; is that it?

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

9 **THE COURT:** It is on the plaintiffs' exhibit list,
10 which was filed on the 7th.

11 **MR. BOIES:** Your Honor, I think it was disclosed at
12 the appropriate time. If I can --

13 **THE COURT:** You are offering it subject to the
14 objection that --

15 **MR. BOIES:** Exactly.

16 **THE COURT:** -- counsel has just made?

17 **MR. BOIES:** Yes.

18 **THE COURT:** Very well. Well, then, subject to that
19 objection, Exhibit 99, Plaintiffs' Exhibit 99.

20 **MR. BOIES:** And may we play that now?

21 (Video played in open court.)

22 **BY MR. BOIES:**

23 **Q.** Now, when you see the line there that says, "Protect our
24 children. Restore marriage." how does that make you feel?

25 **A.** Well, again, it goes to speak to: What are you protecting

1 your children from? To me, are you protecting them from the
2 knowledge that certain people exist and desire certain rights?
3 If that's what you're protecting them from, then maybe the word
4 "protect" should be "considered."

5 To me, the threat that's implied is insulting. And I
6 think that there are ways to convey a message without
7 potentially demonizing a group of people or creating fear
8 around a certain group of people. I think it's unfair, and I
9 don't think it's very just.

10 **MR. BOIES:** Your Honor, I would offer, at this time,
11 another video, which is Plaintiffs' Exhibit 401. It is the
12 video, "Stand up for Proposition 8." And I would offer it,
13 again, subject to the same objections that the defendants have
14 reserved earlier today.

15 **MR. RAUM:** We don't object, Your Honor, subject to
16 the standing relevance objection.

17 **THE COURT:** Very well. Well, what that means is that
18 the witness -- excuse me.

19 **MR. RAUM:** Your Honor, excuse me.

20 **THE COURT:** What's that?

21 **MR. RAUM:** I'm sorry. We do want to preserve an
22 objection based on the fact that it was identified late. It
23 was supposed to be identified within 48 hours of the witness,
24 which exhibits were going to be related to the particular
25 witness on the stand.

1 **MR. BOIES:** Your Honor, I think --

2 **THE COURT:** Very well. I understand.

3 What I think is probably fair under the circumstances
4 is that the witness will have to remain available for any
5 questions that the proponents wish to propound to this witness,
6 related to the exhibit that has been designated in less than 48
7 hours.

8 **MR. BOIES:** Your Honor, I believe it was designated
9 on January 6th. And I believe we can demonstrate that.

10 **THE COURT:** All right.

11 **MR. BOIES:** We'll deal with them offline.

12 **THE COURT:** If that is the case, then, that would
13 resolve the matter.

14 If it is not the case, what I think is fair to both
15 sides is to have the witness remain available so that the
16 witness can be examined with respect to any late designated
17 documents.

18 **MR. BOIES:** Yes, Your Honor.

19 **THE COURT:** All right.

20 **THE WITNESS:** I hate to interrupt, but is this
21 monitor supposed to be working? Because it's not. I was
22 watching over Your Honor's shoulder. Sorry.

23 **THE CLERK:** Is it okay to play, Your Honor?

24 **THE COURT:** What's that?

25 **THE CLERK:** You can publish it?

1 **THE COURT:** Yes.

2 **MR. RAUM:** Excuse me, Your Honor. I'm sorry to
3 interrupt, but my understanding initially the exhibit that was
4 going to be introduced was 99, and that the exhibit that was
5 actually played was Plaintiff's Exhibit 401. Is that the --

6 **MR. BOIES:** I don't think so. We just played 99. We
7 are now going to offer, and have just offered, 401. We are now
8 going to play 401. We have not played 401 yet. We have played
9 99.

10 **MR. RAUM:** Okay. Thank you. Then, in that case,
11 Exhibit 401 was not disclosed at all. It is not in the e-mail
12 that's dated January 10th.

13 **MR. BOIES:** Your Honor, it's noon. I think we can
14 demonstrate to them we disclosed this on January 6th. But this
15 is a campaign video. Everybody knows what these videos are.

16 Your Honor, could I just have a moment?

17 **THE COURT:** All right. Why don't you take a minute
18 and consult with your colleagues. And we'll proceed.

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

20 (Counsel confer off the record.)

21 **MR. BOIES:** Yes, Your Honor.

22 **THE COURT:** Yes.

23 **MR. BOIES:** Exhibit 99, the one we already played,
24 was properly disclosed on January 6. Exhibit 401 was not. So
25 401 is an exhibit that they have not had prior notification of.

1 Having checked the list exactly right now, I note
2 that they were not -- they were not given notification of that.

3 **THE COURT:** Are you withdrawing 401?

4 **MR. BOIES:** Well, Your Honor, I think this is a
5 situation in which it would be appropriate to play it with the
6 witness. We'll keep the witness available, if they have got
7 any questions about it.

8 It's a video from the campaign. It's a video
9 featuring Ron Prentice, chairman of protectmarriage.com. It is
10 one that everybody knows about. There's no surprise. There's
11 no prejudice.

12 I apologize for the inadvertent omission of the
13 document from the list, but I don't think there is any
14 prejudice. I think it will facilitate the orderly examination,
15 to introduce it and play it at this time.

16 **THE COURT:** Counsel.

17 **MR. RAUM:** Your Honor, your order is very clear that
18 exhibits are not identified shall not be used at trial. It
19 certainly is a surprise to us that this video would be used.
20 And it is a surprise. And, certainly, if we knew it was going
21 to be used, we could prepare accordingly.

22 Your pretrial order serves a very distinct purpose.
23 And our position is that it should be enforced.

24 **THE COURT:** Well, it does serve a useful purpose.

25 In view of the fact that this is a campaign statement

1 that was made by your client, what is the prejudice to your
2 client of allowing it to be used, and then holding the witness
3 for any examination with respect to that particular exhibit for
4 at least 48 hours, which would essentially rectify any
5 prejudice that your client may have suffered? Isn't that a
6 cure?

7 **MR. RAUM:** Your Honor, it is a cure, to a certain
8 degree. However, our objection would stand. And, of course,
9 you're free to proceed accordingly.

10 (Laughter)

11 **THE COURT:** Well, I'm delighted to hear that.

12 (Laughter)

13 **MR. RAUM:** It's fine you know that.

14 **THE COURT:** Why don't we proceed on that basis. And
15 I will urge both sides, be sure to check those exhibit lists
16 and be sure that you make them complete and up-to-date.

17 I realize that you've been working hard, preparing
18 this case for trial. We're only on the first day, and there
19 are bound to be a few slips along the way.

20 But it wouldn't appear, given the nature of this
21 particular exhibit, that there would be any great prejudice to
22 your client in allowing it to be used. But, if there is, this
23 witness will have to remain available.

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

25 **THE COURT:** All right.

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

2 **THE COURT:** Proceed.

3 **MR. BOIES:** Could we now play Plaintiff's Exhibit
4 401.

5 Is your monitor working?

6 **THE WITNESS:** Yes.

7 (Video played in open court.)

8 **BY MR. BOIES:**

9 **Q.** How did you feel seeing that video, and in particular the
10 last line, "Stand up for righteousness. Vote Yes on
11 Proposition 8"?

12 **MR. RAUM:** Objection, Your Honor. Counsel
13 represented that this was a video that was produced by
14 protectmarriage.com, proponent in this case. There has been no
15 foundation to that effect. Doesn't appear that it is.

16 And to the extent that the witness is going to
17 testify as to how this particular ad made him feel is of no
18 relevance to this case.

19 **THE COURT:** Mr. Boies.

20 **MR. BOIES:** Your Honor, what I said was it was a
21 campaign video featuring Ron Prentice, chairman of
22 protectmarriage.com.

23 If Counsel is saying it was produced by somebody
24 other than protectmarriage.com, that's not something that I
25 have knowledge about.

1 What it is was a campaign video. Everybody has
2 agreed it was a campaign video. And it's featuring the
3 chairman of protectmarriage.com, Ron Prentice, who played a
4 very prominent role.

5 The purpose of this is to show the effect of these
6 kinds of ads on Mr. Katami and, through him, other members of
7 the gay community.

8 I think that that is an entirely legitimate purpose,
9 given Mr. Prentice's role in that, regardless of who actually
10 produced the video.

11 **THE COURT:** Anything further, Counsel?

12 **MR. RAUM:** Your Honor, just to the extent that it's
13 being characterized as a campaign video, suggests that it's
14 part of an official campaign of Prop 8. And there is no
15 foundation for that, whatsoever.

16 **THE COURT:** I believe the question to the witness is,
17 what his reaction was to seeing this exhibit. And I think that
18 question is proper, without regard to the specific origin of
19 the campaign advertisement.

20 Objection will be overruled.

21 And I'll remind counsel, although this is a court
22 trial, I do generally try to discourage speaking objections. I
23 realize we may be a little more liberal with some of the rules
24 of procedure here than would be true in a jury trial. But you
25 might bear that in mind.

1 Very well. Do you have the question in mind?

2 **THE WITNESS:** Could you repeat the question, please.

3 **BY MR. BOIES:**

4 **Q.** Sure. When you saw this video, and particularly the last
5 tag line of the video that says, "Stand up for righteousness.
6 Vote Yes on Proposition 8." how, if at all, were you affected
7 by that?

8 **A.** I do remember that campaign as -- like this, and this one
9 included. I would be lying if I said -- if I didn't sit here
10 and my heart was racing and I was angry watching it.

11 I mean, again, "Stand up for righteousness." Okay.
12 So we're a class of citizen or a category of people that need
13 to be stood up against, for some reason.

14 And, not to even mention, what I find most disturbing
15 is the reference to, "The devil blurring lines," and "Don't
16 deny Jesus like Peter did," and "this oncoming freight train."

17 Well, what happens to you when a freight train hits
18 you? You're going to be either majorly harmed or killed by
19 that, right?

20 So to be categorized as a person that's part of a
21 community, that's part of an effort to do one thing, we want to
22 do one thing. We don't want to perpetrate against anyone. We
23 don't want to force anyone to do anything.

24 I love Jeff Zarrillo. I want to get married to Jeff.
25 I want to start a family. I'm not going to go out and start

1 some movement that's going to harm any institution or any
2 person or any child. I'm not.

3 You know, and this is offensive to people of faith.
4 I have a lot of friends who are people of faith.

5 To categorize them as people of the devil, or even
6 put them in the same category, I mean, of some effort that is
7 likened to the devil blurring the lines between right and
8 wrong, I would think that those lines between right and wrong
9 are talking about things that are bad in nature, that harm
10 people and society.

11 We're not trying to do that. I just want to get
12 married. I mean, it's as simple as that. I love someone. I
13 want to get married.

14 And so an ad like this goes -- again, it just demeans
15 you. It just makes you feel like people are putting efforts
16 into discriminating against you.

17 And although they have the right to believe what they
18 want to believe, it doesn't make that legitimate or reasonable
19 to me, in my life, when it infringes upon my rights, when it
20 changes the way I identify myself or the way I feel about
21 myself. That's unacceptable.

22 **MR. BOIES:** Your Honor, I would next offer
23 Plaintiff's Exhibit 350, a video entitled "Gathering Storm."
24 This is a video that was released in 2009. And, again, I offer
25 it subject to the objection.

1 **MR. RAUM:** Your Honor, we have a further objection,
2 which is that this particular video was not produced until
3 after the Prop 8 campaign and the vote, and that it would be
4 irrelevant to these proceedings.

5 **THE COURT:** What is the relevance of this, Mr. Boies?

6 **MR. BOIES:** The relevance, Your Honor -- and when I
7 offered it, I made clear it was a 2009 video.

8 And the significance of it is that even after the
9 campaign for Proposition 8 was over with, there continued to be
10 this campaign against gay people; this campaign portraying gay
11 people as a threat.

12 This is part of the pattern of discrimination that
13 we've referred to. And I think it is relevant to Mr. Katami's
14 state of mind, the state of mind of other people, that they are
15 subject to this kind of attacks.

16 Now, in some cases, this may be even more relevant
17 than the campaign videos. In the campaign videos, they have
18 the excuse that they were preparing these things because they
19 were in the middle of a political campaign.

20 This is something that is prepared, is distributed
21 after the campaign is over with. And it can have no
22 function -- as I think the Court will see when it sees the
23 video -- other than to try to demonize gay people, to try to
24 infer that somehow gay people have some kind of agenda that is
25 a threat to society.

1 **THE COURT:** Can you link this to the parties here?

2 **MR. BOIES:** Your Honor, could I have a moment on
3 that?

4 **THE COURT:** You may.

5 **MR. BOIES:** Your Honor, I think it actually shows on
6 the video that it was produced by the National Organization for
7 Marriage, I think the formal name is, which was one of the
8 largest supporters of Proposition 8.

9 The defendants, you know, try to draw a distinction
10 between what they call the official campaign and the unofficial
11 campaign. In fact, it's all one campaign.

12 And the attempt to sort of step back for purposes of
13 this litigation and pretend there was only really an official
14 campaign, and they didn't know anything about or have any
15 knowledge of what was going on with everybody else, I think, is
16 not credible, particularly when you are talking about an
17 organization like the National Organization for Marriage, that
18 was one of their primary funders.

19 So I believe that this is sufficiently related to the
20 campaign broadly defined.

21 I also think that regardless of whether it is linked
22 to the campaign, even if this were simply something that had
23 come up from somebody who had no connection with the campaign
24 it is -- it is relevant to the kinds of issues that the Court
25 is going to consider, in terms of the appropriate standard,

1 whether it's strict scrutiny or rational basis, or somewhere in
2 between, as to whether this is a class of people that is
3 subject to continuing discrimination.

4 **MR. RAUM:** Your Honor, number one, this was not
5 produced by protectmarriage.com. And protectmarriage.com is
6 not the National Organization for Marriage.

7 Number two, it was after, months after the Prop 8
8 campaign.

9 Number three, the ad itself doesn't even reference
10 Prop 8 or California.

11 For all those reasons, including the fact that
12 Mr. Katami has been identified to testify solely about sexual
13 orientation and the harms he suffered as a result of Prop 8,
14 any harm that could have flowed from this particular video is
15 not as a result of Prop 8.

16 **THE COURT:** I'm inclined to think that the connection
17 to the parties-at-suit here, and the issues, is sufficiently
18 tenuous that there would not be a basis for admitting Exhibit
19 350.

20 You're proposing to admit it, Mr. Boies, for purposes
21 of showing an atmosphere or public attitude of homophobia. I
22 think there are other ways of establishing that.

23 And this particular exhibit, given the lack of
24 connection to the parties-at-suit, I don't believe is
25 appropriate for admission. Therefore, the objection will be

1 sustained.

2 **MR. BOIES:** Your Honor, let me then offer Plaintiff's
3 Exhibit 1, which is the Voter Information Guide for
4 Proposition 8.

5 And this, also, is one that, I have now checked, was
6 identified on a timely basis.

7 **THE COURT:** While you're identifying exhibits, did
8 you move in 99 and 401?

9 **MR. BOIES:** Yes, Your Honor we did.

10 **THE COURT:** It's not clear whether those were simply
11 marked or moved for admission.

12 **MR. BOIES:** I had offered those for evidence.

13 **THE COURT:** Okay. Let's see. 401 will be admitted
14 subject to the qualification that I outlined; namely, that the
15 witness must be available for at least 48 hours, in the event
16 that proponents wish to examine him with reference to Exhibit
17 401.

18 So, 99 and 401 will be admitted.

19 (Plaintiffs' Exhibits 99 and 401 received in
20 evidence.)

21 **THE COURT:** Now, you're moving to Exhibit 1. And can
22 that be placed before the witness?

23 **MR. BOIES:** Yes. May I approach, Your Honor?

24 **THE COURT:** Yes, you may.
25

1 **BY MR. BOIES:**

2 **Q.** Mr. Katami, do you recognize this exhibit?

3 **A.** I do.

4 **Q.** And what is it?

5 **A.** It is the California Voter Information Guide for 2008.

6 **Q.** And did you review this in 2008?

7 **A.** Yes. Jeff and I have a habit of reviewing these before
8 elections.

9 **MR. BOIES:** Your Honor, I would offer Exhibit 1.

10 **THE COURT:** Very well. Exhibit 1 will be admitted.

11 **BY MR. BOIES:**

12 **Q.** Let me ask you to turn to page that is numbered in the
13 bottom right-hand corner "3365." And if we could put that up
14 on the screen.

15 And, in particular, I would like to direct your
16 attention in the "Argument in Favor of Proposition 8." Do you
17 see that?

18 **A.** I do.

19 **Q.** At the top of the page. And it's two columns. And in the
20 right-hand column, the next-to-the-last paragraph, do you see
21 that?

22 **A.** Did you say the next-to-the-last paragraph?

23 **Q.** Next-to-the-last paragraph.

24 **A.** Yes.

25 **Q.** It says, "Voting YES on Proposition 8 restores the

1 definition of marriage that was approved by over 61 percent of
2 the voters. Voting YES overturns the decision of four activist
3 judges. Voting YES protects our children."

4 Do you see that?

5 **A.** I do.

6 **Q.** And what was the reaction that you had to that argument?

7 **A.** Well, once again, it always seems to be the punchline of
8 the message. Regardless of what -- Jeff and I are informed
9 voters. We do the reading. We discuss it. And when there are
10 facts of merit, we're open to hearing them. We discuss them.

11 But this punchline, again, of protecting children, it
12 is absolutely clear that because you see this recurring theme
13 of protecting children -- and I go back to: What do you
14 protect children from? Do you protect them from harms that we
15 put upon them? We are not a harm.

16 So, then, that leads me to believe: How does this
17 generate? How does someone even think of putting "protect your
18 children" in here?

19 That language is indicative of some kind of
20 perpetration against a child. Which leads me to believe that
21 there is definitely -- it's discriminatory.

22 It absolutely puts me into a category that I do not
23 belong in. It separates me from the norm. It makes me into
24 someone -- a part of a community that is perpetrating some sort
25 of threat. And that's not who we are or what we're here about.

1 So I disagree with it wholeheartedly. I think it's
2 unfair. And I don't think it represents the situation.

3 **Q.** Mr. Zarrillo testified that the two of you had decided not
4 to register as domestic partners. I'd like to ask you to tell
5 the Court your reasoning for choosing not to register with the
6 State of California as domestic partners.

7 **A.** We hear a lot of, "What's the big deal? Get most of the
8 same rights, virtually all of the same rights. What's the big
9 deal?"

10 The big deal is -- and we've discussed this. The big
11 deal is, it's creating a separate category for us. And that's
12 a major deal because it makes you into a second, third, and, as
13 Mr. Olson said today, a fourth class citizen now that we
14 actually recognize marriages from other states.

15 And everyone says, "Oh, but that's a huge stride;
16 you. Get rights." But we still have discrimination.

17 So it's like -- for lack of a better image, it's
18 putting a Twinkie at the end of a treadmill and then saying,
19 "Here's a bite. Here's another bite." Well, you want that
20 Twinkie. You want the whole thing. I know it's a rudimentary
21 example of what it is, but that's how it is. It is not the
22 same.

23 "Oh, but you have the same rights." Yeah, but what
24 am I supposed to do, go have a domestic partner ceremony and
25 then a reception? It's not what you do. None of our friends

1 have ever said, "Hey, this is my domestic partner."

2 By allowing us full access to those rights, not even
3 the rights as much as it is the identity of being married, the
4 full access to being a full participant as a citizen of our
5 country and our state, that's denied.

6 And when your state sanctions something that
7 segregates you, it fortifies people's biases, in my opinion.
8 It gives them an excuse to say, "It's not right. You don't
9 deserve it because the state tells us that."

10 And, to me, that's fundamentally wrong. It's rooted
11 in something that's fundamentally wrong.

12 Because all I'm desiring, all I want, is to be
13 married. And that affects no one except for my husband, my
14 family, my friends, our concentric circles.

15 And, you know what, if it bolsters our profile in our
16 society and our world, then, good. So be it. Because as long
17 as that we are sanctioned by our state to be told that we're
18 different, regardless of how proud we want to be, regardless of
19 how happy we are in our pursuits, we're still lacking. And, to
20 me, that's absolutely unAmerican.

21 We're not a country about us and them. We're
22 supposed to be a country about us, all of us, working in
23 concert, doing things together. That's why we have these
24 protections.

25 My state is supposed to protect me. It's not

1 supposed to discriminate against me.

2 **MR. BOIES:** Your Honor, I have no more questions.

3 **THE COURT:** Very well. Cross-examine.

4 **MR. RAUM:** Your Honor, would it be possible that we
5 take our lunch break now, and resume --

6 **THE COURT:** Well, that's a good idea.

7 (Laughter)

8 All right. Why don't we then take our lunch, and
9 recess until 1:30 this afternoon. And we'll resume with cross
10 examination of this witness.

11 (Noon recess taken from 12:27 to 1:37 p.m.)

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P R O C E E D I N G S1
2 **JANUARY 11, 2010**

1:37 p.m.

3 (Whereupon, proceedings were resumed

4 after noon recess.)

5 **THE COURT:** Very well, counsel. As the witness is
6 coming to the stand, let me mention something.7 I had mentioned this morning comments received from
8 the Federal Bar Association and others simply for completeness
9 of the record and to make sure that you have what is submitted
10 to the Court, although it pertains to the change in the local
11 rule.12 In view of the proceedings in the Supreme Court, I
13 think completeness of the record calls for that response of the
14 Federal Bar Association to be made part of the record in this
15 case, together with that submitted by the San Francisco Bar
16 Association, an organization called the Equal Justice Society,
17 the Lawyers Committee For Civil Rights, and the American Civil
18 Liberties Union, which appears to have been rather limber in
19 its affiliations in this case. And, in addition,
20 correspondence from the Director of the Administrative Office
21 of the United States Courts to Chief Judge Kozinski dated
22 January 8, 2010, and Judge Kozinski's response to Mr. Duff and
23 to Judge Scirica, the Chairman of the Executive Committee of
24 the Judicial Conference of the United States.

25 Do the extent any of these matters have any bearing

1 on your further proceedings, they should be part of the record
2 and you can deal with them as you think is appropriate, but you
3 certainly should have access to these. So I will direct that
4 the clerk have these filed in the record.

5 All right. Mr. Cooper?

6 **MR. COOPER:** Further, your Honor, to that question,
7 how exactly will we have access to these documents you just
8 referenced? Number one.

9 And, number two: Will we have access as well to the
10 rest of this voluminous collection of comments?

11 **THE COURT:** You want to take a look at those
12 138,000-plus responses? I will be delighted to have you do it.
13 I don't think we want to burden the record with all of them,
14 but they are available. And I can't say I have read every one
15 of them, but I have read many of them, but they are certainly
16 available to everybody.

17 But I thought the organizational responses, which
18 deal specifically with the rules, would be particularly helpful
19 to you.

20 **MR. COOPER:** And will those be available through
21 Pacer on the docket?

22 **THE COURT:** Yes, sir.

23 **MR. COOPER:** Thank you.

24 **THE COURT:** Very well. Let me remind the witness
25 that you are still under oath. The oath that you took this

1 morning applies to this part of your testimony. Do you
2 understand that?

3 **THE WITNESS:** I do.

4 **THE COURT:** Mr. Raum, I believe it is.

5 **MR. RAUM:** Yes. Thank you, your Honor.

6 **THE COURT:** Very well.

7 **PAUL KATAMI,**

8 called as a witness for the Plaintiffs herein, having been
9 previously sworn, resumed the stand and testified further as
10 follows:

11 **CROSS EXAMINATION**

12 **BY MR. RAUM:**

13 **Q.** Good afternoon, Mr. Katami.

14 **A.** Good afternoon.

15 **Q.** We met December 10th, do you recall?

16 **A.** I do.

17 **Q.** It's good to see you again.

18 **A.** Thank you.

19 **Q.** I would like to draw your attention to Plaintiffs' Exhibit
20 116. And if we could play that exhibit and have you look at
21 it, that would be helpful.

22 **THE COURT:** Did you say 116?

23 **MR. RAUM:** Yes.

24 **THE COURT:** Thank you.

25 Well, are you seeking to admit the exhibit, or are

1 you just showing it to the witness to see if it refreshes his
2 recollection, or just as a matter of general interest?

3 **MR. RAUM:** Your Honor, I would like to show the
4 witness the video. It has to do with the issue of Prop 8
5 campaign and the theme that kids would be taught about same-sex
6 marriage in the schools, which is something that he had
7 testified to on his direct.

8 **THE COURT:** My question is somewhat more limited.
9 Are you moving the exhibit in?

10 **MR. RAUM:** No, your Honor, not at this time. I would
11 like him to view the video and then identify it and we will
12 move it in at the appropriate time.

13 **MR. BOIES:** Your Honor, I have no objection to the
14 video so we can offer it at this time.

15 **MR. RAUM:** In that case, your Honor, we move it into
16 evidence.

17 **THE COURT:** Very well. 116 will be admitted.
18 (Defendants' Exhibit 116 received in evidence.)
19 (Videotape played in open court.)

20 **BY MR. RAUM:**

21 **Q.** Mr. Katami, would you agree with me that parents have the
22 primary responsibility for raising their kids?

23 **A.** I agree that parents have a primary responsibility for
24 raising their kids, yes.

25 **Q.** And part of that responsibility includes the development

1 of their moral character?

2 **A.** Part of that responsibility is that, yes.

3 **Q.** And part of developing a child's moral character would
4 involve issues of human sexuality; would you agree with that?

5 **A.** I can't speak as a parent, because I'm not one. I know
6 that myself as a parent, that would be part of my
7 responsibility. If I had differing views on certain aspects of
8 sexuality, that would be my responsibility to impart that to my
9 kids.

10 **Q.** And you testified today that you desired to be a parent
11 ultimately?

12 **A.** I do.

13 **Q.** Would you agree that issues relating to same-sex marriage
14 are for parents to discuss with their children according to
15 their own values and their own beliefs?

16 **A.** I think that works in tandem to what they learn in society
17 and in school and then fortified in the home, depending on what
18 the home vision is.

19 **Q.** Do you think that first and second graders should be
20 taught about sex in the public schools?

21 **A.** I'm not part of any unified school district or school
22 district at all, so I can't speak to what is taught, what is
23 not taught. And you would have to define what you mean by
24 "sex" exactly and how that's taught.

25 **Q.** My question is to you. In your opinion, do you think kids

1 as young as first and second grade should be taught about is
2 sex? In other words, traditional sex education, should that
3 start in first and second grade? You don't think that, do you?

4 **MR. BOIES:** Objection, relevance.

5 **A.** No, I haven't thought about it.

6 **THE COURT:** Let me rule on the objection before you
7 answer it.

8 Objection overruled. I think the door was opened to
9 this line on direct examination. Proceed.

10 **A.** Can you repeat the question, please?

11 **BY MR. RAUM:**

12 **Q.** You don't think that kids as young as first and second
13 grade should be taught a traditional sex ed curriculum, taught
14 about the particulars of sex between individuals, do you?

15 **A.** Again, not as a parent. I can't answer that question with
16 any surety. I don't know. It depends on the curriculum. It
17 depends on what's being taught and how it's taught.

18 **Q.** Do you think kids that are in first and second grade have
19 the capability to process issues of sex? Do you think that,
20 Mr. Katami?

21 **A.** I am not an expert on child development. I can't speak
22 for every child across the country, but I do know that children
23 are growing up a lot faster than they used to, so there is a
24 potential yes to that question.

25 **Q.** Do you think it would be reasonable for someone, a parent,

1 for instance, to disagree with you on that?

2 **A.** It's reasonable that they can disagree, yes.

3 **Q.** You wouldn't have a problem with the public school
4 teaching about same-sex marriage to first and second graders,
5 would you?

6 **A.** Again, I don't know the curriculum of the school system.
7 I don't know what is taught and how it's taught. So I would
8 have to look at the curriculum, see what's being taught, how
9 it's taught.

10 And if it's something I disagreed with in my home and
11 my children came to me and said, "This which is what I
12 learned," it is my mutual responsibility to impart my vision on
13 those children so they understand that there are altering views
14 or methods.

15 **Q.** You had a particular objection as to the Yes On 8 campaign
16 ads to the extent that they pulled children into the equation;
17 isn't that a fact?

18 **A.** It was the manner in which they pulled children into the
19 equation, yes.

20 **Q.** I would like to draw your attention to Plaintiffs' Exhibit
21 1.

22 If we could bring that up, that would be helpful.

23 (Document displayed)

24 **THE COURT:** Previously admitted into evidence?

25 **MR. RAUM:** Yes, your Honor.

1 **BY MR. RAUM:**

2 **Q.** Now, Mr. Katami, you testified on your direct examination
3 that you had a particular problem with part of this exhibit,
4 which is the official argument in favor of Prop 8, that voting
5 yes would protect our children. You had a problem with that,
6 didn't you?

7 **A.** I have an issue, that --

8 **Q.** Particularly --

9 **A.** I'm sorry.

10 **Q.** Particularly you took issue with being associated with
11 something that was bad; that somehow you had to be protected
12 from children. You had a problem with that, is that correct?

13 **A.** I have an issue with the verbiage saying "protect your
14 children," because to me that insinuates that you have to
15 protect from something that is going to harm you.

16 **Q.** And did you find that the ads that brought the children
17 into the equation and claimed that kids might be taught about
18 same-sex marriage in schools was misleading?

19 **A.** I did feel it was misleading.

20 **Q.** I would like to draw your attention to the top of
21 Plaintiffs' Exhibit 1, the top right-hand column.

22 (Document displayed)

23 **Q.** Do you see that? That is on 003365.

24 Do you see the top right-hand column that starts
25 with, "We should not accept"?

1 **A.** The resolution -- I can't read it exactly.

2 Okay, there we go. Thank you.

3 **Q.** Could you read the first four lines of that exhibit?

4 **A.** (As read)

5 "We should not accept a court decision that
6 may result in public schools teaching our
7 kids that gay marriage is okay. That is an
8 issue for parents to discuss with their
9 children according to their own values and
10 beliefs. It shouldn't be forced on us
11 against our will."

12 **Q.** In fact, that's what the Yes On 8 on Prop 8 campaign was
13 seeking to protect children from, am I right?

14 **A.** I can't speak to know exactly what they meant outside of
15 this or with this exactly, but, again, the issue is with
16 protect the children.

17 I don't have an issue if it's taught in school.
18 Again, the mutual responsibility is at home with the parent.

19 And ultimately Proposition 8, for me, had nothing to
20 do with children. We are missing the point completely here.
21 This is, to me, a tactic to divert from what the truth of the
22 situation is; is that the state gave me a right, stripped the
23 right away from me. That right is something I think is
24 inalienably mine.

25 And, therefore, the issue of children is angering and

1 is an issue and a problem to me because of the way it's
2 presented.

3 But is it the whole issue? No. Is it what I
4 consider potentially diversion away from the issue? Yes.

5 **Q.** The fact is, you had a particular problem with the ads
6 because you thought they were misleading; that, in fact, kids
7 were not going to be taught in schools, isn't that true?

8 **A.** At one point my understanding was to believe that kids may
9 not be taught in school; that it wasn't for a fact sure that
10 every state that would pass or legalize gay marriage would be
11 required to teach gay marriage in school.

12 So that, again, it becomes an issue for me based on
13 the language, the tactic and what it insinuates, which does not
14 sit at the core of the issue for what -- how it affects me.

15 **Q.** There is nothing in this ad that says that the Yes on
16 Prop 8 campaign wanted to protect children against you because
17 you were bad, right? It didn't say anything like that, did it?

18 **A.** This ad doesn't literally state --

19 **Q.** That's what I'm asking. It does not literally state it,
20 does it?

21 **A.** This ad does not literally state that there is a harm. It
22 insinuates one to me.

23 **Q.** Thank you, Mr. Katami.

24 And the video that we played about the couple in
25 Massachusetts didn't say anything about the fact that same-sex

1 couples were bad. Didn't say that in the ad, did it?

2 **A.** That ad did not literally state that same-sex couples are
3 bad, but it's definitely insinuated in the emotion of the ad,
4 in the language of the ad, in the bullet points that were
5 obviously provided for the ad.

6 I mean, yes, to me that -- watching that ad
7 absolutely insinuates that there is some disapproval of gay
8 people and that they should be feared.

9 Again, using the terminology, "protect your family,"
10 "protect your children." Every time you see that or hear it,
11 to me, it means you are protecting your children or family from
12 something that is going to harm them.

13 Regardless if it states it legitimate -- not
14 legitimately. It just states it literally or not, it does not
15 legitimize the fact that these people are allowed to have their
16 beliefs, but the minute they turn a belief into an action that
17 legally sanctions my rights, there's an issue there.

18 **Q.** So you believe that parents can disagree on the issue of
19 same-sex marriage, but they have no right to do anything about
20 it?

21 **A.** That's not what I said.

22 **Q.** I see. The fact is that the ad that we played, that has
23 been admitted into evidence, specifically points out that these
24 parents were concerned that their kids would be taught about
25 same-sex marriage in first and second grade. That's what they

1 were concerned with.

2 And, in fact, it did happen in Massachusetts, didn't
3 it?

4 **A.** I don't know for a fact it did.

5 **Q.** Do you have any evidence or reason to believe that what
6 those parents said on that video was inaccurate? Do you have
7 any evidence to that effect?

8 **A.** I do not have any evidence to state that what they're
9 saying is inaccurate, but I also believe that a --

10 (Interruption.)

11 **A.** That a video might be playing?

12 It doesn't also exclude in my mind the fact that they
13 could be arguing about any other number of things that those
14 kids learn in school.

15 Perhaps parents disagree with a lot of the
16 curriculum, so that is an issue that is then taken to the
17 school board, as they did, and resulted in the decision that it
18 had resulted in and, therefore, the responsibility falls back
19 on them.

20 So do you then open the door for all these parents
21 that disagree with things in schools to -- you know, no. I
22 mean, this is an opportunity for them. They took the
23 opportunity to the courts and tried to rectify it in their way.
24 And it didn't fall on their side, but, again, they get to have
25 their beliefs. Should they impose those beliefs on others when

1 it comes to legal matters? Not in my eyes.

2 When it comes to talking to their children, perhaps,
3 their situation could have been really summed up and wrapped up
4 in a conversation with their child saying, "Hey, you know what?
5 You learn that in school, but we don't necessarily believe that
6 in our home," or "We don't necessarily agree with that." What
7 then goes to some disapproval towards gay people.

8 **Q.** And the official ballot language indicated that the issue
9 of same-sex marriage should be for parents to discuss with
10 their children, according to their own values and beliefs. And
11 you testified that you agreed with that?

12 **A.** In addition to that --

13 **Q.** All I'm asking you is whether you agreed with that.
14 That's the only thing I'm asking you?

15 **THE COURT:** Agreed with what, sir?

16 **MR. RAUM:** With whether same-sex marriage is an issue
17 for parents to discuss with their children according to their
18 own values and beliefs.

19 **BY MR. RAUM:**

20 **Q.** You agree with that concept, do you not?

21 **A.** The concept that parents should be able to discuss that
22 with their children?

23 **Q.** The one that I just read to you.

24 **A.** That's what I'm saying. Clarifying it for me.

25 I didn't write this language. So, yes, for me that

1 means it's in conjunction with societal things. If they are
2 watching TV -- there's a lot of other influences. So does the
3 parent have a responsibility and is it their right?

4 Absolutely. Does that prohibit people from seeing or learning
5 about other real truths in their lives? No.

6 So if they had an outside source -- you know, what if
7 their child had gone to a movie and there happened to be a gay
8 character who was married. Would he ask the same question?
9 Perhaps. It's then the parents' responsibility have to have
10 that discussion.

11 **Q.** I want to go back to the first question I asked you; that
12 it's the parents' primary responsibility to raise their kids,
13 and you agreed with that?

14 **A.** Correct.

15 **Q.** Okay. And your objection to the "protect our children"
16 theme was one which you thought was misleading; that there was
17 nothing that the kids needed to be protected against, isn't
18 that a fact?

19 **A.** Once again, my --

20 **Q.** I'm asking you a "yes" or "no" question. Did you think
21 that the kids did not need to be protected? Is that what you
22 thought?

23 **THE COURT:** Let's do one question at a time, okay?

24 **MR. RAUM:** Excuse me.

25 **THE COURT:** Okay.

1 **A.** Can you repeat the question please?

2 **BY MR. RAUM:**

3 **Q.** Is it your opinion that there was nothing that kids needed
4 to be protected against?

5 **A.** It was my opinion --

6 **MR. BOIES:** Objection, your Honor.

7 **THE COURT:** Maybe you can rephrase that, Mr. Raum.
8 That is a little far afield.

9 **MR. RAUM:** I'm sorry.

10 **BY MR. RAUM:**

11 **Q.** You testified that you had a problem with the part of
12 what's in evidence as Plaintiffs' Exhibit 1 that says that we
13 need to protect our children. You testified to that today,
14 correct?

15 **A.** I did.

16 **Q.** Okay. And the fact is, you don't think kids need to be
17 protected from exposure to same-sex relationships, correct?

18 **A.** My opinion, same-sex relationships are not something to be
19 protected from.

20 **Q.** There is nothing wrong with it in your opinion, correct?

21 **A.** Same-sex relationships?

22 **Q.** Yes.

23 **A.** Nothing wrong with it.

24 **Q.** Nothing wrong with it at all.

25 **A.** But the fact is that what the Yes On 8 campaign was

1 pointing at, is that kids would be taught about same-sex
2 relationships in first and second grade; isn't that a fact,
3 that that's what they were referring to?

4 **A.** I don't know that for a fact in first and second grade.

5 **Q.** Well, do you recall when we took your deposition, right?

6 **A.** Yes.

7 **Q.** That was December 10th, 2009?

8 **A.** Correct.

9 **Q.** I would like to refer to page 63 of the deposition
10 transcript.

11 **MR. RAUM:** Your Honor, do you have a copy?

12 **THE COURT:** I believe the clerk is retrieving it
13 right now.

14 (Brief pause.)

15 **THE COURT:** Very well. What page, Mr. Raum?

16 **MR. RAUM:** That's page 63, your Honor.

17 **THE COURT:** Very well. And does the witness have a
18 copy of his deposition?

19 **THE WITNESS:** I do. It's on the screen here.

20 **THE COURT:** Okay.

21 **BY MR. RAUM:**

22 **Q.** Reading from your deposition that's dated December 10,
23 2009, starting at line 18. It says:

24 **"QUESTION:** Okay. When you talk about the
25 points regarding the schools, are you

1 referring to the assertion that kids would be
2 taught about same-sex marriage in the
3 schools?

4 **"ANSWER:** It was multi fold. It was about
5 the kids, textbooks being written to exclude
6 same-sex marriage" -- excuse me, "textbooks
7 being written to include same-sex marriage"
8 --

9 **THE COURT:** I believe "rewritten."

10 **MR. BOIES:** "Rewritten."

11 **MR. RAUM:** "Rewritten."

12 **BY MR. RAUM:**

13 **Q.** Start again.

14 **"ANSWER:** It was multi fold. It was about
15 the kids, textbooks being rewritten to
16 include same-sex marriage, part of the
17 campaign, from what I remember. Also, for
18 the campaigning that was revolved around kids
19 being taken to a lesbian wedding as a school
20 outing and how that would be acceptable, and
21 potentially there would be school outings to
22 gay marriages, and so on and so forth.

23 **"QUESTION:** And was it your position that
24 that was a misrepresentation; that would not
25 happen and could not happen?

1 **"ANSWER:** From my understanding from
2 following news stories and trying to be as
3 educated as possible, from my understanding,
4 that was absolutely not the case or was not
5 going to be the case; that there wasn't going
6 to be an immediate reprinting of textbooks or
7 permission slips to go to gay marriage."
8 Were you asked those questions and did you give those
9 answers?

10 **A.** I did.

11 **MR. RAUM:** I would like to refer to Plaintiffs'
12 Exhibit 15, and I would move it into evidence, if there is no
13 objection.

14 **MR. BOIES:** Do you have a copy?

15 **THE COURT:** Page --

16 (Interruption.)

17 **THE COURT:** Hold on. Hold on.

18 This is exhibit what, Mr. Raum?

19 **MR. RAUM:** This is Plaintiffs' Exhibit 15.

20 **THE COURT:** 15. All right. PX 15.

21 **MR. BOIES:** Campaign video?

22 **MR. RAUM:** Yes.

23 **MR. BOIES:** One from the official campaign?

24 **MR. RAUM:** Yes.

25 **MR. BOIES:** No objection, your Honor.

1 (Witness steps down.)

2 **THE COURT:** Plaintiffs' next witness.

3 **MR. OLSON:** The plaintiffs would call plaintiff
4 Kristin Perry.

5 **KRISTIN PERRY,**

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

8 **THE WITNESS:** I do.

9 **THE CLERK:** State your name.

10 **THE WITNESS:** Kristin Matthews Perry.

11 **THE CLERK:** Spell your first name and your last name,
12 please.

13 **THE WITNESS:** K-r-i-s-t-i-n, P-e-r-r-y.

14 **THE CLERK:** Thank you.

15 **DIRECT EXAMINATION**

16 **BY MR. OLSON:**

17 **Q.** Ms. Perry, are you a plaintiff in this case?

18 **A.** Yes, I am.

19 **Q.** Would you tell us briefly about your background; where you
20 were born, just a brief summary, your age, your educational
21 background? Just a brief summary, please?

22 **A.** I was born in Illinois, but my parents moved here with me
23 when I was two years old. So I have lived in California since
24 I was two years old and I'm 45 years old now.

25 I've grown up -- I grew up in Bakersfield,

1 California. I attended grammar school, middle school, high
2 school there. And then I moved away to go to college at U.C.
3 Santa Cruz. And from there I went to San Francisco State to
4 get my Master's Degree in social work, and I have worked in the
5 Bay Area ever since.

6 **Q.** Describe without -- you don't have to identify the name of
7 your employer, but you -- you work for a government agency. I
8 would like you to describe the work that you do, your
9 profession?

10 **A.** My entire career I have worked in the field of child
11 protection, child development, family support. I started out
12 as a child abuse investigator in a Bay Area county, and from
13 there I moved into prevention services for families that were
14 at risk. I became a supervisor and a program manager and then
15 later on became the executive director of a county agency that
16 supported at-risk children, zero to five.

17 And at this time I am the executive director of a
18 state-wide agency that provides services and support to
19 families with children zero to five.

20 **Q.** So how long have you professionally been engaged in the
21 occupation of working with children?

22 **A.** For almost 25 years.

23 **Q.** On behalf of government agencies of the State of
24 California, did I hear that correctly?

25 **A.** I have spent my entire career working for the government.

1 Q. What is your relationship with plaintiff Sandra Stier?

2 A. Sandy is the woman I love, and we live together in
3 Berkeley.

4 Q. And what is the composition of your family. Is it just
5 the two of you?

6 A. No. Sandy and I live together in Berkeley with our
7 children. We have a blended family. We both brought two sons
8 into our relationship. And Sandy's children are college age
9 and my children are high school age.

10 Q. When did you meet Ms. Stier?

11 A. Sandy and I met in, I think, 1996 while we were both
12 working at the same place.

13 Q. And describe how that relationship -- again, in general
14 terms, how did that relationship grow and what did it grow
15 into?

16 A. Well, I remember the first time I met Sandy thinking she
17 was maybe the sparkliest person I ever met and I wanted to be
18 her friend, and we were friends for a few years. And our
19 friendship became more and more. It became deeper and deeper
20 over time. And then after a few years, I began to feel that I
21 might be falling in love with her.

22 Q. And did it work out that way?

23 A. And it did work out that way. I did fall in love with
24 her, I did.

25 Q. And how did she feel about you?

1 A. She told me she loved me, too.

2 Q. We will be asking her to verify that.

3 A. Okay.

4 (Laughter.)

5 Q. How would you describe your sexual orientation?

6 A. I am a lesbian.

7 Q. And tell me what that means in your own words? What does
8 it mean to be a lesbian?

9 A. Well, for me what it means is, I have always felt strong
10 attraction and interest in women and formed really close
11 relationships with women, and I have only ever fallen in love
12 with women.

13 And the happiest I feel is in my relationship with
14 Sandy and -- because I'm in love with her.

15 Q. Do you feel that that's something that could change, that
16 you could have -- could you have been in the past interested in
17 that same kind of bonding with men or do you feel that that
18 would be -- I know this is somewhat compound, or do you feel
19 that that could turn into -- that could develop in that way in
20 the future?

21 **THE COURT:** Let's see. Which question do you want
22 her to answer?

23 (Laughter.)

24 **BY MR. OLSON:**

25 Q. Do you feel that in the past you could have developed that

1 same kind of bond with a man?

2 **A.** I was unable to do that. I, as I said, grew up in
3 Bakersfield, California and it was in the 70's and 80's. And
4 all of my friends, as we were getting older and they were
5 beginning to date, became more and more interested in boys.
6 And I recognized that that was something that would have been
7 the best thing for me to do if I could.

8 And I did date a few boys, because it was -- it did
9 make life easier, you know. Then I would have a date to go to
10 the prom, too, or I could go to a party, too.

11 But as I got a little bit older, it became clear to
12 me that I didn't feel the same way my friends did about boys
13 and that there was something different about me.

14 **Q.** Do you feel that you were born with those feelings, with
15 that kind of sexual orientation?

16 **A.** Yes, I do.

17 **Q.** Do you feel it could change in the future? Do you have a
18 sense that it might somehow change?

19 **A.** I'm 45 years old. I don't think so.

20 (Laughter.)

21 **Q.** Why are you a plaintiff in this case?

22 **A.** Because I want to marry Sandy. I want to have a stable
23 and secure relationship with her that then we can include our
24 children in. And I want the discrimination we are feeling with
25 Proposition 8 to end and for a more positive, joyful part of

1 our lives to be begin.

2 **Q.** What does the institution of marriage mean to you? Why do
3 you want that?

4 **A.** Well, I have never really let myself want it until now.
5 Growing up as a lesbian, you don't let yourself want it,
6 because everyone tells you you are never going to have it.

7 So in some ways it's hard for me to grasp what it
8 would even mean, but I do see other people who are married and
9 I -- and I think what it looks like is that you are honored and
10 respected by your family. Your children know what your
11 relationship is. And when you leave your home and you go to
12 work or you go out in the world, people know what your
13 relationship means. And so then everyone can, in a sense, join
14 in supporting your relationship, which at this point I can only
15 observe it as an outsider. I don't have any firsthand
16 experience with what that must be like.

17 **Q.** Does it matter that the state is announcing that this is a
18 relationship officially recognized by the State of California,
19 marriage?

20 **A.** Yes.

21 **Q.** And is that part of something that goes into why you want
22 this to happen for you?

23 **A.** I want it to happen for me because I do everything else I
24 can think to do to make myself a contributing, responsible
25 member of this state. And the state isn't letting me feel

1 happy. It's not letting me experience my full potential,
2 because I am not permitted to experience everything I might
3 feel if this barrier were removed.

4 **Q.** Did you and Ms. Stier ever attempt to be married?

5 **A.** We did.

6 **Q.** Tell us what happened, when that was and exactly what your
7 experience was?

8 **A.** Well, in 2003 I proposed to Sandy without any way of
9 knowing that everything that's developed regarding gay marriage
10 in California was about to development, and instead I did it as
11 a way to express my personal interest in marrying her.

12 **Q.** Tell me about your proposal. What happened?

13 **A.** Well, it was around Christmas and we live in a part of
14 Berkeley that's sort of hilly and we live near this big rock
15 called Indian Rock. And if you get up high enough on it and
16 you sit there, you can see everything in the Bay Area laid out
17 in front of you. And I knew I wanted to propose to her there
18 because we could always walk back there and sit there if we
19 wanted to.

20 So I took her on a walk. She didn't know I had a
21 ring, and we sat down on the rock and I put my arm around her
22 and I said, "Will you marry me?" And she looked really happy,
23 and then she looked really confused. And she said "Well, what
24 does that" -- well, she said, "Yes." And then she said, "Well,
25 what does that mean? How will we even do that?" And then he

1 had to invent it for ourselves. We had to figure out what to
2 do.

3 **Q.** So that was in December of 2003. So what did you and --
4 I'm going to call her Sandy. What did you and Sandy do to then
5 invent the relationship that you were hoping to have with her
6 that you had proposed?

7 **A.** We started with basically trying to figure out the day we
8 would like to be married and the place and who we would like to
9 have join us and how we might -- what we might say to each
10 other. So we just started the planning.

11 And as we were in the midst of doing that, private
12 family and friend ceremony planning, we learned that the City
13 and County of San Francisco, they were permitting same-sex
14 same-sex marriages, that was while we were in the middle of
15 planning.

16 **Q.** This was early in 2004 --

17 **A.** That's correct. Uh-huh.

18 **Q.** -- is that correct?

19 And you learned in some way that the mayor of the
20 City of San Francisco had authorized the issuance of marriage
21 licenses and the performance of marriage in San Francisco; am I
22 stating that correctly?

23 **A.** Yes.

24 **Q.** That was in the early part of 2004?

25 **A.** Yes. For us it was February of 2004.

1 Q. And what -- did you act on that information?

2 A. I did. I -- Sandy and I both were reading about it in the
3 newspaper and we talked about whether or not we would want
4 to -- would go to San Francisco to have this marriage and then
5 continue with our other plans, and that's what we decided we
6 wanted to do.

7 So we made an appointment and we went to City Hall.
8 And we brought all of the boys and my mom and we were married
9 in City Hall.

10 Q. And how did you feel about that marriage coming about in
11 the City Hall in San Francisco at that time?

12 A. Well, as amazed and happy as I could ever imagine feeling.
13 And I said a moment ago that I -- I never let myself imagine it
14 happening.

15 So in some ways the feelings I had were new to me. I
16 didn't really know what they were. And I am still confused by
17 these experiences because they are not the ones that have
18 been -- I haven't let myself want to feel them.

19 So I have a sense that -- it's almost an
20 other-worldly experience of like floating above the ceremony
21 and saying, "Oh, that's me getting married. I never thought
22 that would happen."

23 Q. Did you then, after that ceremony, go forward with this
24 private ceremony that you had planned?

25 A. We did. We continued those plans. Because only a few --

1 our kids and my mom attended the ceremony in City Hall, we
2 wanted to continue with the other ceremony so that more people
3 could come and we could see everybody.

4 **Q.** Did you have a party, a ceremony and an exchange of vows?

5 **A.** We did. We did. We planned an afternoon in Berkeley
6 where our friends and family had joined us, and we had a small
7 ceremony, and then we all came inside and there was a big
8 celebration.

9 **Q.** How many? How many people?

10 **A.** There were 100 guests.

11 **Q.** What month was that?

12 **A.** It was August 1st.

13 **Q.** Of 2004?

14 **A.** Yes.

15 **Q.** After that, was there a decision by a California court
16 having to do with the ceremony that you entered into in
17 San Francisco at City Hall?

18 **A.** Yes. A few weeks after our August ceremony, the state
19 Supreme Court ruled that the San Francisco weddings were
20 invalid.

21 **Q.** What was your reaction when you heard that?

22 **A.** Well, the part of me that was disbelieving and unsure of
23 it in the first place was confirmed. That, in fact, I
24 really -- almost when you're gay, you think you don't really
25 deserve things.

1 So it did have this sense of, well, you know, I
2 really didn't deserve to be married.

3 **Q.** Did you receive notification, official notification that
4 your marriage was null and void?

5 **A.** Yeah. The City and County of San Francisco sent us a
6 letter after they -- after the ruling, and it was a form letter
7 and our names were typed at the top. It said, "We are sorry to
8 inform you that your marriage is not valid and we would like to
9 return your marriage fees to you. Would you like them in a
10 check or donated to charity?"

11 And so that was the -- that's when we knew for sure
12 we weren't married in San Francisco any more.

13 **Q.** And what feelings did that evoke, that experience?

14 **A.** I'm not good enough to be married.

15 **Q.** Sometime in 2008 the California Supreme Court rendered a
16 decision, I think it was May of 2008, that marriage could be
17 obtained by same-sex individuals irrespective of sexual
18 orientation; do you remember that decision?

19 **A.** I do.

20 **Q.** What did you feel when you heard that the California
21 Supreme Court said that you had a constitutional right to marry
22 the person of your choice?

23 **A.** I -- I was elated to hear it. I really was. And I know
24 Sandy was, too, because we talked about that ruling when it
25 happened.

1 And after we had known about it for a little while,
2 we started to hear our friends talk about their plans to get
3 married, and we were very excited for them.

4 And then, of course, we asked ourselves, would we get
5 married again? And it didn't take more than a -- really, a few
6 minutes for us to -- it was unanimous that we couldn't -- we
7 couldn't bring ourselves to do it again right then.

8 The experience in 2004 had really -- we hadn't really
9 recovered from it. And it didn't feel at that time, given what
10 was going on outside of the Supreme Court ruling in the
11 political world, that there was necessarily a permanent
12 solution there. And we had experienced the impermanent
13 solution before and we decided not to go forward at that time.

14 **Q.** Were you aware that people were organizing an effort to
15 overturn that California Supreme Court decision?

16 **A.** Yes. I was aware there was a campaign starting.

17 **Q.** What became Proposition 8, you were aware that there was
18 effort going on to put a measure on the ballot to overturn the
19 California Supreme Court decision?

20 **A.** I remember media reports of -- groups or individuals
21 saying, we disagree and we'll have to take action, and the sort
22 of beginnings of what resulted in a ballot initiative.

23 **Q.** And that was a ballot initiative that came on the ballot
24 in November of that same year, is that correct?

25 **A.** Correct.

1 Q. Now, what was it like for you to be a citizen to watch and
2 listen to the campaign to overturn that California -- can you
3 just relate your reactions to what was going on around you in
4 the political world on that subject?

5 A. Well, I mean, I am just -- I'm a California resident, so I
6 could see evidence of the campaign. I commute on a local
7 highway and I would see the bumper stickers every day.

8 I did see some of the television ads. One in
9 particular I remember. I saw some posters on people's lawns,
10 but that was about it.

11 Q. What did you -- you say you saw one ad in particular.
12 What do you remember about that?

13 A. Umm, well, it struck me as being sort of an
14 education-focused ad because there was a moment where they
15 showed the Ed Code in the ad.

16 Q. The Education Code?

17 A. The California Education Code, which I am sort of
18 interested in. So that got me interested in that ad. And it
19 did talk about needing to protect your children from learning
20 about gay marriage in school. That was the gist of the ad.

21 Q. How do you feel did you feel about that? You work with
22 children every day.

23 A. I do. Well, I work on their behalf. I -- I remember
24 feeling that the ad was attempting to create a sense of fear
25 and worry in me, and that the solution to that would be to vote

1 Yes On 8. It was kind of a -- kind of a this-for-that kind of
2 a feeling. They kind of simplified this complex thing about
3 relationships into a bad thing. And then they said if you want
4 to fix a bad thing, do this. And I felt essentially that it
5 was very simplified.

6 **Q.** As a parent, did you have a reaction to the Proposition 8
7 campaign?

8 **A.** Uh-huh. I did. I felt that it didn't represent how I
9 feel about my children or their friends; that I feel compelled
10 all of the time to be protective of them without thinking.

11 And so this message was that maybe I was in a group
12 of people who wouldn't be protective of children, and it didn't
13 match with the way I feel about them.

14 **Q.** Did you feel that voters were being warned that they
15 needed to protect their children from you?

16 **A.** Yes, I did. And I felt like I was being used; that my --
17 the fact that I -- you know, I am the way I am and I can't
18 change the way I am was being mocked and made fun of and
19 disparaged in a way that I -- I didn't really have any way to
20 respond to it. I just had to know that people felt that way.

21 **Q.** Do you, as you go through life every day, feel that -- the
22 other effects of discrimination on the basis of your sexual
23 orientation?

24 **A.** Every day.

25 **Q.** Tell us about that.

1 **A.** Well, when I was an adolescent and beginning to become
2 more and more aware of my sexuality, I struggled to feel like
3 everybody else, to look and feel like everybody else.

4 And for it to even be a struggle in the first place
5 was hard. And I was well aware of the comments and jokes that
6 were circulating through my school all the time, and some of
7 them were directed at me.

8 As I got older and clearer about who I was and I
9 could say I was a lesbian out loud, that would be met at times
10 with criticism or skepticism.

11 And what I want to say about me and being out is, you
12 know, I go to great lengths to not have that happen. I don't
13 want to draw people's criticism. In fact, quite the opposite.
14 I would really like people to like me.

15 So since I know I have this trait that I can't change
16 that people don't like, I go to great lengths to have other
17 traits people do like. So I put a significant amount of time
18 and energy into being likable so that when the discriminatory
19 things happen, either I can turn it around.

20 So if, for example, I'm on a plane and somebody comes
21 up and I have saved a seat for Sandy, but she is not there yet
22 and they say, "Is that saved?" I say, "Yes." And they say,
23 "For whom?" And I say, "For my partner." And they say, "Could
24 you please move that so I can sit here?"

25 Or if we are in a restaurant or in a store and we

1 travel through the store together, people want to know if we
2 are sisters or cousins or friends.

3 And I have to decide every day if I want to come out
4 everywhere I go and take the chance that somebody will have a
5 hostile reaction to my sexuality or just go there and buy the
6 microwave we went there to buy without having to go through
7 that again.

8 And the decision every day to come out or not come
9 out at work, at home, at PTA, at music, at soccer, is
10 exhausting. So much of the time I just choose to do as much of
11 that as I can handle doing in any given day.

12 **Q.** Was coming out something that took a long time for you to
13 do? Was it difficult?

14 **A.** It was sort of gradual, but probably not so long. I think
15 probably by the time I was 18 or 19 I did know that, I was able
16 to talk to myself about that and then I could tell other people
17 over the next few years.

18 But it is what you often hear lesbians and gays say.
19 I feel like once I realized that about myself, then I could
20 say, I think I have been gay from the beginning. But it was a
21 gradual process at first.

22 **Q.** You have had to explain this to your children?

23 **A.** Yes.

24 **Q.** Was that difficult?

25 **A.** Well, they don't know me any other way. So -- you know,

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

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

6 **A.** Yes.

7 **Q.** Tell us when you did that?

8 **A.** That was in August of 2004.

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

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

11 **Q.** That you submit to the state?

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

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

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

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

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

1 process and it was -- I believe it has some unique features,
2 that it was a little different than durable power of attorney
3 or a will, and so we completed it.

4 It allows us to access each other's health benefits
5 and some other benefits through our employers.

6 **Q.** Is it as good as marriage?

7 **A.** Well, to me, they are not the same thing at all. You
8 know, I viewed the domestic partnership agreement as precisely
9 that, an agreement, a legal agreement, and in some ways
10 memorializes some of our responsibilities to each other.

11 But it isn't the same thing as a celebration or
12 something we -- we don't remember the day it happened or invite
13 people over on that day.

14 We just did that as part of the things we did as a
15 couple to protect ourselves since we can't get married.

16 **Q.** One of the issues that the Court is going to have to deal
17 with is how is that domestic partnership relationship different
18 to you than marriage, and why is it that you want marriage so
19 much when you have this opportunity?

20 **A.** Well, I don't have -- I don't have access to the words
21 that describe my relationship right now. I'm a 45-year-old
22 woman. I have been in love with a woman for 10 years and I
23 don't have a word to tell anybody about that. I don't have a
24 word.

25 **Q.** Would the word do it?

1 **A.** Well, why would everybody be getting married if it didn't
2 do anything. I think it must do something. It appears to be
3 really important to people and I would really like to use the
4 word, too, because it symbolizes maybe the most important
5 decision you make as an adult, who you choose. No one does it
6 for you.

7 You weren't born with that as your cousin, and your
8 uncle, your aunt. You chose them over everybody else and
9 you -- and you want to feel that it's going to stick. And that
10 you will have the protection and the support and the inclusion
11 that comes from letting other people know that you feel that
12 way.

13 **Q.** Do you think it would matter in your neighborhood in your
14 community that you would be able to say that you and Sandy were
15 married? Would it cause people to treat you differently?

16 **A.** I think it would be an enormous relief to our friends who
17 are married. Our straight heterosexual friends that are
18 married almost view us in a way that -- I know they love us,
19 but I think they feel sorry for us and I can't stand it.

20 You know, many of them are either in their second
21 marriage or their first marriage, but nevertheless, they have a
22 word and they belong to this institution or this group.

23 And I can think of a time recently when I went with
24 Sandy happily to a football game at the high school where two
25 of our kids go and we went up the bleachers and we were greeted

1 with these smiling faces of other parents sitting there waiting
2 for the game to start. And I was so acutely aware that I
3 thought, they are all married and I'm not.

4 **Q.** It sounds to me like your heterosexual friends don't feel
5 threatened if you were to get married; that same-sex marriage
6 doesn't sound like it threatens them?

7 **A.** No. The friends we have, I think, would feel better about
8 their marriages if we could be married, too. They would feel
9 like they get to help support our family in a way that is
10 familiar to them, makes sense to them.

11 Right now they are a little bit unsure, just like we
12 are, of what we all should be doing because we are outside of
13 any sort of tradition. It's just sort of this thing we
14 invented that no one but us understands.

15 **Q.** You have heard the argument, I think probably in various
16 different places, that allowing you to get married to a person
17 of the same sex would damage the institution -- the traditional
18 institution of marriage; do you agree?

19 **MR. RAUM:** Objection, your Honor. Calls for expert
20 testimony.

21 **THE COURT:** Sustained.

22 **BY MR. OLSON:**

23 **Q.** Have you discussed with Sandy the impact on the marriage
24 relationship itself if you were to prevail in this lawsuit?

25 **A.** Yes, of course we have. We have talked about it. And

1 Sandy has been married before and so, you know, I really envy
2 her having had that experience.

3 But we both believe that there would be a settling in
4 and a deepening of our commitment if we could get through this,
5 instead of feeling instead like it's everybody else's decision.

6 **Q.** Did you in -- prior to the filing of this lawsuit, seek a
7 marriage license?

8 **A.** Yes.

9 **Q.** What happened? Describe that?

10 **A.** We went to the Alameda County Recorder's Office in May,
11 having reached the point where we wanted to see if there was a
12 permanent solution to this problem and wanted to know in a more
13 concrete way whether -- how Prop 8 was being enacted.

14 And we, indeed, pulled a number, filled out a form
15 and waited for our turn. And the clerk that day, we sat down
16 in front of her and she opened up her computer and looked at
17 the form we were trying to get and she -- her eyes got really
18 big and she looked at us and she said, "I'm sorry, but there
19 are reasons why I don't think I can do what you are asking me
20 to do, but I'm not comfortable not doing it. So I'm going to
21 go get my boss. He is going to have to do it."

22 So she left the cubicle, and she went upstairs, and
23 there was a long delay, and she came downstairs with her
24 supervisor.

25 And he had written down this Prop 8, the statute, I

1 think, and he read from it. And he was very nervous and very
2 upset and very, I'm sure, worried that we would be upset as
3 well, which we were. And he said after reading the statute,
4 "I'm very sorry that I cannot give you this license. That I
5 hope some day I can and I hope you will come back."

6 **Q.** Have you thought about the impact upon you, of you and
7 Sandy and your relationship of bringing a lawsuit and being a
8 plaintiff in a civil rights case and what's that like?

9 **A.** I have been thinking about it a lot lately. And to be --
10 well, Sandy and I really like our life where -- we live in our
11 house and we see our kids and we see our friends. We don't
12 want anything to change about our life. In fact, we would
13 really like our life to just get better and better.

14 And when I think about whether or not what we want to
15 have happen would make it possible for other people to have
16 that happen, that makes me really happy, but it, most
17 importantly, comes from a place of just wanting our lives to
18 feel better than they do right now.

19 **Q.** If the courts of the United States were ultimately decided
20 that you and other same -- persons seeking to marry someone of
21 the same sex could indeed, did indeed have the constitutional
22 right to get married, do you think that would have an effect on
23 other acts of discrimination against you?

24 **MR. RAUM:** Objection, your Honor. Speculation.

25 **THE COURT:** Close, but objection overruled. State of

1 mind. You may answer.

2 **A.** I believe for me, personally as a lesbian, that if I had
3 grown up in a world where the most important decision I was
4 going to make as an adult was treated the same way as everybody
5 else's decision, that I would not have been treated the way I
6 was growing up or as an adult.

7 There's something so humiliating about everybody
8 knowing that you want to make that decision and you don't get
9 to that, you know, it's hard to face the people at work and the
10 people even here right now. And many of you have this, but I
11 don't.

12 So I have to still find a way to feel okay and not
13 take every bit of discriminatory behavior toward me too
14 personally because in the end that will only hurt me and my
15 family.

16 So if Prop 8 were undone and kids like me growing up
17 in Bakersfield right now could never know what this felt like,
18 then I assume that their entire lives would be on a higher
19 arch. They would live with a higher sense of themselves that
20 would improve the quality of their entire life.

21 **MR. OLSON:** Thank you, your Honor. I have no further
22 questions.

23 **THE COURT:** Very well. You may cross examine, Mr.
24 Raum, is it?

25 **MR. RAUM:** Yes, your Honor.

1 No questions.

2 **THE COURT:** Very well. Ms. Perry, you may step down.

3 (Witness excused.)

4 **THE COURT:** Mr. Olson, your next witness.

5 **MR. OLSON:** Thank you. The plaintiffs would like to
6 call plaintiff Sandra Stier.

7 **SANDRA STIER,**

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

10 **THE WITNESS:** Yes.

11 **THE CLERK:** Thank you. State your name, please?

12 **THE WITNESS:** Sandra Belzer Stier.

13 **THE CLERK:** Spell your last name?

14 **THE WITNESS:** S-t-i-e-r.

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

16 **THE WITNESS:** S-a-n-d-r-a.

17 **THE CKLERK:** Thank you.

18 **DIRECT EXAMINATION**

19 **BY MR. OLSON:**

20 **Q.** Ms. Stier, are you one of the plaintiffs in this lawsuit?

21 **A.** Yes, I am.

22 **Q.** Would you describe for us and for the Court your
23 background; where you are from, your age, what you do
24 professionally and your family?

25 **A.** Well, I -- I grew up in the midwest. I grew up on a farm

1 in southern Iowa. I'm 47 years old.

2 My background is, really, I lived in Iowa for my
3 youth. I grew up going to public schools, attended college in
4 Iowa, moved to California right after college, and I now work
5 for Alameda County -- or for a county government as an
6 information system director in healthcare systems.

7 Q. And do you -- you live with Ms. Perry?

8 A. I do.

9 Q. And tell us about your family?

10 A. Well, our family is a blended family with our four boys.
11 We each bring two biological children to our family and each
12 other.

13 Q. And just their general ages?

14 A. Well, our two younger sons are in high school. They are
15 teen-agers. And our two older sons are out of high school,
16 young adults.

17 Q. How would you describe your sexual orientation?

18 A. I'm gay.

19 Q. When did you learn that about yourself?

20 A. I really learned it about myself fairly late in life, in
21 my mid-thirties.

22 Q. Had you been married before at that time?

23 A. Yes, I was married before.

24 Q. You were married to a man?

25 A. Yes, I was.

1 Q. When did you get married and where did you live?

2 A. I got married in 1987, and we lived most of the -- most of
3 that marriage in Alameda, California.

4 Q. And you had no feeling at that point in time married to a
5 man that you were a lesbian?

6 A. At that time I did not.

7 Q. And did you have a warm, loving relationship with that
8 individual?

9 A. Umm, I had, unfortunately, a difficult relationship for
10 most of our marriage, but it did start out with the best
11 intentions.

12 Q. Well, did you encounter gay people growing up in Iowa?
13 I'm wondering how this evolved, this -- your realization of how
14 you characterize yourself these days. Tell us how that evolved
15 from your youth in Iowa?

16 A. Growing up in Iowa on a farm in the country where the --
17 you know, the small town that I went to high school in had 1500
18 people and the towns around us were fairly similar.

19 I really had a fairly sheltered upbringing; a good
20 upbringing, but sheltered. We spent most of our time in our
21 home, you know, working with my parents. We didn't really
22 travel and go to any place that was very different from where I
23 grew up.

24 And I did not know of any gay people. I didn't even
25 know of gay people or, really, even the concept of a gay

1 lifestyle or sexuality until I was like a teenager.

2 **Q.** Tell us when you moved to California?

3 **A.** I moved to California in 1985 when I graduated.

4 **THE COURT:** Were you married in Iowa before you came
5 to California or were you married after you came to California?

6 **THE WITNESS:** I moved here in 1985 and got married in
7 1987. So that was in California.

8 **THE COURT:** And did you meet your husband in
9 California?

10 **THE WITNESS:** Yes, I did.

11 **BY MR. OLSON:**

12 **Q.** Tell us about that. Did you have a relationship with him
13 for a certain period of time before you got married?

14 **A.** Yes, I did. We dated for about a year before we got
15 married.

16 **Q.** And give us the date, again, of the marriage?

17 **A.** November 14th, 1987.

18 **Q.** '87. And when did the marriage come to an end?

19 **A.** The marriage came to an end in 1999.

20 **Q.** When did you meet Ms. Perry?

21 **A.** I met Kris around 1996.

22 **Q.** And how did your relationship with her develop? And -- go
23 ahead.

24 **A.** Well, when I first met Kris, of course, I hadn't known her
25 previously. I was teaching a computer class and she was a

1 student in my class. So I just sort of knew of her, but then
2 we started working together on projects at work and ended up
3 being coworkers and became fast friends quite quickly.

4 And we were friends for quite some time and I began
5 to realize that the feelings I had for her were really unique
6 and different from friends, feelings I normally had towards
7 friends. And they were absolutely taking over my thoughts and
8 my -- sort of my entire self. And I grew to realize I had a
9 very strong attraction to her and, indeed, I was falling in
10 love with her.

11 **Q.** And tell us when you realized finally that you had fallen
12 in love with her?

13 **A.** I really -- I realized that in 1999, early in the year.

14 **Q.** Did your falling in love with Kris have anything to do
15 with the dissolution of your marriage?

16 **A.** My marriage was troubled on many fronts and had been in a
17 very, very difficult state. And the end of my marriage was
18 precipitated by my own extreme unhappiness, my ex-husband's
19 severe problems with alcohol and his inability to provide the
20 type of support as a husband and a family person that I had to
21 have.

22 **Q.** Did your sexual orientation or your discovery of your
23 sexual orientation have anything to do with the dissolution of
24 that marriage?

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

1 Q. Your husband is no longer living, is that correct?

2 A. That's true.

3 Q. Then tell us about how your relationship with Ms. Perry
4 developed?

5 A. Well, my relationship with Kris, the romantic part of the
6 relationship certainly started for me in a -- just a very
7 exciting place. I had never experienced falling in love
8 before, and I think --

9 Q. Are you saying that you weren't in love with your husband?

10 A. I was not in love with my husband, no.

11 Q. Did you think that you were at some point?

12 A. I had a hard time relating to the concept of being in love
13 when I was married to my husband. And while I did love him
14 when I married him, I honestly just couldn't relate when people
15 said they were in love. I thought they were overstating their
16 feelings and maybe making a really big deal out of something.
17 It didn't really make sense to me. It seemed dramatic.

18 You know, when you grow up in the midwest and in a
19 farming family -- which is a really unique way to grow up, if
20 anybody knows much about that -- but there is a pragmatism that
21 is inherent and it's part of the fabric of life and an
22 understated way of being that is just pervasive in terms of
23 your development.

24 And I remember as a young girl talking to my mom
25 about love and marriage and she would say, "You know, marriage

1 is more than romantic love. It's more than excitement. It's
2 an enduring long-term commitment and it's hard work." And in
3 my family that seemed very true.

4 (Laughter.)

5 So I really thought that was what I was kind of
6 signing up for when I got married; not that it would be bad,
7 but that it would be hard work and I would grow into that love,
8 and that I needed to marry a good, solid person and I would
9 grow into something like my parents had, which was really a
10 lovely marriage and still is.

11 **Q.** And then you were -- I interrupted you. You were in the
12 midst of describing what happened in terms of your own feelings
13 as your relationship with Ms. Perry developed?

14 **A.** Well, with Kris my -- so we have this wonderfully romantic
15 relationship and -- that just really grew and blossomed very
16 beautifully. And not only were we in love, but we wanted -- we
17 realized fairly soon that we wanted to build a life together.
18 We wanted to join our families and live as a family. That we
19 didn't want to date.

20 I was 36 or 37 years old, and Kris is a tiny about it
21 younger than me, but we really wanted to build a family
22 together and have that kind of life of commitment and stability
23 that we both really appreciated.

24 **Q.** How convinced are you that you are gay? You've lived with
25 a husband. You said you loved him. Some people might say,

1 Well, it's this and then it's that and it could be this again.

2 Answer that.

3 **A.** Well, I'm convinced, because at 47 years old I have fallen
4 in love one time and it's with Kris. And our love is -- it's a
5 blend of many things. It's physical attraction. It's romantic
6 attraction. It's a strong commitment. It's intellectual
7 bonding and emotional bonding. For me, it just isn't love. I
8 really, quite frankly, don't know what that would be for
9 adults. I don't know what else to say about it.

10 **Q.** Why are you a plaintiff in this case?

11 **A.** Well, I'm a plaintiff in this case because I would like to
12 get married, and I would like to marry the person that I choose
13 and that is Kris Perry. She is a woman. And according to
14 California law right now, we can't get married, and I want to
15 get married.

16 **Q.** You did hear the description before of the experience you
17 went through in that summer of 2004, the spring and summer of
18 2004 where you came to San Francisco, thought you had gotten
19 married, had a ceremony in Berkeley, thought that that was a
20 celebration of your marriage, and then found out you weren't
21 married.

22 **A.** Correct.

23 **Q.** What feelings did you have during that period of time?

24 **A.** Well, I -- when we found out -- well, during that period
25 of time, you know, we were planning our wedding in 2004. And

1 then when we had the opportunity to get married in
2 San Francisco, we were really excited because we didn't expect
3 that to even happen. So we did it. It was a great day. And
4 it made planning our August wedding all the more fun, because
5 we were planning a celebration of something that had been
6 formalized and legalized in San Francisco. So it just added
7 this amazingly wonderful dimension to our wedding.

8 So August 1st was a terrific day for us and we loved
9 it, and our family and friends were there. One of our kids
10 gave this amazing toast. He said, "Kris and Sandy, you are
11 perfect for each other and this couldn't have turned out any
12 better." And I thought, you know, rock on. I couldn't
13 believe -- I couldn't agree with you more.

14 Shortly thereafter, though, we did find out that our
15 marriage was invalidated, and we received a document from the
16 city that Kris described earlier saying that it was
17 invalidated. And I felt so outraged and hurt by that and
18 humiliated.

19 And I felt like everybody who had come to our wedding
20 and gone out of their way and brought us lovely gifts and
21 celebrated with us must feel a level of humiliation themselves,
22 too. And it made me feel like there are people in the world
23 that are dearest and nearest to me that probably felt a certain
24 level of pity for us, and the last thing I ever wanted to do is
25 invoke those feelings of pity on us for something especially as

1 beautiful as our marriage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 A domestic partnership, to me -- and certainly the
2 way that we entered it -- was really very much a part of estate
3 planning, and it was based upon legal advice that we had
4 gotten; just to make sure that our affairs were tightly in
5 order, that our children had the maximum protection, and that
6 Kris and I for each other had the maximum legal protection that
7 we could under State of California law.

8 But there is certainly nothing about domestic
9 partnership as an institution -- not even an institution, but
10 as a legal agreement that indicates the love and commitment
11 that are inherent in marriage, and it doesn't have anything to
12 do for us with the nature of our relationship and the type of
13 enduring relationship we want it to be. It's just a legal
14 document.

15 **Q.** Well, did the lawyer tell you that domestic partnership
16 would give you virtually all the same legal rights, vis-a-vis
17 your partner, as marriage?

18 **A.** I actually don't recall our lawyer saying that
19 specifically, but she did say it's important that you file the
20 domestic partnership agreement for your maximum protection.

21 **Q.** If it did give you virtually all of the legal rights and
22 so forth with respect to Ms. Perry, why wouldn't it be good
23 enough?

24 **A.** Because it has nothing to do with marriage. Nothing.

25 **Q.** Tell us what marriage, then, means to you. That's the

1 second part of the question.

2 What is it that is so special about that word and
3 that relationship, that institution of marriage, that means so
4 much to you that you want it so badly that you will bring this
5 lawsuit?

6 **A.** Well, marriage is about making a public commitment to the
7 world, to your partner and to -- what I hope is someday my
8 wife, to our friends, our family, our society, our community,
9 our parents. It's just -- to me, it's -- it's the way we tell
10 them and each other that this is a lifetime commitment or it's
11 not -- we are not girlfriends. We are not partners. We are
12 married. We are -- we want -- I want to have a spouse. It
13 just is -- it's so different from domestic partnership, and --
14 and I simply want that.

15 And I have to say, having been married for 12 years
16 and been in a domestic partnership for 10 years, it's
17 different. It's not the same. I want -- I don't want to have
18 to explain myself and have -- in a way that would indicate
19 there must be something wrong with me or I wouldn't have to
20 explain myself to anybody who has some reason they may need to
21 know.

22 **THE COURT:** Did you misspeak? You said you had been
23 married for 12 years?

24 **THE WITNESS:** I was married for 12 years, yes.

25 **THE COURT:** The marriage was dissolved in '99?

1 **THE WITNESS:** Correct. And it began in 1987.

2 **THE COURT:** I see. All right. I misunderstood.

3 Let me ask you this: If the state were essentially
4 to get out of using the term "marriage" and admitting persons
5 of the same sex or opposite sex into what it called a "domestic
6 union," "spousal relationship," whatever name you want to use,
7 but not "marriage," wouldn't that put you on the same plane as
8 others who have the same relationship even though they are of
9 opposite sex?

10 **THE WITNESS:** I believe it would. Because there
11 wouldn't be anything different.

12 Right now we are being treated differently and if the
13 state stopped, I guess, issuing marriage licenses and nobody
14 else picked up the task that could exclude us, then we would
15 have the same access. And if we had the same access, I would
16 feel like we are being treated equally.

17 **THE COURT:** Even though the term "marriage" was not
18 used?

19 **THE WITNESS:** Right. Because then marriage wouldn't
20 be something that anybody got to claim as a legal status.

21 I guess you would have to also look at the people who
22 were already married and would they still have marriages.

23 But if marriage were not a legal status sanctioned by
24 the state or any type of government in our society, then, I
25 guess, I wouldn't have to worry about not having access to it

1 because nobody else would either.

2 **BY MR. OLSON:**

3 **Q.** You said that you have to explain yourself. Give the
4 Court some examples of things in everyday life, where you go,
5 things that you do, where this relationship you have you have
6 to explain or that it's awkward or humiliating or whatever?
7 Just give the Court some examples?

8 **A.** Well, there are a number of examples. It could be
9 anything from going to our younger son's school and having --
10 to pick them up for something and telling -- you know, I
11 consider myself to be their stepmother. And I do get Mother's
12 Day cards, so I think that -- they think the same thing of me.

13 But if I pick them up, I have to explain who I am.
14 I'm their stepmother. I am the domestic partnership of their
15 mother. That's -- you know, this is who I am, this is why I'm
16 picking them up. Or other familial terms such as aunt to a
17 niece or a nephew.

18 But in other ways just explaining who we are. The
19 term "domestic partner" or "partner" isn't really that commonly
20 known or understood by everybody. It's certainly probably
21 understood by everybody in this courtroom and maybe people
22 that -- of a certain part of society or a generation. But it's
23 not common in the world. And it -- even for those who know
24 what the term means, it doesn't reflect our relationship in a
25 way that feels authentic, appropriately descriptive in any way.

1 We have a loving, committed relationship. We are not
2 business partners. We are not social partners. We are not
3 glorified roommates. We are -- we are married. We want to be
4 married. It's a different relationship.

5 **Q.** Are there occasions where you have to fill out forms that
6 ask whether you are married or name of spouse or things like
7 that?

8 **A.** Frequently. I have encountered forms at school where you
9 have to say who -- you know, mother -- who is the mother? Who
10 is the father? There is never a place there for -- you know,
11 instead of Parent 1, Parent 2, even there something different.

12 Doctor's offices. Are you single or are you married
13 or are, you know, divorced even? But, you know, so I have to
14 find myself, you know, scratching something out, putting a line
15 through it and saying "domestic partner" and making sure I
16 explain to folks what that is to make sure that our transaction
17 can go smoothly.

18 **Q.** Would being married have anything -- would it provide you
19 with any sense of security or stability that domestic
20 partnership does not?

21 **A.** It would. It really would. It would provide me with a
22 sense of inclusion in the social fabric. The society I live in
23 that I want to have, and it would make -- I think I would feel
24 more respected by other people and I feel like our relationship
25 is more respected and that I could hold my head up high as --

1 in our family and just -- our family could feel proud.

2 And I want our children to feel proud of us. I don't
3 want them to feel worried about us or in any way, like, our
4 family isn't good enough.

5 **Q.** When the campaign occurred between the time in May of
6 2008, when the California Supreme Court gave you a
7 constitutional right or announced that you had a constitutional
8 right, and November, when the voters took that away, were you
9 exposed to the election campaign in ways in your everyday life?

10 **A.** I was. I was -- I certainly saw ads on television. I saw
11 bumper stickers on cars, signs in yards, you know on front
12 lawns.

13 I went to a rally. I was quite exposed to it at the
14 rally. I went to -- you know, just support the No On 8, but
15 both sides were represented at the rally. So, yes, I was quite
16 exposed.

17 **Q.** Did you hear things during that campaign in favor of
18 Proposition 8 that were disturbing or upsetting to you?

19 **A.** Many things. Really, everything for the Yes On 8 campaign
20 was disturbing on some level, and some more than others.

21 **Q.** Describe those emotions then? What bothered you on what
22 level and what bothered you on the other level? We need to
23 inform the Court what it was like?

24 **A.** Well, as I think folks probably remember the campaign was
25 very focused on protection; protect marriage and protect

1 children, and with the subtle implication always that you need
2 to be protected from gay marriage because it must be,
3 apparently, bad or you wouldn't have to protect anybody from
4 it.

5 I felt like the constant reference to children -- it
6 felt manipulative and it felt very harmful to me, as an
7 individual, to us, as a couple, and our children, our family,
8 our community. I felt like there was great harm being done and
9 I felt like it was used to sort of try to educate people or
10 convince people that there was a great evil to be feared and
11 that evil must be stopped and that evil is us, I guess.

12 And as a mom of, you know, four kids, I -- I don't
13 know if there is anything more inherent in parenting and
14 stronger than the desire to protect your children. That's
15 first and foremost, you protect your children. And the very
16 notion that I be part of what others need to protect their
17 children from was just -- it was more than upsetting. It was
18 sickening, truly. I felt sickened by that campaign.

19 **Q.** As a parent of four children, you must have a strong sense
20 of what a good parent ought to be. You must have feelings
21 about that.

22 Would your boys be better off with a man in the
23 house?

24 **A.** I think all children are -- the best thing children can
25 have is parents who love them. That's the most important

1 thing. And I know I love my children with all my heart. Kris
2 loves our children with all her heart. And that's what I
3 believe to be the best thing for them, to be loved.

4 **Q.** How do you feel about being a plaintiff in a case trying
5 to change the Constitution? Is it a burden or is it something
6 that that is easy for you because of what it means? Tell us
7 about that?

8 **A.** Well, it's -- it doesn't feel like a burden. I feel like
9 a little, tiny person in this huge, gigantic -- this huge
10 country that just -- I just want my rights.

11 And I guess I keep focusing on the Federal
12 Constitution more than the California Constitution. So I
13 think, I'm not trying to change anything. I'm just trying to
14 get the rights that the Constitution already says I have. So I
15 just want the same thing that I think I'm due and that I think
16 everybody else is due as well.

17 **Q.** Well, let's -- tell us now if you are successful, how will
18 it change your life, if given the right to marry and to be a
19 part of lots and lots and lots of same sex couples that will
20 also be given that right?

21 **THE COURT:** Why don't you rephrase that and stop
22 about midway?

23 How would your life be different? Isn't that what
24 you are asking?

25 **MR. OLSON:** I couldn't phrase it better than you just

1 did, your Honor.

2 (Laughter.)

3 **THE COURT:** Right answer.

4 **BY MR. OLSON:**

5 **Q.** Tell us what it means to you, as a plaintiff in this case,
6 if you were to be successful? How it would change your life?

7 **A.** Well, I think it would change my life dramatically. The
8 first time somebody said to me, "Are you married," and I said
9 "Yes," I would think, "Ah, that feels good. It feels good and
10 honest and true."

11 I would feel more secure. I would feel more
12 accepted. I would feel more pride. I would feel less
13 protective of my kids. I would feel less like I had to protect
14 my kids or worry about them or worry that they feel any shame
15 or sense of not belonging.

16 So I think there are immediate, very real and very
17 desirable personal gains that I would experience. And, of
18 course, close family.

19 But on a different level, you know, as a parent you
20 are always thinking about that other generation, that next
21 generation, because you are -- they are in your house. So you
22 are constantly thinking about the world that you're -- the
23 society you are in, what are you doing for them? And are we
24 building a good world for them? And I really want that.

25 I want our kids to have a better life than we have

1 right now. When they grow up, I want it to be better for them.
2 And their kids, I want their lives to be better, too.

3 So I really do think about that generation and the
4 possibility of having grandchildren some day and having them
5 live in a world where they grow up and whoever they fall in
6 love with, it's okay, because they can be honored and they can
7 be true to themselves and they can be accepted by society and
8 protected by their government. And that's what I hope can be
9 the outcome of this case in the long run.

10 And as somebody who is from one of those conservative
11 little pockets of the country where there isn't necessarily a
12 lot of difference in the types of people that are there, having
13 those legal protections is everything. It's important for
14 these kids that don't have ready access to all types of people
15 to at least feel like the option to be true to yourself is an
16 option that they can have, too.

17 And that's what I hope for. I hope for something for
18 Kris and I, but we are big, strong women. You know, we are in
19 a good place in our lives right now. So we would benefit from
20 it greatly, but other people over time, I think, would benefit
21 in such a more profound life-changing way.

22 **MR. OLSON:** Thank you, Ms. Stier.

23 Thank you, your Honor.

24 **THE COURT:** Very well. You may cross examine Mr.

25 Raum.

1 **MR. RAUM:** We have no questions, your Honor.

2 **THE COURT:** Very well then. Ms. Stier, thank you for
3 your testimony. You may step down.

4 (Witness excused.)

5 **THE COURT:** Very well. Your next witness.

6 **MR. DUSSEAULT:** Your Honor, the plaintiff will be
7 calling Professor Nancy Cott. Professor Cott and Mr. Boutrous
8 are right outside the door.

9 **THE COURT:** Very well.

10 (Brief pause.)

11 **THE COURT:** Mr. Boutrous, are you going to be taking
12 this witness?

13 **MR. BOUTROUS:** Yes, your Honor.

14 **THE COURT:** Very well.

15 **MR. BOUTROUS:** Plaintiffs call Professor Nancy Cott.

16 **THE COURT:** Very well, Ms. Cott.

17 **NANCY COTT,**

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

20 **THE WITNESS:** I do.

21 **THE COURT:** Very well. Please be seated.

22 State your name and spell your last name for the
23 record.

24 **THE WITNESS:** Nancy F. Cott, C-O-T-T.

25 **THE COURT:** And be sure that you keep your voice up.

1 So maybe you can move that microphone a little closer.

2 **THE WITNESS:** Fine. How is this?

3 **THE COURT:** Well, we'll see.

4 **DIRECT EXAMINATION**

5 **BY MR. BOUTROUS:**

6 **Q.** Good afternoon, Professor Cott.

7 **A.** Good afternoon.

8 **Q.** I would like you have to give us a brief description of
9 your academic and professional background.

10 Before I do, we have handed you a binder of the
11 exhibits and if we could turn to Plaintiffs' Exhibit 2323,
12 which is the last document in the binder?

13 (Witness complied.)

14 **Q.** Could you tell me if you recognize that document?

15 **A.** Yes, it's my CV.

16 **MR. BOUTROUS:** Your Honor, I would move Exhibit 2323
17 into evidence.

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

19 **THE CLERK:** Do you have a binder for the Court?

20 **MR. BOUTROUS:** Yes, if I may approach.

21 **THE COURT:** You may. Of course.

22 **MR. BOUTROUS:** This is a binder of all the exhibits I
23 may refer to.

24 (Whereupon, document was tendered
25 to the Court.)

1 **THE COURT:** There is no objection to 2023, I believe.

2 **MR. BOUTROUS:** 2323, your Honor.

3 **THE COURT:** I beg your pardon, 2323.

4 **THE CLERK:** Are you offering it?

5 **MR. BOUTROUS:** Yes. Thank you.

6 (Brief pause.)

7 **THE COURT:** 2323?

8 **THE WITNESS:** It's at the end.

9 **THE COURT:** All right. Perhaps you can furnish the
10 Court an updated exhibit list? We stopped at 2320. You
11 thought 2320 exhibits was enough.

12 (Laughter.)

13 **MR. BOUTROUS:** We kept going. This was actually part
14 of Exhibit 1306, which we're not going to use and we broke it
15 out, and I consulted with counsel on the other side. I should
16 have explained that, your Honor. Thank you.

17 **THE COURT:** All right. 2323 is admitted.

18 (Plaintiffs' Exhibit 2323 received in evidence.)

19 **MR. BOUTROUS:** Thank you.

20 **BY MR. BOUTROUS:**

21 **Q.** Professor Cott, could you give us a brief description of
22 your academic background?

23 **A.** Yes. I gained my PhD in the History of American
24 Civilization in 1974. And shortly after that, I began teaching
25 in the Departments of History and American Studies at Yale

1 University, and I remained there moving up through the ranks.
2 I remained there for 26 years teaching in those fields,
3 specializing in the history of women, gender, the family,
4 marriage and related social and cultural and political topics.

5 And in 2002, at which point I was a Sterling
6 Professor of History in American Studies at Yale, which is the
7 highest faculty honor the university gives, I moved to Harvard
8 University, where I remain. I'm the Jonathan Trumble Professor
9 of American History, and I am also the faculty director of the
10 Schlesinger Library and the History of Women in America as part
11 of my responsibilities there. I continue teaching in the same
12 fields.

13 **Q.** Are you a historian?

14 **A.** Yes.

15 (Laughter.)

16 **Q.** And have you published any books, Professor Cott?

17 **A.** Yes. I have published eight books.

18 **Q.** And has the history of marriage in the United States a
19 research area of yours during your career as a historian?

20 **A.** It has. Some of my earlier books in the 1970's and 80's
21 dealt with questions about marriage, but my main period of
22 research on the history of marriage was during the decade of
23 the 1990's and, as a result of which, I wrote and published the
24 book *Public Vows, A History of Marriage in the Nation*.

25 And I also published an article which dealt with

1 materials that I decided not to include in the book, in the
2 *American Historical Review*, which is the leading journal in the
3 historical field. This article dealt with marriage and women's
4 citizenship.

5 **Q.** What is your current position at Harvard?

6 **A.** I'm the Jonathan Trumbull Professor of American History.

7 **Q.** And when did you first start investigating the history of
8 marriage in the United States?

9 **A.** It was around 1990. I -- I decided I wanted to look at
10 the history of marriage from an angle which I thought other
11 American historians had neglected, and that was the history of
12 marriage as a public institution, a structure created by
13 governments for individuals and for social benefit.

14 And insofar as historians had dealt with the history
15 of marriage, typically they had tried to examine and look at
16 change over time and the way married individuals experienced
17 the institution, and I thought that the -- this other angle was
18 neglected, and that's what I began to research.

19 **Q.** While you were at Yale, did you teach any classes on the
20 history of marriage?

21 **A.** Well, many of my courses that dealt with the history of
22 women and the family touched upon marriage, but in the -- while
23 I was in the process of researching this book, I received a
24 special honor from the president of Yale University, which was
25 to be appointed as the DeVane Professor. This is a temporary

1 appointment that one faculty member per year is given to teach
2 a course of his or her own choosing that's outside the regular
3 structure of the departments. It can be interdisciplinary or
4 unusual.

5 And because I was coming to some conclusions and I
6 had a great deal of evidence and research about the history of
7 marriage at that time -- it was 1997 when I got this request or
8 honor -- I said I would teach a course on the history of
9 marriage in the United States over two centuries and I did
10 teach that course in 1998.

11 **Q.** And were you able to devote all your teaching that year to
12 --

13 **A.** That entire semester; not the entire year, but the entire
14 semester.

15 **Q.** Thank you.

16 Professor Cott, I would like you to turn to
17 Plaintiffs' Exhibit 1746 in the exhibit booklet.

18 **A.** Are these in numerical order? Yes. I think so. I see
19 1750 -- oh, here we are. I recognize this.

20 **Q.** You recognize the cover of your book?

21 **A.** It is the cover of my book, *Public Vows*, yes.

22 **MR. BOUTROUS:** And if we could put that up on the
23 screen?

24 (Document displayed)

25

1 **BY MR. BOUTROUS:**

2 **Q.** You call your book *Public Vows, A History of Marriage and*
3 *the Nation*. Why did you title your book *Public Vows*?

4 **A.** Well, I have made somewhat of a specialty of having my
5 book titles have a kind of double meaning, and I did so this
6 time in that I meant by "public vows" to express two aspects of
7 marriage as a public institution, two related aspects.

8 One is simply that the couple in taking their
9 marriage vows makes them publicly before a witness. And that
10 is part of the formalization of a valid marriage.

11 But in addition to that, I was struck through my
12 research at the extent to which marriage was an institution --
13 was the institution that we know it as because the public, in
14 the form of the state, is making certain vows to the couple
15 about the protection and support of their relationship in
16 granting them a valid marriage.

17 And what I was examining far more in the book than a
18 couple's intent, any individual private couple's intent, was
19 what the public intentions in the institution of marriage had
20 been over time.

21 **Q.** In what year was your book published?

22 **A.** It was published in the year 2000.

23 **Q.** How long did you spend researching and conducting your
24 work in --

25 **A.** A decade. About a decade.

1 **THE COURT:** Wait for counsel to finish his question.

2 **THE WITNESS:** Thank you.

3 **BY MR. BOUTROUS:**

4 **Q.** Professor Cott, could you give -- provide us with an
5 overview of the subject of your book *Public Vows*?

6 **A.** Well, as I said, I wanted to emphasize the public side of
7 marriage. And one of the themes that became apparent to me and
8 that goes throughout the book and now characterizes my views on
9 marriage is what a captious institution it is.

10 It is a unique institution, of course, but one of the
11 things that particularly characterizes it is the way it
12 encompasses aspects that in other settings we think of as
13 opposites, and the public nature of marriage is very much one
14 of those; that is, marriage is both a public and a private
15 institution.

16 Most people who consider marrying think principally
17 about the private matter. Have they found a partner they love?
18 Do they want to join in this intimate relationship which is
19 ideally last for life?

20 It is also the foundation of the private realm of
21 family creation, property transmission, and what we think of as
22 the private, when we contrast it with the public.

23 On the other hand, it is by its very definition a
24 public institution that the state has authorized and uses to
25 regulate the population and that the public -- in the state,

1 through the state and the law dispenses certain benefits
2 through.

3 This public/private hybrid that marriage is, is
4 unique and there are other seemingly contradictory or
5 paradoxical characteristics to the institution that I stressed
6 as the theme of my book.

7 One quite related to its public aspects is the way
8 that marriage has through our history had a very strong
9 governance function at the same time that it is characterized
10 by liberty. Marriage is only possible for individuals who can
11 exercise the liberty, value of our citizens, and it has also
12 been -- particularly in the 20th century -- the realm created
13 by marriage, that private realm has been repeatedly reiterated
14 as a -- as a realm of liberty for intimacy and free decision
15 making by the parties in that private realm.

16 **Q.** In forming your opinions in this case, the Perry case, did
17 you rely on the work that you did for a decade in preparing and
18 writing your book?

19 **A.** Yes. That is the principal body of research and thinking
20 that I have relied on in my thinking about marriage for this
21 case.

22 **Q.** And since your book was published in 2000, have there been
23 other materials that you are relying on in the opinions that
24 you have developed in this case that have emerged since you
25 published your book in 2000?

1 **A.** Yes. I think that this area has produced other
2 scholarships since then, mostly developing areas that I did not
3 touch on in great detail. And I continue to update my -- my
4 own knowledge in that area. And so in writing my report for
5 this case, I did rely on other books and articles as well.

6 **MR. BOUTROUS:** Your Honor, we tender Professor Cott
7 as an expert on the subject of the history of marriage in the
8 United States.

9 **THE COURT:** Very well. Voir dire?

10 **MR. THOMPSON:** We have no objection, your Honor, to
11 her being qualified as an expert on that subject.

12 **THE COURT:** Very well. And thank you, sir.

13 You may proceed, Mr. Boutrous.

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

15 **BY MR. BOUTROUS:**

16 **Q.** First, Professor Cott, I would like to ask you: Has over
17 the history of our nation marriage played a central vital role
18 in American society?

19 **A.** Yes. I think there is no doubt about that.

20 **Q.** As a historian, perhaps you could help us understand a
21 little bit better what you, as a historian, are talking about
22 when you talk about the concept of marriage?

23 **A.** Yes. Well, marriage in our setting is a very particular
24 form of the institution. Human cultures in different places
25 and over time have formulated many different forms of what --

1 of the marriage institution.

2 Ours is relatively recent in human culture and it
3 is -- it has its own distinctive antecedents in the Anglo
4 American common law.

5 To think of marriage as a universal institution, the
6 same around the globe, it seems to me inaccurate --

7 **MR. THOMPSON:** Objection, your Honor. I move to
8 strike this is answer because she has been qualified as an
9 expert in marriage in the United States and now she is opining
10 on marriage around the globe.

11 I specifically asked her in her deposition whether
12 she was an expert in history outside the United States and she
13 said no.

14 **BY MR. BOUTROUS:**

15 **Q.** Professor Cott, in conducting your work and research, and
16 evaluating the institution of marriage in the United States,
17 did you evaluate and look at the history of marriage that
18 preceded the formation of the United States, around the world?

19 **A.** I did. And let me comment on that. From inside U.S. --

20 **THE COURT:** The answer is, "Yes."

21 What's your next question?

22 **THE WITNESS:** Yes.

23 **BY MR. BOUTROUS:**

24 **Q.** And was your evaluation of the systems of marriage
25 throughout civilized history, did that play an important part

1 in your work, in writing the book *Public Vows* and in forming
2 your opinions about the history of marriage in the
3 United States?

4 **A.** Well, I'd like to answer that from inside American
5 history, and some of the awareneses and sensitivities of the
6 founders of the United States at the time of the American
7 Revolution.

8 **THE COURT:** Why don't you just answer "yes" or "no."

9 **THE WITNESS:** I'm sorry. I'm sorry, Your Honor.

10 **THE COURT:** Yes or no. And, believe me, he will go
11 on to the next question.

12 (Laughter)

13 **THE WITNESS:** Thank you, Your Honor, for prompting
14 me.

15 **MR. BOUTROUS:** I'm ready.

16 **THE WITNESS:** Yes.

17 **BY MR. BOUTROUS:**

18 **Q.** Yes.

19 **MR. BOUTROUS:** Your Honor, I would ask that the
20 objection be overruled.

21 **MR. THOMPSON:** Your Honor, if the Court would like, I
22 can pull up on the screen the portion of the deposition
23 testimony where I said:

24 "You don't consider yourself an expert in the
25 history of marriage in countries outside the

1 United States; is that right?

2 "That is right."

3 And now she is being offered and asked to speak about
4 the history of marriage around the world, and whether it's a
5 universal institution.

6 There is nothing of that in her report. So this
7 would violate Rule 26. And she, herself, has admitted she is
8 not an expert in this subject.

9 **THE COURT:** As I understood the questions of the
10 witness, it elicited that to inform her view of the history of
11 marriage in the United States, she did make some comparisons of
12 the institution of marriage in other societies and other
13 countries and other civilizations.

14 And I think that's an appropriate subject for her
15 testimony. But I would agree with you that she is not
16 qualified as an expert on marriage generally, marriage around
17 the world.

18 So with that limitation, Mr. Boutrous, you may
19 continue.

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

21 **BY MR. BOUTROUS:**

22 **Q.** And let me just go back and clarify, in conducting your
23 work and evaluating the history of marriage in the
24 United States, did you compare the institution of marriage in
25 the United States with the institution of marriage in other

1 nations and other civilizations?

2 And, as the Court suggested, if you could --

3 **A.** Not literally. Not literally. I would like to clarify
4 what I did do, if I may.

5 **Q.** Please clarify what you did do.

6 (Laughter)

7 **A.** I began my book by focusing on the place of marriage in
8 the views of the founders of the American republic. And they
9 were very much aware of what a minority, in among all the
10 peoples of the globe, their form of marriage constituted.

11 They were very aware that most of the peoples in the
12 globe, at that time, practiced polygamy or group marriage, or
13 as they saw among Native Americans, other forms of marriage
14 quite different from their own.

15 And, in fact, that was one of the great discoveries
16 of colonization and exploration by Europeans and British people
17 in the rest of the globe, that forms of marriage were so
18 various in other cultures and among other peoples.

19 So that, simply from my expertise in American
20 history, makes me very aware that there have been many forms of
21 marriage that have been qualified and sanctioned by the
22 societies that have invented them.

23 **Q.** Thank you.

24 When you speak of marriage as a historian, do you
25 speak of it as a civil institution?

1 **A.** Well, I am -- in talking about our -- yes. I should say
2 yes.

3 (Laughter)

4 **THE COURT:** And now you may clarify.

5 (Laughter)

6 **BY MR. BOUTROUS:**

7 **Q.** Can you explain that further?

8 (Laughter)

9 Let me rephrase that. In what manner has the
10 institution of marriage in the United States historically been
11 deemed a civil matter as opposed to a religious matter or some
12 other type of entity?

13 **A.** This has been characteristic in all the states of our
14 nation since their founding, that the civil law has been
15 supreme in defining and regulating marriage.

16 Even while most of the people involved in writing
17 these laws were -- found no objection to religious ceremonies,
18 they felt that marriage was a civil matter. So much of it had
19 to do with property and inheritance and the economy, things
20 that civil law was principally concerned with.

21 And in all the American states, at the founding of
22 the nation and then continuingly, the civil law has controlled
23 marriage.

24 **Q.** In your evaluation from a historical perspective, what
25 role has religion played in the institution of marriage in the

1 United States?

2 **A.** Religion has been in the background of many, perhaps most
3 Americans' understanding of marriage, and has influenced their
4 own practices, whether sacramental or otherwise, and often
5 their ceremonial practices. That's been extremely common. But
6 these are apart from and have no particular bearing on the
7 validity of marriages.

8 Any clerics, ministers, rabbis, et cetera, that were
9 accustomed to seeing -- performing marriages, only do so
10 because the state has given them the authority to do that. And
11 they do that as the delegate of the state.

12 **Q.** When California entered the Union as a state, did its
13 government address the issue of ensuring separation between
14 religion and religious marriage and civil marriage in this
15 state?

16 **A.** Yes.

17 **Q.** How did California address that issue?

18 **A.** There was a clause in the first constitution that
19 specifically said that no religious forms could -- no religious
20 disagreements with a particular marriage could invalidate that
21 marriage.

22 **Q.** Did -- in your view, did the colonists, when this nation
23 was first colonized, did they view the institution of marriage
24 as an important one?

25 **A.** Yes.

1 Q. Did they move to adopt marriage in their colonies?

2 A. Yes. Every single colony did.

3 Q. Now, you were here this morning when several -- when two
4 of the ads were played during the testimony of the plaintiffs,
5 correct?

6 A. Yes.

7 Q. And did you note that in one of the ads one of the people
8 speaking mentioned that, Biblical marriage should be the goal,
9 as opposed to marriage between individuals of the same gender?

10 **MR. THOMPSON:** Objection, Your Honor.

11 Under Rule 26, there is no mention of this -- of the
12 analysis of the ads. It's not a material she considered in
13 either her opening report or her rebuttal report. And I did
14 not have an opportunity to depose her about her views of the
15 ads.

16 **THE COURT:** Well, I think the witness just said that
17 she was here in the courtroom and she heard those. I think --
18 she has been qualified to opine on the subject of the history
19 of marriage in the United States.

20 Let's see where this goes. We'll see what the
21 testimony is and how much weight to give it, if any.

22 **BY MR. BOUTROUS:**

23 Q. Were you here --

24 A. Yes.

25 Q. -- and saw that?

1 **A.** I was here and I saw that, yes.

2 **MR. BOUTROUS:** Your Honor, I had a demonstrative
3 prepared based on Mr. Cooper's testimony, that simply tracks
4 what he said.

5 **THE COURT:** Mr. Cooper's testimony?

6 **MR. BOUTROUS:** Mr. Cooper's opening statement. I'm
7 sorry.

8 And would like to display that on the screen, with
9 the Court's permission.

10 **THE COURT:** Very well.

11 **MR. BOUTROUS:** If we could have Proponents' Position
12 1 displayed, please.

13 (Document displayed)

14 **BY MR. BOUTROUS:**

15 **Q.** And while that's happening, Professor Cott, let me ask you
16 this. When you hear the term "Biblical marriage" as a
17 historian, what does that mean to you?

18 **A.** Well, I -- to be honest, I had never seen this ad before
19 this morning. And when I heard it, I thought it was really
20 quite amusing, because The Bible is a situation with characters
21 that are practicing polygamy, as was true in the ancient world
22 among the Jews. So I was very surprised to hear him endorsing
23 this.

24 **Q.** And we have on the screen one of the things that
25 Mr. Cooper said during his opening statement. And that is,

1 "The limitation of marriage to a man and woman is something
2 that has been universal. It has been across history, across
3 customs, across society."

4 Do you agree with that statement?

5 **MR. THOMPSON:** Objection. Leading and beyond the
6 scope of her expertise, which is limited to the United States.

7 **THE COURT:** Well, I think we've allowed the witness
8 to testify as to her understanding of other foreign
9 institutions as they have informed her evaluation of American
10 marriage. And so I think that question is probably okay.

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

12 **THE WITNESS:** I think this is inaccurate.

13 **BY MR. BOUTROUS:**

14 **Q.** Why do you believe it's inaccurate?

15 **A.** Because of my knowledge of the existence of many forms
16 that are not a man and a woman.

17 **Q.** Could you give the Court an example.

18 **A.** Certainly, the examples of polygamist marriage that have
19 been sanctioned in, well, take ancient Judaism, take Muslim
20 cultures still today. It's fairly clear, I think, to anyone
21 who has looked at all at world history, that this is not an
22 accurate statement.

23 **Q.** In the United States we have a tradition of an -- and in
24 the laws, which require monogamy.

25 Where did that tradition and that legal structure

1 arise from, as a historical matter?

2 **A.** I believe that monogamy is attributable to Christianity.
3 And that is probably why the person in the ad said "Biblical,"
4 because he was thinking of the New Testament, not the
5 Old Testament.

6 And it is a tribute to the success of Christian
7 evangelism, particularly after the 18th century, that there has
8 been so much move around the globe toward monogamous union as
9 compared to polygamy.

10 **Q.** Professor Cott, let me ask you this: Historically, in the
11 United States, has there developed a social meaning of
12 marriage?

13 **A.** Yes.

14 **Q.** And by the phrase "social meaning of marriage," what do
15 you, as a historian, understand that to mean?

16 **A.** I would take that to be another way of saying that
17 societal evaluation or understanding of marriage, which is
18 compounded of all the populations' individualized view of
19 marriage, so that it is an amorphous item to talk about the
20 social meaning of marriage.

21 But I think we do make generalizations of this sort,
22 common understandings. And that's how I would see social
23 meaning -- what the social meaning of marriage would express,
24 the common understanding of it.

25 **Q.** Can you tell me your view, your opinion as a historian,

1 what the social meaning of marriage in the United States is.

2 **A.** Do you mean today, or over time?

3 **Q.** As it has developed over time, and the features that have
4 developed over time through history, to form what we now think
5 of as the institution of marriage.

6 **A.** Well, first, I would want to say that marriage is unique
7 in some of the ways I alluded to before, in its paradoxical
8 aspects that it combines successfully.

9 It is a unique institution, as an evaluation of a
10 couple's choice to live with each other, to remain committed to
11 one another, and to form a household based on their own
12 feelings about one another, and their agreement to join in an
13 economic partnership and support one another in terms of the
14 material needs of life.

15 So marriage places a unique valuation on such
16 couples' choices. And that is the core of its social meaning.
17 And upon that core very many cultural add-ons have been
18 admitted, as well, which I want to mention.

19 But before talking about the cultural aspects of
20 marriage and cultural advertisements for marriage, one might
21 say, I should mention first, really, certain features of it
22 which I emphasized in my book and which I think are far less
23 obvious to people when they think about marriage. Because most
24 people think about marriage in terms of an intimate choice.

25 **Q.** Can you tell me about -- give me a couple of examples of

1 those features?

2 **A.** Yeah. Well, first of all, marriage, the ability to marry,
3 to say, "I do," it is a basic civil right. It expresses the
4 right of a person to have the liberty to be able to consent
5 validly.

6 And this can be seen very strikingly in American
7 history through the fact that slaves during the period, the
8 long period that American states had slavery, slaves could not
9 marry legally.

10 **Q.** Why were slaves barred from marrying?

11 **A.** Because as unfree persons, they could not consent. They
12 did -- they lacked that very basic liberty of person, control
13 over their own actions that enabled them to say, "I do," with
14 the force that "I do" has to have. Which is to say, I am
15 accepting the state's terms for what a valid marriage is.

16 A slave couldn't do that because the master had
17 overall rights over the slaves' ability to disport his person
18 or to make any claim. The slave could not obligate himself in
19 the way that a marriage partner does obligate himself or
20 herself.

21 **Q.** What happened when slaves were emancipated?

22 **A.** When slaves were emancipated, they flocked to get married.
23 And this was not trivial to them, by any means.

24 They saw the ability to marry legally, to replace the
25 informal unions in which they had formed families and had

1 children, many of them, to replace those informal unions with
2 legal, valid marriage in which the states in which they lived
3 would presumably protect their vows to each other.

4 In fact, one quote that historians have drawn out
5 from the record, because many of these ex-slaves were
6 illiterate, of course, but one quotation that is the title of
7 an article a historian wrote, it was said by an ex-slave who
8 had also been a Union soldier, and he declared, "The marriage
9 covenant is the foundation of all our rights."

10 Meaning that it was the most everyday exhibit of the
11 fact that he was a free person. He could say, "I do" to his
12 partner.

13 And then in corollary with that -- because, of
14 course, the history of slavery is happily behind us -- there
15 are other ways in which this position of civil rights, of basic
16 citizenship, is a feature of the ability to marry and to choose
17 the partner you want to choose.

18 **Q.** What would be an example of another one of those features?

19 **A.** Well, I want to use an example of that, that again comes
20 from the period while slavery still existed. But it doesn't
21 have to do with the slave. It has to do with a black man,
22 Dred Scott, who tried to say, when he was in a
23 non-slave-holding state, that he was a citizen. And in an
24 infamous decision, the Supreme Court denied him that claim.

25 And why this is relevant here is that Justice Taney

1 spent about three paragraphs of that opinion remarking that the
2 fact that Dred Scott as a black man could not marry a white
3 woman -- in other words, that there were marriage laws in the
4 state where he was and many other states, that prevented blacks
5 from marrying whites -- was a stigma that marked him as less
6 than a full citizen.

7 Because if he had had free choice, that would be --
8 Taney wouldn't have mentioned it. But he remarked on it
9 because of the extent to which this limitation on Dred's
10 ability to marry was a piece of evidence that Justice Taney was
11 remarking upon in his opinion to say this shows he could not be
12 a full citizen.

13 **Q.** Now, going back to the era of slavery, would slaves form
14 something they would call marriage, or that the slave owners
15 would call marriage, at least informally?

16 **A.** Yes.

17 **Q.** And was that viewed by the state or by society as an
18 important relationship?

19 **A.** Certainly, it was regarded as an important relationship
20 within slave communities. They were the only relationships
21 they had, these informal relationships.

22 But they were totally treated with abandon by white
23 society. Broken up all the time. And no -- no state
24 authorities gave any protection or credence to these
25 relationships whatsoever.

1 Q. And, as a historical matter, to what do you attribute the
2 desire to be formally married by the state upon emancipation?

3 A. Well, it was, as I suggested, because this was a
4 common-sense indication of freedom, of possessing basic civil
5 rights, and because they assumed it would mean to them that
6 white employers -- because, of course, the ex-slaves were still
7 quite poor and employed by white -- whites who were -- well, at
8 any rate, white employers would often try to demand that
9 families worked in certain ways, or that children worked, and
10 so on. And so the emancipated -- the freed men and women
11 assumed that once they were legally married, that they could
12 make valid claims about their family rights.

13 Q. You mentioned a little earlier that some of these values
14 and the things that go into the social meaning of marriage are
15 less visible to some. What did you mean by that?

16 A. Well, I think this was true of myself, until I started to
17 do this research. And I think it's true of the vast majority
18 of people who have no apparent limitations on their marriage
19 rights, because the person they choose is someone who is, you
20 know, perfectly fine for them to marry. And I think people
21 remain unaware that, in marrying, one is exercising a right of
22 freedom.

23 As I said, most people think of it as a private
24 choice. Do I marry or don't I? They don't tend to articulate
25 this -- this -- the citizenship, the civil rights aspect of it.

1 It's only those -- and I have seen this in my book
2 and in various instances with various ethnic groups, racial
3 groups, and so on. It is only those who cannot marry the
4 partner of their choice, or who cannot marry at all, who are
5 aware of the extent to which this is -- that the ability to
6 marry is an expression of one's freedom, and being the barrier
7 of basic civil rights.

8 **Q.** In your view, as a historical matter, have efforts by
9 individuals to acquire the right to marry strengthened or
10 weakened the institution of marriage and how it's viewed in
11 society?

12 **A.** Uhm, do you mean individuals like emancipated slaves? I'm
13 not sure what you mean.

14 **Q.** Let me put it a different way. Do you believe that
15 when -- as in this case, when individuals are fighting for the
16 right to marry, and there's a debate about that, how does that
17 affect the way society talks about and views the institution of
18 marriage?

19 **A.** I see. I see. You were referring to those groups I
20 mentioned who had been restricted?

21 **Q.** Yes.

22 **A.** Yes.

23 **Q.** Yes.

24 **A.** I see.

25 Well, yes, I think in every instance, the most

1 stunning of which, of course, is the elimination of racial bars
2 on marriages to whites, these racial bars were quite -- they
3 proliferated. They were quite various and as well as numerous.
4 That the restrictions on marriage as they have been removed
5 have tended to make the institution more appealing, more --
6 more clearly an equal right that people share. And so I would
7 say that the removal of such restrictions has tended to
8 strengthen the institution.

9 **Q.** Now, you mentioned that -- a cultural value that infuses
10 the social meaning of marriage.

11 Could you explain to us what you mean by that, and
12 what the -- how culture values marriage in the United States
13 through its history.

14 **A.** Yes. Well, I'll just be brief because this is a huge
15 subject.

16 But, first of all, I would say that the religious
17 connotations that many different groups, different sects and
18 different religions have attached to marriage have been part of
19 its high cultural valuation.

20 More than that, in our entertainment, in our
21 folktales, in our songs, in our movies, at least since the rise
22 of the novel in the 18th century, marriage has been the happy
23 ending to the romance, to the conflict that may have transpired
24 over the course of a story. It is the principal happy ending
25 in all of our romantic tales.

1 And that kind of cultural polish on marriage has, in
2 the past century, been greatly forwarded by advertising and
3 other forms of visual imagery that surround us all the time and
4 that present the rice, the white dress, the happy couple
5 parading down the aisle, as a destination to be gained by any
6 couple who love one another.

7 So these cultural attributes are probably too various
8 to mention, but I'm sure you get my point.

9 **Q.** Let me ask you this. How does the cultural value and the
10 meaning, social meaning of marriage, in your view, compare with
11 the social meaning of domestic partnerships and civil unions?

12 **A.** I appreciate the fact that several states have extended --
13 maybe it's many states now, have extended most of the material
14 rights and benefits of marriage to people who have civil unions
15 or domestic partnerships. But there really is no comparison,
16 in my historical view, because there is nothing that is like
17 marriage except marriage.

18 And I would add that in that halo around marriage,
19 the cultural valuations have not been the only thing that has
20 driven this. But, rather, the extent to which states have in
21 the past century gone beyond -- states and the federal
22 government, have gone beyond the basic freedom that marriage
23 implies, to add many, many other benefits that are channeled
24 through marriage. And while these, at least at the state
25 level, are the material benefits that domestic partnership

1 gives, the states choosing this institution named marriage,
2 through which to channel the benefits, has itself added greater
3 cultural valuation to the institution.

4 **Q.** At the founding of the country, and as a historical
5 matter, were there ever comparisons between marriage and
6 democracy in the public discourse at the time?

7 **A.** This is really a very interesting story. Yes, there
8 have -- there were.

9 **Q.** And what were the comparisons that were made at the time?

10 **A.** Well, let me clarify, first of all, that it wasn't
11 precisely democracy but, rather, the form of republican
12 government that the Americans were founding. And their
13 republican form -- small "r" -- was a government based on
14 consent and voluntary allegiance.

15 This was distinct from being a subject of Great
16 Britain. Great Britain, at the time, did not call its people
17 its citizens. They were its subjects. And they were -- had to
18 be allegiant to the King just because they were born there.

19 But in breaking away from Great Britain, the founders
20 of the American republic were forming a government based on
21 voluntary allegiance and consent. And that was very, very
22 present in public discourse.

23 And they found -- and one sees this in newspapers and
24 journals at the time. They found that the best analogy they
25 could bring to this -- to convince people that this was a good

1 thing, to voluntarily consent to a stable relationship that may
2 govern you, but it's for your own good, that the best analogy
3 they could find was marriage.

4 And so in the popular periodicals of the time and in
5 newspapers, the -- that analogy was very, very frequently made,
6 to persuade former subjects of Great Britain that they should
7 consent to be governed, as people consented to be governed by
8 marriage laws, consent to be governed by this new institution
9 to which they would give voluntary allegiance.

10 **THE COURT:** About how much longer do you have with
11 this witness?

12 **MR. BOUTROUS:** Your Honor, I was about to move to
13 another topic. I probably have another hour or so.

14 **THE COURT:** Well, then, this would probably be a good
15 time to take our adjournment for the day.

16 We are off to a good start, Counsel. I appreciate
17 that very much. And we will begin tomorrow -- can we begin at
18 8:30, instead of 9 o'clock? Is that agreeable to everybody?

19 **MR. BOUTROUS:** Yes, Your Honor.

20 (Multiple counsel affirm.)

21 **THE COURT:** All right. We will see you tomorrow
22 morning, at 8:30.

23 **THE WITNESS:** Thank you, Your Honor, for reminding
24 me. This is a hard lesson for me to learn. When a student
25 asks me a question, I can't just stop at "yes."

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Thank you, Judge.

(At 4:02 p.m. the proceedings were adjourned until
Tuesday, January 12, 2010, at 8:30 a.m.)

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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, **Kristin M. Perry, et al., vs. Arnold Schwarzenegger, in his official capacity as Governor of California, et al.**, were reported by us, certified shorthand reporters, and were thereafter transcribed under our direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR
U.S. Court Reporter

Monday, January 11, 2010