

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 )  
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Vital Statistics; LINETTE SCOTT, )  
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Clerk-Recorder for the County of )  
Alameda; and DEAN C. LOGAN, in his )  
official capacity as )  
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for the County of Los Angeles, )

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

TRANSCRIPT OF PROCEEDINGS

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*Official Reporters - U.S. District Court*

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P R O C E E D I N G S1  
2 JANUARY 20, 2010

8:38 A.M.

3  
4 **THE COURT:** Very well. Good morning, counsel.

5 (Counsel greet the Court.)

6 **THE COURT:** We have a few items to take up. And  
7 let's take up the scheduling item, first.8 I just learned that a message from the clerk to  
9 Mr. Boutrous, apparently, was not delivered or not received,  
10 that we have cleared the calendar and will be able to continue  
11 the trial tomorrow.12 The clerk put a call in to Mr. Boutrous to that  
13 effect, and to Mr. Thompson, and requested each to notify  
14 everybody else. Apparently, Mr. Thompson did not do so. And  
15 Mr. Boutrous apparently didn't receive the message.16 But, be that as it may, we're ready to continue the  
17 trial tomorrow, and we'll proceed as expeditiously as possible.18 **MR. THOMPSON:** And, your Honor, I would like to  
19 apologize. I had assumed that it was informed counsel on our  
20 side. I had not realized that I was supposed to coordinate.  
21 And I picked up the message on Tuesday morning. But I do  
22 apologize to the Court.23 **THE COURT:** Very well. I accept that. I understand.24 Now, we have some discovery and other matters to deal  
25 with.

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

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

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

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

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

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

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

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

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

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

5 **MS. STEWART:** Peterson.

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

8 Mr. Rob Wirthlin is the fourth.

9 **MS. STEWART:** Peterson.

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

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

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

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

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

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

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

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

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

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

14           Ms. Moss.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

20           **THE COURT:** All right.

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

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

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

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

1 introduced into evidence. It was PX0188 and PX0189.

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

6 **THE COURT:** Very well.

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

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

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

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

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

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

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

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

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

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

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

25 We believe that there are at least four reasons why

1 his testimony should be excluded from this case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15          Goes on:

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

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

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

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

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

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

8 And:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16           **THE COURT:** I see.

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

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

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

23           **THE COURT:** Through studies.

24           **MR. CAMPBELL:** Yes.

25 (Laughter)



1           **THE COURT:** Okay.

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

4           Thank you, Your Honor.

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

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

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

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

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

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

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

1 denied.

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

7           (Laughter)

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

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

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

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

14           **THE COURT:** All right.

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

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

21           Mr. Boies, would you like --

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

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

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

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

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

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

10 **THE COURT:** All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 (Laughter)

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

1 multiple grounds under which the testimony is admissible.

2           Clearly, if there are counter-designations that the  
3 proponents wish to have the Court consider, they may do so.

4           Although, if it's correct, Mr. Cooper, that you  
5 received these designations a week ago, I would think you'd be  
6 able to get in your counter-designations by now. But I'm not  
7 going to foreclose you from making counter-designations once  
8 you hear the testimony.

9           So, all right.

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

11 **WHEREUPON:**

12   PAUL NATHANSON,

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

15           (Time noted: 9:01 a.m.)

16           **MR. BOIES:** Your Honor, that completes  
17 Dr. Nathanson's deposition excerpt. I would offer, at this  
18 time, Plaintiffs' Exhibit 2334, which is Dr. Nathanson's  
19 resume.

20           **THE COURT:** 2354?

21           **MR. BOIES:** 2334.

22           **THE COURT:** '34. I beg your pardon. 2334.

23           **MR. COOPER:** No objection, Your Honor, to the resume  
24 coming in.

25           **THE COURT:** Very well.

1 (Plaintiffs' Exhibit 2334 received in evidence.)

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

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

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

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

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

13 **THE COURT:** All right.

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

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

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

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

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

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

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

1 it while she's testifying.

2           **THE COURT:** Very well.

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

5           **THE COURT:** Very well.

6           (Plaintiffs' Exhibit 2335 received in evidence.)

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

10           **THE COURT:** 2544?

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

12           **THE COURT:** Very well.

13           (Plaintiffs' Exhibit 2544 received in evidence.)

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

16           **THE COURT:** All right.

17           (Plaintiffs' Exhibit 2545 received in evidence.)

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

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

21 **WHEREUPON:**

22                                   **KATHERINE YOUNG,**

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

25           (Time noted: 9:20 a.m.)

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

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

4           **THE COURT:** Very well.

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

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

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

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

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

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

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

15           **THE COURT:** Very well.

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

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

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

21           **THE COURT:** Very well.

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

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





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

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

5 Where did you grow up?

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

7 Q. And when were you born?

8 A. In 1983.

9 Q. So you are 26 years old now?

10 A. That's correct.

11 Q. Where did you attend elementary school?

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

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

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

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

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

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

25 A. I'm a gay man.

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

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

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

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

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

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

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

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

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

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

1 even just gay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 A. I went two or three times.

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

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

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

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

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

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

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

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

5 **Q.** Why not?

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

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

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

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

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

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

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

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

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

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

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

24 **Q.** From what ages?

25 **A.** 14 to 16.

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

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

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

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

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

17 Q. Who did you meet with at NARTH?

18 A. I met with Dr. Joseph Nicolosi.

19 Q. Who was Dr. Joseph Nicolosi?

20 A. Nicolosi was the executive director of NARTH.

21 Q. Was he also a therapist?

22 A. Yes.

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

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



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

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

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

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

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

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

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

16 **A.** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 **A.**    That's correct.

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

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

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

14           So, no, things did not get better.

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

16 **A.**    Four or five years.

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

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

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

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

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

3 A. That's correct.

4 Q. How long have you done that?

5 A. Over two years now.

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

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

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

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

16 A. Yes, I am.

17 Q. Can you tell me which ones?

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

21 Q. What is that commission?

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

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

1 as a member of that commission?

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

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

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

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

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

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

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

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

14 **CROSS EXAMINATION**

15 **BY MR. CAMPBELL:**

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

18 Have you ever lived in the state of California?

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

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

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

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

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

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

4 A. Yes.

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

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

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

10 A. That is true.

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

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

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

18 A. In public, yes.

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

22 A. That's also true.

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

25 You were compelled to go to conversion therapy by

1 your parents; isn't that correct?

2 **A.** Yes.

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

5 **A.** Yes.

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

9 **A.** That is correct.

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

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

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

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

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

21 **A.** Absolutely true.

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

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

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

4 A. That's correct.

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

8 A. Yes.

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

12 A. Yes.

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

17 A. Yes, I have.

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

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

21 A. Yes.

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

23 A. Yes.

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



1 isn't that true?

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

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

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

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

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

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

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

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

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

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

20 **A.** Yes.

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

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

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

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

**REDIRECT EXAMINATION**

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**BY MR. FLYNN:**

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

**A.** Yes, I was.

**Q.** Who was that?

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

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

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

(Laughter)

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

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

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

**A.** For a brief period, yes.

1 Q. How long?

2 A. Few months.

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

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

5 MR. FLYNN: I have no further questions.

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

8 And your next witness.

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

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

14 THE COURT: Very well.

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

18 THE COURT: That would be fine.

19 MR. BOUTROUS: To be fair.

20 THE COURT: Absolutely.

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

23 THE CLERK: Raise your right hand, please.

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**GARY SEGURA,**

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

**THE WITNESS:** I do.

**THE CLERK:** Please, have a seat.

State your name, please.

**THE WITNESS:** Gary Segura.

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

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

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

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

**THE CLERK:** Thank you.

(Pause)

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

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

(Pause)

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

**MR. THOMPSON:** Thank you.

**THE COURT:** Are you organized now?

**MR. THOMPSON:** Yes, Your Honor.

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

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

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

DIRECT EXAMINATION

1  
2 **BY MR. BOUTROUS:**

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

4 **A.** Good morning.

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

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

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

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

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

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

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

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

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

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

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

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

15 (Reporter interrupts.)

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

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

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

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

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

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

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

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

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

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

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

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

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

3 **A.** I have.

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

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

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

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

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

11 **A.** Yes.

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

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

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

16 **A.** Yes.

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

19 **A.** Yes.

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

22 **A.** Yes.

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

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



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

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

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

11 **A.** Constantly.

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

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

15 **Q.** Thank you.

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

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

19 **Q.** Thank you.

20 **A.** Uh-huh.

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

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

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

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

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

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

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

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

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

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

1 well as a presentation of topical research.

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

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

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

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

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

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

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

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

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

23 (Laughter)

24

25

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

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

7 **BY MR. BOUTROUS:**

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

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

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

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

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

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

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

21 **THE COURT:** Very well.

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

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

24 **BY MR. BOUTROUS:**

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

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

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

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

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

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

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

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

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

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

8 **A.**   I did.

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

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

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

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

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

24 **A.**   I did.

25 **Q.**   Dahl, D-a-h-l.

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

3 **A.**    It is.

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

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

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

10 **A.**    I did.

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

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

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

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

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

22 **A.**    I did.

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

24 **A.**    I did.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

12 **A.** Yes.

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

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

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

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

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

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

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

9 **A.** Okay.

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

12 (Document displayed.)

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

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

18 **A.** Twenty-nine.

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

21 **A.** I did.

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

23 **A.** I did.

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

1 **A.** Wyoming.

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

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

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

10 **A.** Three.

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

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

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

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

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

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

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

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

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

9 **A.** I am.

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

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

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

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

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

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

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

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

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

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

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

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

1 ameliorate a wrong that exists.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 they exist for gays and lesbians?

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that they find themselves fighting these ballot initiatives?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 **Q.** Thank you.

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

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

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

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

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

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

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

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

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

1 power of gay men and lesbians?

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1   **A.**    Okay.

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

4   **BY MR. BOUTROUS:**

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

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

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

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

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

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

1 **A.** I did.

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

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

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

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

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

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

1 other groups.

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

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

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

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

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

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

25 **A.** I do.

1 Q. What is your view?

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

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

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

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

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

22 A. I do.

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

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

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

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

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

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

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

16 **A.** I do.

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

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

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

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

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

13 **A.** It is.

14 **Q.** Why is that?

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

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

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



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

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

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

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

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

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

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

23 **A.** I have.

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

1 **A.** I did.

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

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

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

7 (Document displayed)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9           (Document displayed)

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

11 **A.** Okay.

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

13 **A.** I have.

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

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

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

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

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

24 **A.** Nine.

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

1 you.

2 (Document displayed)

3 **BY MR. BOUTROUS:**

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

5 **A.** No problem.

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

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

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

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

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

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

25 **Q.** At the --

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

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

3 (Witness complied.)

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

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

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

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

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

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

19 **A.** I did.

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

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

1 behaviors are unacceptable.

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

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

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

20 **A.** Certainly --

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

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

23           **THE COURT:** Invisible.

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

1 relentless and insidious.

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

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

10 **BY MR. BOUTROUS:**

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

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

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

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



1 where their density is smaller.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that in his testimony.

2 You may proceed, Mr. Boutrous.

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

4 **BY MR. BOUTROUS:**

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

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

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

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

25 **A.** Well, it certainly lowers their familiarity. So if the

1 public is not aware of any contributions of gay people to  
2 American life or to world society, or if they are aware of the  
3 contributions, but the individual is not identified as being  
4 gay or lesbian, then the public might reasonably conclude that  
5 they don't have any evidence of significance social  
6 contributions by gay men and lesbians.

7 **Q.** How does that affect the political power?

8 **A.** Again, it demeans the relative worth of the community  
9 vis-a-vis all others.

10 **Q.** Does it make other groups not take gay men and lesbians as  
11 seriously when they speak out on behalf of a particular issue?

12 **A.** Conceivably, it means that they are not taken as  
13 seriously.

14           It also might mean that they are not seen as  
15 desirable coalition partners. And at the same time it makes  
16 them easier targets. It's easier to target people who have  
17 never contributed anything.

18 **Q.** You don't dispute, do you, that gay men and lesbians do  
19 have some allies in the political system, in California and in  
20 the United States?

21 **A.** They do, of varying reliability, but they do.

22 **Q.** Why doesn't that give that group political power in this  
23 country?

24 **A.** Okay. So the question of allies is an important one  
25 because we need to look at allies with respect to both their

1 reliability, with respect to the range of their potential  
2 actions on behalf of gays and lesbians, and with respect to  
3 kind of what potential outcomes they can and can't secure with  
4 the structure of the governmental system.

5           So it is nice to have allies; and if those allies are  
6 reliable, that's even better. But there are a number of  
7 instances where ostensible allies of the gay community, when  
8 faced with difficult decisions that might be electorally risky,  
9 retreat and retreat quickly.

10           Or, there is also the disconnect between, say,  
11 rhetoric on the one hand and action on the other. So if you  
12 think of the major groups in society, you know, outside of the  
13 commercial enterprises, you think about, you know, the  
14 military, the church, the Democratic and Republican parties.  
15 These are the power centers in American society. And of those  
16 only the Democratic party purports to be an ally of gays and  
17 lesbians.

18           But the Defense of Marriage Act was signed into law  
19 by a Democratic president. "Don't ask, Don't tell" was passed  
20 by a Democratic Congress and signed into law by a Democratic  
21 president.

22           The current president describes himself as a fierce  
23 advocate of gay and lesbian civil rights, but, yet, has  
24 actually taken no steps to overturn either of those and,  
25 actually, I understand has refused an order by the chief judge

1 of the Ninth Circuit to provide domestic partner benefits to  
2 his clerk and has filed briefs hostile to gay and lesbian  
3 interests.

4           So even fierce advocates are submitting briefs  
5 supporting the Defense of Marriage Act, comparing gay and  
6 lesbian same-sex marriage to bestiality. This is not a  
7 reliable ally.

8           Now, certainly, some allies are more reliable than  
9 that, but we have to look at the disconnect between rhetoric  
10 and action.

11 **Q.** In your view, is a smaller group in society more in need  
12 of reliable allies in the political sphere?

13 **A.** Well, just from the absolute numerical question of  
14 electoral politics, the smaller the group, the more allies  
15 necessary in order to sustain the day. That's clearly the  
16 case.

17           If you are particularly insular or you are  
18 geographically isolated, without allies you are very unlikely  
19 to have an impact beyond, you know, fairly limited geographic  
20 circumstances.

21 **Q.** In your expert opinion, does the gay and lesbian community  
22 have any reliable allies in the way you are using that term  
23 from a political science standpoint?

24 **A.** Umm sure. I wouldn't say that they have no reliable  
25 allies. I think that would be an unfair statement.

1           I think that when we look at kind of across the  
2 country and across the range of issues, the number of allies on  
3 which gays and lesbians can count on in a tough fight is fairly  
4 small, but I wouldn't say it's zero.

5 **Q.** Do you think that those -- that group of reliable allies  
6 is sufficient to give gay men and lesbians political power in  
7 the United States?

8 **A.** In my view, no.

9 **Q.** What has been the impact of HIV and Aids on the political  
10 power of gay men and lesbians in this country?

11 **A.** So I spoke before about the fairly small numbers of gays  
12 and lesbians. Those numbers are diminished by over 300,000  
13 deaths of men engaged primarily in same sex sexual behavior  
14 from HIV, another quarter of a million infections in the same  
15 category.

16           So that's done a couple of things. One is, it's  
17 diminished the voting power of a group that's already small.

18           Second, the disease has rather dramatically sapped  
19 the financial resources of the group. Obviously, the 300,000  
20 who have passed are not in a position to make contributions.  
21 Those who are ill, are frequently on disability, spending  
22 untold treasure on their medications.

23           More importantly, resources from the healthy are  
24 being directed towards HIV activities and action, prevention  
25 campaigns, HIV support, charities and whatnot, quite rightly.



1           And, finally, during the period of the worst severity  
2 of the Aids epidemic, that was, frankly, the more important  
3 agenda item; that gays and lesbians turn their attention first  
4 to surviving before engaging the political system.

5           So I think HIV has been a real setback, certainly,  
6 for the people who have been infected, but for the cause as  
7 well.

8 **Q.**    When a group, when a minority group faces a well  
9 orchestrated, well-funded opposition, does that affect its  
10 powerlessness in our political system?

11 **A.**    Right.  And so I think this really kind of gets to one of  
12 the central problems that gays and lesbians face in the  
13 political system.

14           So you could imagine for the sake of hypothesis that  
15 there are two groups with exactly the same number of voters,  
16 with exactly the same number of dollars.  Are they equally  
17 powerful?  And the answer is, no, because that depends on what  
18 their opposition is.

19           So you can imagine a group that faces relatively  
20 little hostility or relatively little opposition, and we would  
21 assume that they would be more powerful than a group that faces  
22 well-funded and coordinated opposition to simply even with the  
23 same amount of resources, because it's tougher sledding.  It's  
24 an uphill battle for the group with strong opposition.

25           **MR. BOUTROUS:**  Your Honor, I'm going to ask to

1 approach to provide the witness with another smaller collection  
2 of exhibits in a binder and provide the Court and opposing  
3 counsel with those exhibits, if that's okay?

4 **THE COURT:** Very well.

5 **MR. BOUTROUS:** Thank you.

6 (Whereupon, binders were tendered  
7 to the Court, counsel and the witness.)

8 **MR. BOUTROUS:** And, your Honor I'm going to present  
9 the clerk with a listing of exhibits for convenience of the  
10 Court. I have provided a copy to the witness and opposing  
11 counsel as well.

12 **THE COURT:** Very well.

13 **BY MR. BOUTROUS:**

14 **Q.** Professor Segura, I would like you to start out by opening  
15 the binder to Plaintiffs' Exhibit 1550 --

16 (Witness complied.)

17 **Q.** (Continuing) -- and ask you if this is a document that you  
18 reviewed in connection with your testimony in this case?

19 **A.** It is.

20 **Q.** And before I ask you questions about that document, did  
21 you study the Proposition 8 campaign and draw any conclusions  
22 about the degree of opposition that gay men and lesbians faced  
23 during the Proposition 8 campaign?

24 **A.** I generally familiarized myself with the details of the  
25 campaign, but I can't say as I went into any depth on the

1 organizations of the two sides.

2           So I know what money was spent, et cetera, but I  
3 didn't really have available to me a lot of information about,  
4 for example, volunteerism and those sorts of things.

5 **Q.** And since you have been involved in this case, were you  
6 provided with certain documents that were received by the  
7 plaintiffs during the discovery over the last week from the  
8 proponents of Proposition 8 in this case?

9 **A.** I was.

10 **Q.** And is one of those documents Plaintiffs' Exhibit 1550?

11 **A.** It is.

12 **Q.** And could you tell us what, if anything -- well, describe  
13 this document and explain to the Court what, if anything, it  
14 tells you about the political opposition arrayed against gay  
15 men and lesbians?

16 **A.** It appears to be a flyer or perhaps a web screen capture  
17 then sent as an electronic mail.

18           There are two things in it that I took note of when I  
19 was looking through it. The first is on the second page the  
20 role of the LDS Church in supporting Prop 8.

21           **MR. BOUTROUS:** And, your Honor, I would move  
22 admission of Plaintiffs' Exhibit 1550.

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

24           **THE COURT:** Very well. 1550 is admitted.

25

1 (Plaintiffs' Exhibit 1550 received in evidence.)

2 **BY MR. BOUTROUS:**

3 **Q.** And if we could display Plaintiffs' Exhibit 1550?

4 (Document displayed)

5 **Q.** And, Professor Segura, I would ask you to direct us to the  
6 portion that you are referring to on page two and read the  
7 portion that you found relevant.

8 **A.** Page two under the title "LDS Church takes an active  
9 role." I'm particularly interested in a couple of notes.  
10 First, the second sentence:

11 "A letter from the First Presidency of the  
12 LDS Church in Salt Lake announced the  
13 church's official position during Sunday  
14 services on June 29th. The LDS Church rarely  
15 takes an official stand on political issues,  
16 but in this case the First Presidency sent a  
17 letter to the highest worldwide church  
18 leaders and California local LDS leaders."

19 **Q.** And why do you find that relevant to the question of  
20 political power and powerlessness of gay men and lesbians?

21 **A.** Churches -- many churches, and the LDS Church I would  
22 include in this, are hierarchical. They have very clear  
23 patterns and lines of communication.

24 All churches have the good fortune to essentially be  
25 able to speak to their flock once a week or more, which makes

1 for a very strong communications network.

2           And so to me this illustrated that the LDS Church was  
3 very active, not just on the financial side, but even in the  
4 sort of grassroots side of pushing forward the proposition.

5 **Q.** Please turn to page three of Plaintiffs' Exhibit 1550?

6           (Witness complied.)

7 **Q.** Is there anything on that page that you found relevant to  
8 your analysis of the political forces arrayed against gay men  
9 and lesbians gay men and lesbians in the Prop 8 campaign?

10 **A.** Sure. Under the subtitle "Pastor's Committee."

11 **Q.** If you could read that for the record and then explain  
12 what, if any, relevance it has to your opinions?

13 **A.** On 17 -- excuse me:

14           "On June 17, 2008, Jim Garlow, senior pastor  
15 of Skyline Church in San Diego, released an  
16 invitation letter to the state's pastor  
17 community asking them to participate in a  
18 state-wide conference call for pastors. The  
19 call, which marked the first in a series of  
20 pastor meetings, served to kick off an  
21 aggressive grassroots campaign among churches  
22 of varying denominations. A total of 1700  
23 pastors based in 101 locations across the  
24 state participated."

25 **Q.** What relevance does that passage have to your analysis of

1 the political powerlessness issue in this case?

2 **A.** So in going through these documents, Reverend Garlow's  
3 name appears frequently and he ends up organizing this team,  
4 and it goes on to become, I believe, Protect Marriage CA.

5 And they were very instrumental in trying to involve  
6 the Evangelical community in supporting the proposition.

7 And I was particularly taken aback by the notion of  
8 1700 pastors. That is a profound network of influence. I  
9 think most campaigns, candidate campaigns, initiative  
10 campaigns, party coordinated campaigns would be thrilled to  
11 have 1700 volunteers across the state on any given conference  
12 call. I think that that would be considered a heroic success.

13 So this is an admirable organization at some level.  
14 I mean, it's enviable.

15 **Q.** And you are not suggesting there is anything wrong with  
16 like-minded groups and like-minded organizations, including  
17 churches, banding together to fight for a cause they believe  
18 in, right?

19 **A.** Umm, well, of course, there are limitations under the tax  
20 code about political advocacy; but of terms of individual  
21 groups working together on their own behalf, they are perfectly  
22 allowed to do that. And, in fact, that's kind of the center  
23 piece of pluralist democracy, is that people get to advocate  
24 for what they believe in.

25 I think what takes me back here is just sort of the

1 sheer breadth of the organization and its level of coordination  
2 with Protect Marriage.

3 **Q.** Let's turn to Plaintiffs' Exhibit 2310, which is the  
4 second document in the binder.

5 (Witness complied.)

6 **Q.** Is this a document that you reviewed in connection with  
7 your work on this case over the last week?

8 **A.** It is.

9 **Q.** And could you describe your understanding of what this  
10 document is?

11 **A.** This document appears to be a cover page screen capture of  
12 ProtectMarriage.com's website.

13 **MR. BOUTROUS:** Your Honor, I move admission of  
14 Plaintiffs' Exhibit 2310.

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

16 **THE COURT:** 2310 is admitted.

17 (Plaintiffs' Exhibit 2310 received in evidence.)

18 **BY MR. BOUTROUS:**

19 **Q.** Professor Segura, was there anything about this document  
20 that caught your eye as you evaluated the relative political  
21 power of gay men and lesbians vis-a-vis others?

22 **A.** Frankly, it was just the word "coalition."

23 So the very first subpoena is:

24 "ProtectMarriage.com is a broad-based

25 coalition of California families, community

1           leaders, religious leaders, pro-family  
2           organizations and individuals from all walks  
3           of life who have joined together to support  
4           Proposition 8."

5           And so coalitions we know exist, you know, in an  
6 informal sense in all forms of political contestation. And  
7 this appeared to be sort of a stipulation of a more formal  
8 association.

9           So it was more of an impression that I got from that  
10 sentence that -- you know, that there was an organized effort  
11 here, rather than just simply a group of people who happened to  
12 agree.

13 **Q.**   Based on your evaluation of the record in this case before  
14 you saw these documents and in connection with public  
15 statements that you had seen previously, was the use of the  
16 word "coalition" significant to you in this document?

17 **A.**   When I evaluate the political opportunity structure that  
18 gays and lesbians face in my evaluation of their level of power  
19 or powerlessness, it enhances my understanding and enhances my  
20 estimation of the strength of their opposition.

21 **Q.**   Professor Segura, please turn to Plaintiffs' Exhibit 2314.

22           (Witness complied.)

23 **A.**   I'm there.

24 **Q.**   Have you reviewed this document?

25 **A.**   I have.



1 Q. What does -- could you describe this document? And then I  
2 will ask that it be moved into evidence before you go on. But  
3 just give your over -- overall description of the document,  
4 please?

5 A. This is also a screen capture of a website called "The  
6 Pastor's Rapid Response Team," which sounds fun and --

7 (Laughter.)

8 A. I'm sorry. The term "rapid response" just struck me as  
9 odd. Again, it's headed by Jim Garlow from Skyline Church.

10 MR. BOUTROUS: And, your Honor, I move admission of  
11 Plaintiffs' Exhibit 2314.

12 MR. THOMPSON: No objection, your Honor.

13 THE COURT: Very well, 2314 is in.

14 (Plaintiffs' Exhibit 2314 received in evidence.)

15 MR. BOUTROUS: Thank you, your Honor.

16 Please display 2314.

17 (Document displayed)

18 BY MR. BOUTROUS:

19 Q. In political parlance, Professor Segura, what is a rapid  
20 response team?

21 A. It's an unusual term in political science. I'm more  
22 accustomed to the term with respect to toxic waste bills or  
23 fires or medical emergency sorts of things. So I'm not sure  
24 what they had in mind when they coined the term.

25 I would assume that what they wanted to do would be

1 in a position to put out responses to or to stage a public  
2 event quickly in response to sort of developments throughout  
3 the course of the campaign, the word "rapid" and "response"  
4 being the key words there.

5 But I was just more taken aback that there was an  
6 organization who was sort of regularly monitoring everything  
7 and ready to go at a moment's notice.

8 **Q.** Well, thank you. Let's turn to Plaintiffs' Exhibit 2389.

9 **MR. THOMPSON:** Your Honor, I would like to say we are  
10 getting to a part of this binder where there are many documents  
11 that are stamped "Attorneys' Eyes Only," "Highly Confidential."  
12 This document doesn't have that stamp on it, but we believe it  
13 is confidential.

14 We haven't had an opportunity to have dialogue with  
15 plaintiffs' counsel about the extent to which we might be able  
16 to lift those designations, but we are certainly concerned  
17 about these documents being discussed in open court without  
18 having an opportunity to assess that.

19 And I might suggest that we take a lunch break and  
20 look and see whether we can work with plaintiffs' counsel to  
21 resolve those issues without having to take the Court's time  
22 fighting document by document over this on the fly.

23 **MR. McCARTHY:** If I may, your honor, attorney Vincent  
24 McCarthy. I represent Pastor Jim Garlow and Pastor Miles  
25 McPherson.

1           I have concerns regarding these documents, which I  
2 haven't seen, your Honor. I'm presently in the process of  
3 discussing with counsel for the plaintiffs a potential  
4 agreement on the motion to quash and for a protective order  
5 that I filed in this matter.

6           My clients are currently reviewing certain documents  
7 and disks, some of which appear to be the documents that are  
8 being introduced here, to make a decision as to whether or not  
9 they will agree to the introduction of those documents and/or  
10 authenticity of the documents.

11           For plaintiffs to be introducing these while telling  
12 me that they want my clients to review them on the issues of  
13 both authenticity and admissibility, I think is somewhat  
14 misleading. We are still reviewing these documents and if they  
15 are going to be introduced at this point or counsel is going to  
16 seek to introduce them, then I would like to have the motion to  
17 quash and for a protective order decided, because the part of  
18 the motion that goes to a protective order goes to any  
19 testimony by Pastors Garlow and McPherson. And if these  
20 documents include testimonial matters regarding these two  
21 pastors, then they are included within the motion for  
22 protective order.

23           As your Honor knows, we have argued not only under  
24 the earlier *Perry* decision, but the *Trump* decision, that there  
25 are First Amendment implications to the introduction of

1 testimonial evidence from pastors. Particularly, a lot of  
2 this, I think, concerns sermons that they have given, speeches  
3 they have given to other people regarding their biblical  
4 beliefs, and all of which we believe are protected by the First  
5 Amendment and have been argued in the motion papers that your  
6 Honor presently has.

7           **THE COURT:** Well, Mr. Boutrous, I guess there are two  
8 suggestions; Mr. Thompson's suggestion for lunch, and the  
9 comment raised by counsel for Reverend Garlow.

10           **MR. BOUTROUS:** I have no objection to the lunch  
11 suggestion.

12           (Laughter.)

13           **MR. BOUTROUS:** Let me make that clear, but let me  
14 address two of the points.

15           First, counsel -- we provided this gentleman with  
16 disks, documents. Asked him over the weekend, as I represented  
17 to the Court we would do, to review the documents that we might  
18 use to absolve his clients of having to appear and testify  
19 about them.

20           He sent us back an email, which I can provide the  
21 Court -- I was hoping to spare you having to delve into this --  
22 basically that it would be too burdensome for his clients to  
23 review the documents to tell us whether they had any objection  
24 to us using them, and essentially refused to participate in the  
25 back-and-forth on the documents. That's number one.

1           Number two. This document that is -- as Mr. Thompson  
2 astutely noted, the next exhibit, Plaintiffs' Exhibit 2389,  
3 does not say "Attorneys' Eyes Only." It was not designated  
4 confidential. It's an email from Ned Dolejsi, who was on the  
5 executive committee of ProtectMarriage.com, and we obtained it  
6 from the formerly anonymous Mr. Swardstrom in production  
7 without any limitation on our using this document whatsoever.

8           The third point I would make, your Honor, is that  
9 these are documents that were produced after the Ninth Circuit  
10 amended its opinion in footnote 12, after Judge Spero ruled  
11 regarding the scope of the privilege. These are documents that  
12 were disseminated widely, widely.

13           Some of the documents you will see, your Honor, they  
14 talk about 3,000 pastors on a conference call in order to  
15 disseminate more messages to huge numbers of people.

16           So they are clearly not within any cognizable scope  
17 of a First Amendment privilege and they're covered -- and this  
18 is -- covered by the order that the Court today upheld from  
19 Judge Spero.

20           So and, finally, we did redact the names. We did not  
21 do it on this document because it was not produced pursuant to  
22 any protective order. But the version I have provided the  
23 Court and the witness and that I was going to seek admission of  
24 evidence, we redacted the names that we believed had not been  
25 made public or we didn't know, consistent with the agreement

1 that I made with Mr. Cooper last week regarding the use of  
2 these documents.

3           And we did have a dialogue with -- with the  
4 proponents' counsel over the weekend in terms of redaction, and  
5 I think some of the things we did agree on and others -- we are  
6 in the middle of trial with witnesses. We just took our best  
7 good faith effort to eliminate names of people we didn't have  
8 information concerning, the extent to which they had been  
9 publicly revealed.

10           So I don't think there's any basis for any objection  
11 to these documents. They are documents produced by the  
12 proponents or the individual members of the executive  
13 committee, in the latter case, without any limitation on our  
14 use.

15           **THE COURT:** You are representing that Exhibit 2389  
16 and the other document that are contained in this binder came  
17 from the sources you identified rather than from counsel's  
18 client?

19           **MR. BOUTROUS:** Correct, your Honor.

20           **MR. MCCARTHY:** Your Honor, if I may just correct the  
21 record?

22           I don't think one hand knows what the other is doing  
23 with regard to plaintiffs' team. There is an attorney named  
24 Lazarus, who I am dealing with, who presented me yesterday with  
25 a separate binder with, I believe, eight disks in it and about

1 10 or 12 documents.

2 She stated to me on the phone that if my clients  
3 would review them, she would -- and agree to the  
4 admissibility -- or not admissibility, authenticity of the  
5 documents, she would withdraw the subpoenas.

6 Now, I sent those documents in good faith, together  
7 with the disks, by overnight mail yesterday to my clients  
8 because the prior package that had been sent to me was over 40  
9 hours in length and the plaintiffs wanted my clients to review  
10 them on a Sunday and Martin Luther King holiday, which it was  
11 impossible to get the documents to them and for them to spend  
12 30 hours on that on a Sunday on Martin Luther King's birthday.  
13 So right now my clients are reviewing them thinking that there  
14 is an offer on the table here.

15 So we are completely taken by surprise. And if  
16 counsel is going to proceed with this, apparently, then they  
17 are withdrawing the offer that they made earlier to me  
18 yesterday and I would like an opportunity to argue the motion  
19 to quash.

20 And we've also prepared a motion to stay, because we  
21 would like to have the Ninth Circuit take a look at this as  
22 well. We know of no instance in which pastors have been called  
23 to testify regarding their sermons and other biblical  
24 interpretations to their congregants and others.

25 **THE COURT:** Well, that's a separate issue, is it not,

1 from the documents that Mr. Boutrous is proposing to use with  
2 this witness?

3 **MR. McCARTHY:** Unless they include testimonial  
4 materials, your Honor. Then they would be covered by the  
5 motion for a protective order.

6 **THE COURT:** A protective order motion is different.  
7 As I understand it, these are not the documents that were  
8 produced by or came from the files of your client.

9 **MR. McCARTHY:** Right. But I'm objecting not only to  
10 the authenticity of the documents, but, also, to the  
11 admissibility of the document because of the First Amendment  
12 consideration set out in our motion.

13 **THE COURT:** That is a separate issue, isn't it?

14 **MR. McCARTHY:** It's only separate if there is no  
15 testimonial materials in the documents that have been  
16 introduced.

17 **THE COURT:** Now, what do you mean "testimonial  
18 material"?

19 **MR. McCARTHY:** In other words, if there are  
20 statements from either Pastors Garlow or McPherson in these  
21 documents, then what plaintiffs are doing is getting in  
22 statements by my clients over the motion for protective order  
23 that I have made protecting any statements made by my clients  
24 under the First Amendment.

25 **THE COURT:** If the statements, however, were made to



1 third parties, what possible protection could there be for  
2 these statements?

3 **MR. McCARTHY:** Your Honor, I don't even -- I haven't  
4 seen these before. I have no idea what's in them. I was  
5 provided with a --

6 **THE COURT:** That would tell you whether there is some  
7 kind of privilege that attaches to the statements, would it  
8 not?

9 **MR. McCARTHY:** Well, it would, sure. If the material  
10 in these documents includes biblical interpretations of my  
11 clients of the issues that are being talked about here, then  
12 the Court is really asking a pastor to testify as to his of  
13 view of traditional marriage, of same-sex marriage, and we  
14 believe that would violate the First Amendment rights of a  
15 pastor to do that, your Honor.

16 **MR. BOUTROUS:** Your Honor, may I make one point?  
17 This was a pastor who was on the Pastor's Rapid  
18 Response team. So he injected himself into the political  
19 sphere.

20 **THE COURT:** You are saying he can respond quickly, is  
21 that it?

22 (Laughter.)

23 **MR. BOUTROUS:** I wish I had thought of that.

24 **THE COURT:** All right. Lets take Mr. Thompson's  
25 suggestion and have lunch, and you and Mr. Thompson can work

1 out whatever you want with respect to these documents.

2           One other piece of information for counsel. I have  
3 been informed that Magistrate Judge Spero has heard the parties  
4 on proponents' motion to expand the designation of the  
5 proponents' core group.

6           Magistrate Judge Spero granted proponents' motion  
7 with respect to John Doe, but denied the motion with respect to  
8 Rob Wirthlin, Richard Peterson and Bill Criswell. So you may  
9 consider that in the course of your discussions.

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

11           **THE COURT:** All right.

12           (Whereupon at 12:12 p.m. proceedings  
13 were adjourned for noon recess.)

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P R O C E E D I N G S

JANUARY 20, 2010

1:09 P.M.

**THE COURT:** Very well. With regard to the matter that we were discussing just before the luncheon recess, I want to advise counsel that I'm going to make a reference of the motion to quash, that counsel is addressing, to Magistrate Judge Spero so that he may attend to that while we proceed with the trial.

And so I would urge Counsel, whose name I'm afraid I have forgotten --

**MR. MCCARTHY:** McCarthy, Your Honor.

**THE COURT:** Oh, yes, Mr. McCarthy.

**MR. MCCARTHY:** Yes, Your Honor.

**THE COURT:** If you and your opposite numbers on the plaintiffs' team and on the proponents' team would make yourself available to Magistrate Judge Spero, he will be able to attend to this matter and deal with it.

**MR. MCCARTHY:** Thank you, Your Honor.

**MR. BOUTROUS:** Your Honor, may I just confer with Mr. McGill, for one moment?

**THE COURT:** Of course.

(Pause)

**THE COURT:** Ready to go?

**MR. BOUTROUS:** Yes, Your Honor.



1 Q. And without disclosing the names or the titles of the  
2 individuals to whom this e-mail was sent, can you generally  
3 describe the nature of the -- the people to whom this e-mail  
4 was sent?

5 A. In broad terms, I would describe it as the senior  
6 leadership of the Roman Catholic Church in California.

7 Q. And could you generally describe the subject matter of  
8 this e-mail, at least as to the first page of the document.  
9 Again, without going into any detail concerning the actual  
10 specific contents.

11 A. Uhm, it appears to be sort of half of a thank you note,  
12 half of a celebratory message on the election day, recounting  
13 the specific contributions that Catholic organizations and the  
14 Church itself played in prosecuting the Yes On 8 campaign.

15 Q. In going back to the top of the document. Under the  
16 "from" line there's a "subject" line. Could you read that for  
17 me.

18 A. It says, "Go to confession."

19 Q. And what is the date of the e-mail?

20 A. November 4, 2008.

21 Q. And is there a time stamp on it?

22 A. 9:28, in the morning.

23 **MR. BOUTROUS:** Your Honor, I move admission of  
24 Plaintiffs' Exhibit 2389. The parties did -- we did discuss  
25 this document.

1           There is still a dispute about whether the whole  
2 thing can come in. I propose that it be entered into evidence  
3 subject to redaction, and that I would only display the  
4 portions of the document that the parties agreed to be  
5 displayed, published to the public and put on the screen for  
6 now. And then we could resolve the -- any other -- I still  
7 believe this document is not covered by any privilege. But to  
8 move things along, would suggest we proceed that way.

9           **THE COURT:** Mr. Pugno.

10          **MR. PUGNO:** Thank you, Your Honor. Is this on?

11          **THE COURT:** I believe it is.

12          **MR. PUGNO:** I'm sorry, Your Honor.

13           Thank you. And thank you for pronouncing my name  
14 correctly. Everyone gets it wrong.

15          **THE COURT:** Oh, well.

16          **MR. PUGNO:** We discussed this at length during the  
17 break, and we're doing everything we can to accommodate the  
18 plaintiffs on this.

19           And we identified some portions of this that we were  
20 comfortable having read to the witness. But the -- but the --  
21 this is, as has been described by the witness, a communication  
22 between the executive director of the Catholic Conference of  
23 Bishops and the bishops who make up the Catholic Conference of  
24 Bishops. And, you know -- and the subject matter has to do  
25 with the Church's involvement, as I understand it from the

1 witness.

2           We don't agree to lift, voluntarily, the attorneys'  
3 eyes only privilege for this entire document. But we did,  
4 earlier, work out some highlighted portions that could be read  
5 to the witness without our objections. So that's where we are  
6 at this moment.

7           **THE COURT:** Well, then, do I understand it's mutually  
8 agreeable to the parties that we proceed with respect to the  
9 portions that you've highlighted and as to which there is no  
10 objection to being read to the witness?

11           **MR. BOUTROUS:** Yes.

12           **MR. PUGNO:** That is correct. But as to the admission  
13 of the entire document into evidence, we haven't gotten there  
14 yet.

15           **THE COURT:** All right. Well, we'll deal with that  
16 when and if we reach that point.

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

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

19           At this time, I would like to publish the newly  
20 redacted first page of Exhibit -- Plaintiffs' Exhibit 2389.

21           And then I'll ask the witness to read from the  
22 sections that have not been redacted, those paragraphs. And  
23 then I'll ask the witness a couple of questions about that.

24           Maybe we can enlarge it, so it's easier to read.

25           (Document displayed.)

1           **MR. BOUTROUS:** Thank you.

2           **THE WITNESS:** Would you like me to read it in its  
3 entirety?

4 **BY MR. BOUTROUS:**

5 **Q.** Yes, if you could, Professor. Thank you.

6 **A.** (As read)

7           "Today is election day. I am sure you share  
8 my relief that it is finally here. We have  
9 all been subjected to the longest campaign  
10 for President in American history. And in  
11 our own state, the intensity of the campaign  
12 around Proposition 8 has been incredible.  
13 The direct involvement of the CCC has been  
14 unusual - although not unprecedented."

15           **MR. PUGNO:** Your Honor, I'm sorry to interrupt. But  
16 what's been posted on the screen is more than what has been  
17 highlighted and agreed to by the parties.

18           **MR. BOUTROUS:** Oh, I'm sorry. Were you -- do you  
19 want additional sentences? I had this sort of blocked. I  
20 thought --

21           **MR. PUGNO:** That's fine.

22           **MR. BOUTROUS:** -- we had agreed to those two  
23 paragraphs.

24           **MR. PUGNO:** What's highlighted.

25           **MR. BOUTROUS:** Okay. Well, maybe I can ask our team



1 to redact, in that second paragraph, everything -- not that I  
2 like asking to have things redacted. Let me just make that  
3 clear. But to move this along, the sentences that -- up until  
4 the sentence that begins, "The Catholic conference has  
5 played..." So, basically, the first two sentences of the  
6 second paragraph. If we can redact those as well.

7 My apologies for the delay, Your Honor.

8 Yes. There we go. Thank you.

9 (Document displayed.)

10 **BY MR. BOUTROUS:**

11 **Q.** Professor Segura, could you pick up reading with the now  
12 slimmed-down version -- slimmed-down version of this exhibit.

13 **A.** (As read)

14 "The Catholic Conference has played a  
15 substantial role in inviting Catholic  
16 faithful to put their faith in action by  
17 volunteering and donating. Led by the  
18 Knights of Columbus national donation of  
19 \$1.15 million, other million-dollar donors,  
20 and countless major donors, and with a  
21 significant percentage of the 90,000 online  
22 donors, the Catholic community has stepped  
23 up. Of course, this campaign owes an  
24 enormous debt to the LDS Church. I will  
25 comment specifically at a later time, under

1 separate cover, about their financial,  
2 organizational and management contribution to  
3 the success of the effort. The  
4 ProtectMarriage.com campaign has surpassed  
5 \$37 million in donations."

6 **Q.** Thank you, Professor Segura.

7 What about this document, and in particular those  
8 passages that you read, bears on your analysis of the array of  
9 political opposition that gay men and lesbians face in the  
10 United States in general, and in particular in California as it  
11 relates to Proposition 8.

12 **A.** Well, certainly, it suggests that the fairly substantial  
13 monetary resources of the Roman Catholic Church and its  
14 faithful were mobilized in substantial portion on behalf of the  
15 Yes On 8 campaign.

16 It also suggests a fairly close cooperation between  
17 the Catholic Church and the LDS Church, which is certainly  
18 remarkable from a historic perspective.

19 And I was taken aback, frankly, by the phrases  
20 "financial, organizational and management contributions to the  
21 success of the effort," which suggests a very close  
22 coordination between those organizations and the campaign.

23 **Q.** In your study of American politics and political science,  
24 to your recollection, have you ever seen an example where two  
25 churches of the scope and size and power of the Catholic Church

1 and the LDS Church had banded together and arrayed themselves  
2 against a particular minority group in society?

3 **A.** I don't -- I wouldn't claim to have an exhaustive  
4 knowledge of the political action of those churches forever,  
5 but I would suggest that this is unprecedented in my  
6 experience.

7 **Q.** Let's turn to the next exhibit, Plaintiffs' Exhibit 2552.

8 **MR. BOUTROUS:** And, Your Honor, I would move -- I  
9 would move -- actually, let me can ask the witness a couple of  
10 questions first.

11 **BY MR. BOUTROUS:**

12 **Q.** Is this a document that you've seen before, sir?

13 **A.** Yes, it is.

14 **Q.** And is it a document you've reviewed this week, in  
15 preparing for your testimony, once we received this document in  
16 the production that proponents of Proposition 8 made to the  
17 plaintiffs in this case?

18 **A.** Yes, it is.

19 **MR. BOUTROUS:** Your Honor, I move admission of  
20 Plaintiffs' Exhibit 2552.

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

22 **THE COURT:** Very well. 2552 is admitted.

23 (Plaintiffs' Exhibit 2552 received in evidence.)

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

25

1 **BY MR. BOUTROUS:**

2 **Q.** Professor Segura, can you describe your understanding of  
3 this document and how it relates to your analysis of the  
4 political powerlessness of gay men and lesbians.

5 **A.** This document appears to be a personal e-mail from the  
6 chairman of the protect marriage effort. And it recounts the  
7 financing of the signature petition gathering -- signature  
8 gathering phase of the Prop 8 campaign.

9 **MR. BOUTROUS:** I would like to publish this exhibit,  
10 2552, to the screen, please.

11 (Document displayed.)

12 **BY MR. BOUTROUS:**

13 **Q.** In your understanding, is the e-mail line from -- and  
14 maybe we can highlight that -- "ronp" of CaliforniaFamily.org,  
15 who do you understand "ronp" to be?

16 **A.** Ron Prentice.

17 **Q.** And who do you understand Ron Prentice to be?

18 **A.** The chairman of ProtectMarriage.com, or the head.

19 **Q.** What about -- what was it about this document, what  
20 portion of this document did you find shed light on the  
21 opinions that you formed, that you're giving in this case?

22 **A.** On the second page, the paragraph about a third of the way  
23 down the page that begins with "the total."

24 **Q.** Could you read that for the record.

25 **A.** (As read)

1           "The total projected cost for the  
2           qualification effort has been set at  
3           1.5 million. Thus far, 1.25 million has been  
4           raised and spent. The monies have come from  
5           four primary sources thus far: The Catholic  
6           community of San Diego, due to the  
7           involvement of Auxillary Bishop Cordileone,  
8           Fieldstead & Company, who pledged 50 cents  
9           for each dollar raised in January for the  
10          effort, Focus on the Family, and small gifts  
11          from direct mail efforts by  
12          ProtectMarriage.com."

13 **Q.** Are you knowledgeable, generally, about the organization  
14 Focus on the Family?

15 **A.** I am.

16 **Q.** What is Focus on the Family?

17 **A.** It's a nationally prominent evangelical organization  
18 dedicated to supporting issue positions consistent with the  
19 evangelical community's preferences.

20 **Q.** Is it a group that has been known to be politically  
21 active?

22 **A.** Very much so.

23 **Q.** And going back to page 1 of the document, the first  
24 paragraph of the document, if we could pull that up.

25           (Document displayed.)

1           Could you -- could you read -- just read that  
2 paragraph, just into the record, so we have it.

3 **A.**    Okay.  (As read)

4           "I spoke with" -- person redacted -- "in your  
5 office, who suggested I send along some  
6 information.  I serve as the CEO of the  
7 California Family Council.  Our 501c4  
8 organization, California Renewal, is the  
9 sponsoring organization for the marriage  
10 amendment that is attempting to qualify in  
11 California.  Thus, I serve as the volunteer  
12 chairman of ProtectMarriage.com steering  
13 committee."

14 **Q.**    What is it about this document that relates to your  
15 opinions on political powerlessness of gay men and lesbians?

16 **A.**    Well, I drew from this two things.  First of all, was the  
17 very early involvement of the organized religious communities  
18 in the signature and petition gathering phase of the campaign.

19           And the second thing I drew from it was that this  
20 was, really, a national political campaign; that Focus on the  
21 Family is, of course, a national organization; and, therefore,  
22 communities, organizations, and leaders far and wide were  
23 involved in the effort.

24 **Q.**    Adding Focus on the Family and the organizations -- the  
25 other organizations mentioned in this document, to the LDS

1 Church and the Catholic Church, that was discussed in the prior  
2 document, is that a coalition you've seen before, arrayed  
3 against a particular minority group in the United States in a  
4 political battle?

5 **A.** I would say that there's probably one other issue position  
6 against which such a coalition might emerge, and that would be  
7 a Pro Choice abortion rights position.

8           Apart from that, I can't think of a minority group  
9 against whom such a coalition has been raised.

10 **Q.** Thank you.

11           I would like you to now turn to Plaintiffs' Exhibit  
12 2554. And I'm going to ask you some general questions about  
13 this document.

14           I would like you to refrain from mentioning any of  
15 the names, but -- because, as you can see by the approach of  
16 Mr. Thompson, there's an objection to admission of this  
17 document.

18           But have you seen this document before?

19 **A.** I have.

20 **Q.** Does this document shed any light on the powerful  
21 political forces arrayed against gay men and lesbians in  
22 connection with the Proposition 8 campaign?

23 **MR. PUGNO:** Your Honor, if I may object, this --

24 **THE COURT:** Let's get an answer to the question  
25 first.

1           **MR. PUGNO:** I'm sorry, Your Honor.

2           **THE WITNESS:** Yes, it sheds light.

3           **THE COURT:** All right. Mr. Pugno.

4           **MR. PUGNO:** Yes. Your Honor, this is still under  
5 attorneys' eyes only confidentiality.

6           As the Court can probably see from the body of the  
7 message, the "to" and the "cc" designations, from all  
8 appearances, this is an internal communication among leadership  
9 of a particular church.

10           I don't see anything that connects it to the Prop 8  
11 campaign, or that it was disclosed beyond the church leadership  
12 officials that are listed there.

13           So we would object to testimony about this document.

14           **THE COURT:** Mr. Boutrous.

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

16           First, without revealing anything other than the  
17 following, I think I can reveal that it references the fact  
18 that the effort being discussed in the -- in this e-mail is in  
19 concert with the leaders of many other faiths and community  
20 groups forming part of the ProtectMarriage.com Coalition.

21           This is a document that we received in production  
22 from the proponents of Proposition 8 in this case, in the wake  
23 of the order rejecting their First Amendment claims and  
24 defining the core group.

25           So I think it's not subject to a First Amendment



1 privilege. It was clearly disseminated more widely than those  
2 who saw it. And, therefore, I believe it should be admissible.

3 **MR. PUGNO:** Your Honor --

4 **THE COURT:** This Mr. Bentley is not one of the  
5 individuals that has been designated -- that have been  
6 designated as in the core group. Is that correct?

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

8 **MR. PUGNO:** Your Honor, I really must clarify, this  
9 document -- how do I say this?

10 Whether or not any of these individuals are in the  
11 core of ProtectMarriage.com is completely a different issue.

12 This is a document in the possession of one of our  
13 clients who is -- or, at the time, was a church official and  
14 had a document in his possession revealing communications with  
15 other church officials. And that's the body of this.

16 Now, it may relate to Prop 8, but there is -- I think  
17 that we are -- it would be very troublesome to say that  
18 religious organizations, churches, lose their ability to  
19 communicate within their leadership in the church because the  
20 church works with other churches and other organizations, even  
21 in a cooperative way in a campaign.

22 **THE COURT:** But, as I understand it, this is a  
23 document that was in ProtectMarriage.com's files.

24 **MR. PUGNO:** No, Your Honor. In the file of an  
25 individual who is an official proponent.

1           **THE COURT:** One of the parties?

2           **MR. PUGNO:** One of the intervenor individuals, not  
3 the campaign committee.

4           **THE COURT:** But it was in that individual's files?

5           **MR. PUGNO:** That's right.

6           **THE COURT:** That individual is not part of this  
7 religious organization, correct?

8           **MR. PUGNO:** He is, Your Honor. That individual is a  
9 member of the organization -- a member of the religious  
10 denomination, and at the time had a position of authority in  
11 that church and was -- sent this e-mail in that -- in  
12 connection with his -- in other words, Your Honor, someone can  
13 be on the executive committee and be an official proponent, and  
14 they can also be involved with their church.

15           And this is a communication about Prop 8 among church  
16 officials with one of our proponents who was also a church  
17 official.

18           In other words --

19           **THE COURT:** Well, but he's one of the proponents.  
20 He's an individual intervenor-defendant in the case.

21           The document relates to the Prop 8 campaign. If  
22 there has been a disclosure --

23           **MR. PUGNO:** It relates to the churches' support for  
24 Prop 8.

25           This is not a publication of the campaign. This is

1 not a document produced by ProtectMarriage.com. This is an  
2 internal church communication.

3 **THE COURT:** I don't understand how, if it is a  
4 document that relates to the Prop 8 campaign, in the files and  
5 possession of one of the defendant-intervenors, how it can have  
6 some kind of privilege attached to it.

7 **MR. PUGNO:** Well, there's -- there's --

8 **THE COURT:** It obviously falls outside the  
9 First Amendment privilege as defined by the Ninth Circuit.

10 **MR. PUGNO:** Absolutely agree with that, Your Honor,  
11 because that First Amendment privilege articulated by the Ninth  
12 Circuit was with regard to the campaign's internal formulation  
13 of messaging strategy.

14 We are on a completely different field here. We're  
15 dealing with the religious association of a religious  
16 denomination and their ability to communicate with one another  
17 within the walls of the church.

18 **THE COURT:** Mr. Boutrous.

19 **MR. BOUTROUS:** Your Honor, I would make a couple of  
20 points.

21 First, I don't see how Mr. Pugno and  
22 ProtectMarriage.com have standing to assert this  
23 First Amendment privilege on behalf of the people who wrote  
24 this document, number one --

25 **THE COURT:** Well, he can assert it on behalf of the

1 individual that he represents.

2           **MR. PUGNO:** Right, the individually-named defendant.

3           **MR. BOUTROUS:** Mr. Jansson.

4           **THE COURT:** Which named defendant are we talking  
5 about?

6           **MR. BOUTROUS:** Mr. Jansson.

7           **THE COURT:** Mr.?

8           **MR. BOUTROUS:** Jansson.

9           **THE COURT:** Mr. Jansson.

10          **MR. BOUTROUS:** Yes.

11          **THE COURT:** Okay.

12          **MR. BOUTROUS:** So assuming there is some level of  
13 standing, the -- I would direct the Court to the first  
14 sentence. And, again, I think I can read this without bringing  
15 down the First Amendment.

16          **MR. PUGNO:** I am going to object, Your Honor, to  
17 this -- this internal church communication being read aloud in  
18 court.

19          **MR. BOUTROUS:** Let me try it this way, Your Honor.  
20 The document, on its face, says it relates to the role in  
21 Public Affairs of the Prop 8 campaign.

22                 And then in the third -- or the fourth paragraph, it  
23 talks all about the campaign and the fact that certain  
24 officials -- who I won't name, even though I don't think that  
25 name is confidential -- who report directly to the

1 ProtectMarriage.com Coalition leaders.

2           So it seems to me this is a classic -- it's a  
3 document that's in the files of a person who sat on the  
4 executive committee of ProtectMarriage.com precisely to play  
5 this role in this broad coalition that breaches and breaks down  
6 any limits between these groups for this effort in the  
7 political sphere, and then arrays against the folks on the  
8 other side of Proposition 8.

9           So I think it -- it's hardly the kind of sensitive  
10 religious tract that might otherwise be subject to protection  
11 under the First Amendment.

12           **MR. PUGNO:** Your Honor, Mr. Jansson testified in his  
13 deposition that he, at this time, was a member of -- forgive  
14 me. I don't remember the exact name. But it was the Public  
15 Affairs something something office of the Church of Jesus  
16 Christ of Latter-day Saints.

17           That was a role that he played independent of the  
18 executive committee of ProtectMarriage.com.

19           The references in capital letters, in title caps, to  
20 "Public Affairs" are a reference to those church officials.  
21 And there's also a mention in the cc to -- to -- I won't say it  
22 aloud, but other leadership in the church.

23           So this is an internal communication of the church.  
24 It certainly refers to the larger Prop 8 effort. But unless  
25 there is a communication from Mark Jansson to another

1 organization in his capacity as an official proponent or as an  
2 executive committee member -- which this is not -- then we  
3 really are not having to be even concerned with what the core  
4 is, and so on.

5 This is an individually-asserted First Amendment  
6 protected right of Mr. Jansson to have in his possession an  
7 internal church memo that he does not have to produce in court.

8 **THE COURT:** The content of the document appears to  
9 relate to the messaging of the campaign.

10 Mr. Jansson is a party to the litigation. The issue  
11 of his role in the campaign is very much an issue in the case.  
12 He intervened to serve as a party in the case. And I think it  
13 is appropriate that the plaintiffs have sought from and  
14 obtained discovery concerning his role. And, apparently, his  
15 role relates to his religious affiliation. I'm not aware of  
16 any privilege that attaches to that, under these circumstances.  
17 And the objection will be overruled.

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

19 With that, I would like to publish the original  
20 version as redacted. Not any other version, but the original  
21 version to the screen. Thank you.

22 (Document displayed.)

23 **BY MR. BOUTROUS:**

24 **Q.** Professor Segura, I'd like you to look at the very first  
25 paragraph of this document.

1           **MR. BOUTROUS:** And enlarge that on the screen so we  
2 can take a look at it.

3           (Document displayed)

4 **BY MR. BOUTROUS:**

5 **Q.** If you could read that into the record, and then give me  
6 your views on any -- the significance, if any, of that  
7 statement to your opinions.

8 **A.** (As read)

9           "Since the first Presidency letter was read  
10 in every ward throughout California last  
11 month, I have been frequently asked what our  
12 role in Public Affairs will be in the Prop 8  
13 campaign."

14 **Q.** And in the third paragraph, that begins "as you know," if  
15 you could read that. And then maybe you can talk about the  
16 significance, more generally, with respect to the entire  
17 document, rather than going through it one by one, paragraph by  
18 paragraph.

19 **A.** Sure. (As read)

20           "As you know from the first Presidency  
21 letter, this campaign is entirely under  
22 priesthood direction - in concert with  
23 leaders of many other faiths and community  
24 groups forming part of the  
25 ProtectMarriage.com Coalition. I believe" --

1 name redacted -- "will be the LDS chair for  
2 all of California, with the help in Southern  
3 California from" --

4 **Q.** Why don't you just skip --

5 **A.** Skip that.

6 **Q.** -- that for now.

7 **A.** I will.

8 "All of us working in public affairs will  
9 simply stand by and prepare to be anxiously  
10 engaged, like all citizens and lay members,  
11 when that time comes."

12 **Q.** And then if we jump down to the next -- the paragraph that  
13 begins, "What is the necessary step in this campaign?" Could  
14 you read -- read that into the record, and then tell me your  
15 views about this document.

16 **A.** (As read)

17 "What is the next step in this campaign? I  
18 understand that all grass roots organizing  
19 efforts in OC will be led by ..."  
20 I believe his name is not protected?

21 **Q.** I believe that's correct.

22 **A.** (As read)

23 "... Gary Lawrence, who will report directly  
24 to the ProtectMarriage.com Coalition  
25 leaders."



1           **MR. PUGNO:** Your Honor, somewhat after the fact, I  
2 need to object that Mr. Lawrence's role in another capacity was  
3 not protected, and was disclosed, and has been open -- open and  
4 public in this whole trial.

5           His capacity here has been, as far as I know,  
6 protected, not disclosed.

7           **THE COURT:** Well, recall that the Ninth Circuit --

8           **MR. PUGNO:** It would have been nice to have a chance  
9 to redact this, maybe, with regard --

10          **THE COURT:** Well, the Ninth Circuit protected  
11 communications, internal communications involving the core  
12 group.

13          This would appear to be a communication that mentions  
14 Mr. Lawrence, but it's outside a communication among the core  
15 group. So the mere fact that an individual is in the core  
16 group does not mean that his or her name cannot come out in  
17 some other way in the course of discovery.

18          **MR. PUGNO:** I don't disagree with that at all, Your  
19 Honor. Just that individuals have privacy rights to be able to  
20 be involved in a campaign and to not have their name become  
21 part of the public record, against their will, in connection  
22 with things that they did not do in a public way.

23          **THE COURT:** Well, but Mr. Lawrence has been afforded  
24 core group protection for his internal communications. This is  
25 not one of those communications.

1           **MR. PUGNO:** He was a polling and researcher for the  
2 campaign, polling and so on. Actually, the protection was  
3 Lawrence Research, the company. And Judge Spero's order of  
4 January 8 says that the protection is given to Lawrence  
5 Research, the company through which the campaign did polling.

6           This is attempting to reveal, without an opportunity  
7 to redact, a completely different role that he had, that was  
8 not a public role.

9           **THE COURT:** Mr. Boutrous.

10          **MR. BOUTROUS:** Your Honor, Mr. Lawrence's name was  
11 public. He was publicly associated with the campaign.

12          And this paragraph talks about the fact that the  
13 efforts in OC -- which I guess is Orange County -- will be led  
14 by Gary Lawrence, who will report directly to  
15 ProtectMarriage.com Coalition leaders.

16          So it's talking about his role in a campaign, a  
17 public campaign to pass a law in California. And the fact that  
18 religious organizations participate in the political debate is  
19 a perfectly fine thing.

20          But once they do, and they're public, there's no  
21 support for the notion that we suddenly keep people's names  
22 secret even though they are associated publicly.

23          And from a First Amendment perspective, probably one  
24 of the most basic principles is that once something is public,  
25 courts and other governmental bodies aren't allowed to keep it

1 secret without a compelling reason.

2           So Mr. Lawrence's name is public. He has been  
3 well-known to be associated with the campaign. I can't see a  
4 First Amendment interest in not noting that he was playing a  
5 principal role and liaison role here, with this broad-based  
6 group of coalition leaders.

7           **THE COURT:** Last word, Mr. Pugno.

8           **MR. PUGNO:** Your Honor, I realize the nuance that his  
9 company did research and polling. He had a completely  
10 different hat that he wore in this campaign, that was not a  
11 public hat.

12           And if we're going to start revealing those, I don't  
13 see a distinction between this and production of a list of  
14 every volunteer who helped in the campaign.

15           **THE COURT:** Well, this individual appears not to fit  
16 the category of the famous Mrs. McIntyre, who was the subject  
17 of a good deal of litigation in the Supreme Court.

18           It's important to bear in mind, this is a public  
19 campaign. This is a political campaign. It was out in the  
20 open. And the people who advocate on either side, as a result  
21 of their advocacy, and particularly their participation in the  
22 litigation that follows, inevitably subject themselves to  
23 disclosures of the kind that are contained in this document.

24           So I don't see, frankly, Mr. Pugno, that there is a  
25 privilege or protection that applies to this document, or that

1 applies to Mr. Lawrence's role in this communication. An  
2 internal communication with other members of the core group is  
3 a different matter, entirely.

4 Very well. Proceed, Mr. Boutrous.

5 **MR. BOUTROUS:** Thank you, Your Honor.

6 **BY MR. BOUTROUS:**

7 **Q.** Professor Segura, if you could finish reading that  
8 paragraph, and then we can -- we can move on to your opinions  
9 regarding this document as it relates to political power.

10 **A.** Okay. (As read)

11 "He has also been hired by the coalition to  
12 do polling work for Prop 8. The main  
13 California grass roots leaders are in the  
14 process of being called as, quote, area  
15 directors, end quote, with the responsibility  
16 for areas that generally correspond to each  
17 of the 17 LDS coordinating councils for the  
18 LDS mission boundaries. Thereafter,  
19 priesthood leaders will call local prop  
20 coordinators over each stake and leaders by  
21 zip code within each ward - potentially  
22 working not only with LDS, but also LDS  
23 volunteers."

24 **Q.** In your opinion, Professor Segura, what does this document  
25 relate to, in analyzing the degree of political power of gay

1 and lesbians, and particularly with respect to the Prop 8  
2 campaign?

3 **A.** There are at least two things worthy of note.

4 The first is that there is a very close coordination  
5 between people involved in the church and the campaign, from an  
6 organizational standpoint.

7 Phrases like, you know, "This entire campaign is  
8 entirely under priesthood direction" are -- are notable.

9 The other thing that I take notice of is the term  
10 "called." So it is customary, in the practice of the LDS  
11 Church, for volunteers to be solicited through encouragement.

12 So it appears that there was an LDS volunteer in  
13 every zip code, to coordinate those activities. Which is, once  
14 again, a very enviable political organization. I think any  
15 political candidate would be pleased to have such a thing.

16 **Q.** Thank you.

17 **MR. BOUTROUS:** Your Honor, I wanted to make sure that  
18 with all the back and forth, that Plaintiffs' Exhibit 2554 had  
19 been admitted into evidence.

20 **THE COURT:** It has.

21 (Plaintiffs' Exhibit 2554 received in evidence.)

22 **MR. BOUTROUS:** Thank you, Your Honor.

23 **BY MR. BOUTROUS:**

24 **Q.** Professor Segura, let's move on to Plaintiffs' Exhibit  
25 2555.

1           Is this a document that you have reviewed over the  
2 past week, in connection with your work on this case and your  
3 analysis of the issues in the case?

4 **A.**    It is.

5           **MR. PUGNO:** Your Honor, I apologize, but I must lodge  
6 another objection. And perhaps I could just lodge what will be  
7 a standing objection.

8           These are the minutes of a church meeting. I cannot  
9 imagine how this is not protected from disclosure in a federal  
10 court trial, especially -- Your Honor, this has got to be  
11 protected information.

12          **THE COURT:** Well, I think we need a foundation for  
13 this document.

14          **MR. BOUTROUS:** I will -- I will establish one, Your  
15 Honor. Thank you.

16          **THE COURT:** All right.

17 **BY MR. BOUTROUS:**

18 **Q.**    Professor Segura, did you -- you reviewed this document.  
19 And did it shed any light on your analysis of political power?

20          **THE COURT:** Well, is this witness able to lay a  
21 foundation for the document?

22          **MR. BOUTROUS:** This witness can testify that this was  
23 a document we represented to him was produced by proponents in  
24 this case pursuant to the production order, and that he  
25 reviewed it, and that it's relevant to his opinion.

1           **THE COURT:** And your representation is, from what  
2 source did the document come?

3           **MR. BOUTROUS:** This document was produced by the  
4 defendant-intervenors in response to our request for  
5 production, after they began to comply with Judge Spero's order  
6 rejecting their First Amendment claim.

7           So I think it falls into the same category as the  
8 last document, 2554.

9           **THE COURT:** It does appear to be the minutes of a  
10 Stake meeting.

11           I gather, Mr. Pugno, this is a document that came  
12 from the files of ProtectMarriage.com, or one of the individual  
13 intervenor-defendants?

14           **MR. PUGNO:** I can say, Your Honor, it was one or the  
15 other. I'm not certain which. But I suspect it was --

16           **THE COURT:** Well, if it is, in fact, what it appears  
17 to be, and that is minutes of a Stake meeting, but it was,  
18 nonetheless, in the files of an organization other than a  
19 religious organization, I can't see how it would enjoy any  
20 religious institution privilege, if there is one.

21           **MR. PUGNO:** Well, Your Honor, just to clarify, I'm  
22 almost certain this came from Mr. Jansson's file.

23           As far as the named defendant-intervenors, he's the  
24 only one that I'm aware of that is a member of the LDS church.

25           These are the minutes of a meeting of church members

1 and officials. And the fact that it was in Mr. Jansson's  
2 possession, I cannot imagine, abrogates the privilege to be  
3 able to communicate with -- with -- there really is no  
4 First Amendment protection here, Your Honor, if having a copy  
5 of your correspondence with other members of your church in  
6 your possession becomes -- abrogates -- abrogates your  
7 First Amendment rights.

8           **THE COURT:** Well, it's rather lengthy attorney-client  
9 privilege. Confidentiality must be maintained. And it appears  
10 that that was not done in connection with this document.

11           Mr. Jansson may have had multiple roles, but his role  
12 here is his role in the campaign. And this document apparently  
13 relates to that activity.

14           **MR. PUGNO:** Your Honor, there's no evidence here that  
15 this was sent to anyone, by Mr. Jansson. This is in  
16 Mr. Jansson's shoebox under his bed. This is the minutes of a  
17 meeting that I don't -- I don't even -- I haven't looked to see  
18 whether he was in attendance at the meeting. But this -- I  
19 know that he was a -- a Public Affairs official at the time of  
20 the campaign.

21           But my point is, is that Mr. Jansson did not send  
22 this to anybody. The only reason this is here is because a  
23 federal court order told him to take it out of his shoebox and  
24 bring it in to court.

25           **THE COURT:** Shoebox?



1 (Laughter)

2 **MR. PUGNO:** It illustrates the point, Your Honor. He  
3 did not send this to his neighbors. These are his private  
4 records of his private political religious associations. How  
5 in the world can that be compelled to be brought into court and  
6 laid bare in the public record?

7 **THE COURT:** But this appears to relate to the Prop 8  
8 campaign.

9 **MR. PUGNO:** It clearly relates to this religious  
10 denomination's Public Affairs meeting, part of which included a  
11 discussion of a ballot measure and the efforts of their  
12 members, in which anyone on either side of the issue has a  
13 fundamental right to associate with others, including in their  
14 religious organizations --

15 **THE COURT:** Of course. Of course, no one is  
16 questioning the fundamental right of association. No one is  
17 questioning the right of Mr. Jansson to participate in the  
18 political campaign.

19 But that does not afford a right against the  
20 disclosure of his role, what he did.

21 **MR. PUGNO:** Well, Your Honor, then I would suggest  
22 that unless there is something in this document for which a  
23 foundation can be laid that he had anything to do with the  
24 matters discussed in here, then I have to object on a lack of  
25 foundation.

1           **MR. BOUTROUS:** I think I can lay that foundation,  
2 Your Honor.

3           **THE COURT:** I beg your pardon?

4           **MR. BOUTROUS:** I think I can lay that foundation.

5           **THE COURT:** All right.

6           **MR. BOUTROUS:** On page 10685, which would be the  
7 second page -- and this is, really, the -- the paragraph that  
8 begins "Legislative Update"?

9           **THE COURT:** Yes.

10           **MR. BOUTROUS:** That's really -- the remaining  
11 portions of this document I think we could probably redact even  
12 more, if it goes into the record.

13           But this is the key part, the part that says, "Mark  
14 Jansson reported on the California Constitutional Amendment  
15 Proposition 8."

16           And then it goes on to describe the public activities  
17 with ProtectMarriage.com, this broad-based coalition. That's,  
18 really, what I would like to direct the witness's attention to.

19           **THE COURT:** Very well. The objection will be  
20 overruled, and 2555 is admitted.

21           (Plaintiffs' Exhibit 2555 received in evidence.)

22           **MR. BOUTROUS:** Thank you, Your Honor.

23           Please publish Plaintiffs' Exhibit 2555. Focus on --  
24 if we can go right to page 10685, the paragraph that is  
25 entitled "Legislative Update."

1 (Document displayed.)

2 **MR. BOUTROUS:** And, actually, if you can put the  
3 paragraph that follows that, as well.

4 (Document displayed.)

5 **BY MR. BOUTROUS:**

6 **Q.** And while that's happening, Professor Segura, give me your  
7 impression as to what this document, this portion of the  
8 document, relating to Legislative Update, is doing in terms of  
9 this memorandum.

10 **A.** As I read it, Mr. Jansson is reiterating the strategy  
11 that's to be employed, with how church leaders and church  
12 members should present themselves with respect to the Prop 8  
13 campaign.

14 **Q.** And in what -- what is it about this document that leads  
15 you to that conclusion?

16 **A.** Particularly, the first two sentences of the second  
17 paragraph. Quote:

18 "Brother Jansson emphasized that we are not  
19 to take the lead on this proposition but to  
20 join in coalition with ProtectMarriage.com.  
21 Salt Lake City conducted a teleconference  
22 with 159 of 161 Stake presidents in the State  
23 of California, and told the presidents LDS  
24 are involved in this issue but are not to  
25 take the lead; teach youth and young adults

1           the doctrine of marriage by using the" -- I  
2           assume that's "letter read in sacrament  
3           meetings, and LDS are encouraged to  
4           contribute the fund-raising \$30 suggested  
5           donation. Brother Jansson announced that  
6           5 million is the projected goal in addition  
7           to general fund-raising. Donations are best  
8           provided to ProtectMarriage.com."

9 **Q.** Then, if we could turn to the next page, 10686, which is  
10 the stamped number on the bottom of the page, the paragraph  
11 begins, "We were asked."

12 **A.** Uh-huh.

13 **Q.** I would like to focus you on the first and the last  
14 sentence of that paragraph. And then tell me your views on the  
15 connection between this document and political power.

16           (Document displayed.)

17 **A.** (As read)

18           "We were asked to wait patiently for talking  
19           points from the Coalition."

20 **Q.** And then how about the last sentence?

21 **A.** (As read)

22           "Director Holland highlighted the luxury of  
23           having Mark Jansson on key committees, and  
24           that he will receive direct communications,"  
25           I assume, "from him."

1 Q. As a political scientist, what is it about this document  
2 and these statements that is relevant to analyzing the balance  
3 of political power between gay men and lesbians and religious  
4 organizations to the extent they're involved in political  
5 activities in California?

6 A. Well, with respect to the Proposition 8 campaign, it makes  
7 it clear that there was a sort of two-way flow of information,  
8 where strategic talking points were being provided to religious  
9 leaders by the campaign. And, in turn, the religious leaders  
10 were providing volunteers to the campaign.

11 But there was this cautious strategic  
12 not-to-take-the-lead notion so as to provide a -- I don't know,  
13 plausible deniability or respectable distance between the  
14 church organization per se and the actual campaign.

15 Q. And does that have an impact on how the power of gay and  
16 lesbians is viewed by public officials and in the public, that  
17 kind of approach to political advocacy?

18 A. Well, certainly, because as we're looking at the political  
19 opportunity structure, sort of how fertile the ground is for  
20 political action, and how strong your opponents might be, we  
21 might look at the religious belief as a source of opposition to  
22 homosexuality and say some number of religious adherents went  
23 out and voted their -- their beliefs on election day. And I  
24 think that that's, in fact, kind of the end of it.

25 But, in fact, this appears to suggest fairly close

1 coordination between hierarchy and officials within church  
2 organizations -- as in some of the past documents have  
3 illustrated -- and the leaders of the ballot initiative.

4 **Q.** Have you ever, in your studies, in your review of the  
5 literature, and your analysis of political activity in the  
6 United States, ever seen this kind of structure constructed and  
7 deployed in an effort to eliminate a fundamental state  
8 constitutional right of a community group?

9 **A.** This is new in my experience.

10 **Q.** Let's -- let's jump ahead to Plaintiffs' Exhibit 2557.

11 **A.** Okay.

12 **MR. PUGNO:** Your Honor, I need to lodge an objection  
13 to the use of this document. Again, it is under attorneys'  
14 eyes only confidential privilege.

15 This is a post-election document. And it refers to  
16 activities and financial activities post-election.

17 And so the -- the relevance is a problem, and it --  
18 to the extent this reveals confidential inner-workings of  
19 relationships between organization that supported Prop 8, this  
20 is highly, highly revealing and -- and confidential, and we  
21 object.

22 **THE COURT:** Well, not to make light of that, usually  
23 why people want to introduce documents is because they are  
24 revealing.

25 (Laughter)

1           But it does appear that this is a communication  
2 amongst individuals who are part of the core group. Is that  
3 not correct, Mr. Boutrous?

4           **MR. BOUTROUS:** It's a communication from someone  
5 outside the core group, to people who are in the core group.  
6 Which --

7           **THE COURT:** Oh, I see.

8           **MR. BOUTROUS:** Yes.

9           **THE COURT:** I see.

10          **MR. BOUTROUS:** The "from" line.

11          **THE COURT:** The "from" line.

12          **MR. BOUTROUS:** And, Your Honor, the foundation --  
13 there is no question this is an authentic document. It was  
14 sent to the -- you know, the entire -- basically, the entire  
15 executive committee, Mr. Dolejsi, Mr. Pugno himself,  
16 Mr. Jansson, Mr. Schubert, who is the political consultant,  
17 Jeff Flint, another political consultant. And it -- it -- and  
18 they are all copied on it.

19                 And the reason that it's relevant, without disclosing  
20 the full contents, is that it really shows the degree of  
21 connection between ProtectMarriage.com and the organization  
22 that sent this document, in terms of the funding.

23                 And the ProtectMarriage.com in this court before Your  
24 Honor, and in the depositions, and in other context, have taken  
25 the position that these other organizations were not really

1 that connected to ProtectMarriage.com and the official  
2 campaign.

3           This document goes directly to that. And, as  
4 relevant to Professor Segura's testimony, demonstrates this  
5 significant, broad coalition that was connected by not only the  
6 same views about Proposition 8, but by an incredible  
7 fund-raising mechanism and relationships.

8           So I think it's directly relevant. It was produced  
9 by proponents of Proposition 8. It includes people outside the  
10 core group. So I think it should -- it should be admitted.

11           **MR. PUGNO:** Your Honor, maybe we can confirm the  
12 sender. If I could see an unredacted copy of this.

13           **MR. BOUTROUS:** I can show you that right now. Your  
14 Honor, I could --

15           **THE COURT:** Sure.

16           **MR. PUGNO:** Your Honor, the sender is a person  
17 identified in Judge Spero's order of January 8 as a member of  
18 the core group. Otherwise, we'll just state our continuing  
19 objection.

20           **THE COURT:** You say he was identified as part of the  
21 core group, the sender?

22           **MR. PUGNO:** Well, he was under seal. And he was  
23 identified by the -- by Judge Spero, by a reference to  
24 paragraph and line number, as a member of the core group. Not  
25 by his -- his name doesn't appear in the order. It refers to a



1 sealed declaration.

2 **THE COURT:** You've lost me.

3 **MR. PUGNO:** There are six members of the --

4 **THE COURT:** Did Spero include this individual as a  
5 member of the core group?

6 **MR. PUGNO:** Yes, Your Honor.

7 **MR. BOUTROUS:** That one, Your Honor, I don't -- there  
8 is, I think, one -- maybe a core group member or two that I  
9 don't even know about. But I would suggest there --

10 **THE COURT:** Is this John Doe?

11 **MR. PUGNO:** No, it's not, Your Honor.

12 Well, this morning's John Doe?

13 (Laughter)

14 **THE COURT:** John Doe 1. John Doe 2.

15 **MR. PUGNO:** I believe, Your Honor, that there were as  
16 many as six individuals --

17 **THE COURT:** How many?

18 **MR. PUGNO:** As many as six individuals that were  
19 identified to Judge Spero, by John Doe 1, John Doe 2, or  
20 something in that nature, under a sealed declaration.

21 And the order which lists the members of the core  
22 group includes those six individuals. And that is the  
23 individual who sent this communication.

24 **THE COURT:** My inclination is to do this. I'm not  
25 sure I follow the John Doe business. But accepting Counsel's

1 representation that the sender is a member of the core group,  
2 the document is a post-election document. The document is  
3 being offered to establish a connection between the religious  
4 organization and the campaign; that being a subject that I  
5 think, Mr. Boutrous, you have pursued and have introduced  
6 significant evidence on.

7           So I will sustain an objection, basically, on  
8 cumulative grounds.

9           **MR. PUGNO:** Thank you, Your Honor.

10           **MR. BOUTROUS:** Thank you, Your Honor.

11           And I just have a couple more documents here, Your  
12 Honor, that I think the next document, Plaintiffs' Exhibit  
13 2561, this is one to which there is no objection, I'm pleased  
14 to announce.

15 **BY MR. BOUTROUS:**

16 **Q.** Professor Segura, is this a document that you have  
17 reviewed?

18 **A.** It is.

19 **Q.** And did -- did it -- did you consider it in forming your  
20 opinions, the opinions that you're giving here today?

21 **A.** I did.

22           **MR. BOUTROUS:** Your Honor, I move admission of  
23 Plaintiffs' Exhibit 2561.

24           **MR. THOMPSON:** No objection, Your Honor.

25           **THE COURT:** Very well. Music to my ears,

1 Mr. Thompson.

2 (Laughter)

3 (Plaintiffs' Exhibit 2561 received in evidence.)

4 **MR. BOUTROUS:** That was refreshing.

5 If we could publish Plaintiffs' 561 please.

6 (Document displayed.)

7 **BY MR. BOUTROUS:**

8 **Q.** Professor Segura, briefly, what is it about this document  
9 that reflects on political power, in your view?

10 **A.** Going to the heart of the matter, the last sentence of the  
11 first paragraph reads, quote:

12 "You may know that the Mormons have been out  
13 walking neighborhoods the past two Saturdays,  
14 with about 20,000 total volunteers."

15 **Q.** And why is that important in evaluating the political  
16 power in this context?

17 **A.** Again, I -- I would suggest that any political consultant  
18 would be thrilled to have 20,000 precinct walkers on any given  
19 Saturday.

20 So I think it speaks to the -- the breadth and size  
21 of the opposition to gay and lesbian interests.

22 **Q.** Please turn to Plaintiffs' Exhibit 2562.

23 Is Plaintiffs' Exhibit 2562 a document you reviewed  
24 over the last week, in connection with your testimony?

25 **A.** It is.

1           **MR. BOUTROUS:** Your Honor, I move admission of this  
2 document, Plaintiffs' Exhibit 2562. It's another document that  
3 was produced by the proponents over the last week.

4           **MR. THOMPSON:** No objection beyond our standing  
5 objections, Your Honor.

6           **THE COURT:** Thank you, Mr. Thompson. Very well.

7           (Plaintiffs' Exhibit 2562 received in evidence.)

8           **MR. BOUTROUS:** Please publish this exhibit.

9           (Document displayed.)

10 **BY MR. BOUTROUS:**

11 **Q.** And I would like to direct, the witness just to expedite  
12 things, to the second page. Actually, let me ask, go to the  
13 first page.

14           What is this document, Professor, in your  
15 understanding, if you could describe it?

16 **A.** Uhm, it appears to be an e-mail from the chair of  
17 ProtectMarriage.com, to others, dealing with some issue  
18 regarding how designated gifts take place to the campaign.

19 **Q.** Then, let's go to the next page. And are there -- is  
20 there anything on this page that caught your eye as you  
21 evaluated the issue of political power?

22 **A.** There are three things. The first would be everything  
23 under the numeral 1.

24 **Q.** What is it about that portion of the document that's  
25 relevant to what you're talking about today?

1 **A.** Numeral 1 recounts the early organizational efforts,  
2 largely among evangelicals to get church leadership involved in  
3 the campaign, and reports that in these very, very large  
4 teleconferences when sort of message -- the message that the  
5 campaign wanted to send through the pulpit was -- was  
6 discussed, there were 1700 participants in June, and 3,000  
7 participants in July of 2008.

8           And the third bullet point suggests that their goal  
9 was to have as many as 5,000 California pastors participate in  
10 one of these calls.

11 **Q.** Thank you. And, finally, Plaintiffs' Exhibit 2598.  
12 Please turn to that exhibit.

13           **MR. BOUTROUS:** And, Your Honor, in conversations with  
14 Mr. Pugno, there are a couple of names in this that I'm happy  
15 to redact, that we missed. I will refrain from publishing  
16 them. But, other than that, I don't believe there's an  
17 objection to this document, and would move its admission.

18           It's another one, a document produced by the  
19 proponents.

20           **MR. THOMPSON:** Subject to the redaction, no  
21 objection, Your Honor.

22           **THE COURT:** Very well. 2598 is admitted.

23           Yes, go ahead.

24           (Plaintiffs' Exhibit 2598 received in evidence.)

25           **MR. BOUTROUS:** Thank you, Your Honor.

1 **BY MR. BOUTROUS:**

2 **Q.** Professor Segura, since there's this redaction issue, I'm  
3 not going to put this up on the screen.

4 What is this document, and what is it about it that  
5 sheds light, in your view, on the political power issue?

6 **A.** It appears to be a fund-raising letter. And it's to  
7 someone who has given generously to the Family Research Council  
8 in the past.

9 And the reason I found it interesting was it -- it  
10 suggests a -- a coordination of potential donor bases, a sort  
11 of sharing of sort of people with capacity, as endowment folks  
12 like to say, who -- who are potentially able to give.

13 **Q.** In that regard, could you turn to the very last page,  
14 which is stamped 009699.

15 **A.** Uh-huh.

16 **Q.** At the top of the page, the sentence that begins, "We have  
17 the."

18 **A.** Yes.

19 **Q.** Could you read that, and then give me your impressions on  
20 that, in terms of political power.

21 **A.** (As read)

22 "We have the political and financial support  
23 of groups such as Focus on the Family, Family  
24 Research Council, American Family  
25 Association, The Arlington Group, and many

1           others."

2 **Q.**   And are those significant groups, in terms of political  
3 power in the United States, when banded together?

4 **A.**   Separately and together, each of them are a fairly  
5 powerful interest group representing the evangelical movement  
6 in national politics.

7 **Q.**   Based on the factors that you've described today, as well  
8 as the manifestations that you described earlier this morning,  
9 relating to political powerlessness, what is your opinion  
10 regarding the political powerlessness of gay men and lesbians  
11 in the United States and in California?

12 **A.**   My opinion is that when we take together the moments of  
13 legislative victory, the moments of legislative defeat, the  
14 presence of ballot initiatives, the absence of statutory or  
15 constitutional protection, the presence of statutory or  
16 constitutional disadvantage, and a host of circumstances,  
17 including small numbers, public hostility, hostility of elected  
18 officials, and a clearly well-integrated, nationally prominent,  
19 organized opposition, I conclude that gays and lesbians lack  
20 the sufficient power necessary to protect themselves in the  
21 political system.

22 **Q.**   Now, I have two principal lines of questioning for you, as  
23 we finish things off here.

24           The first is, I would like you to explain whether you  
25 conducted any comparison with the political power of gay men

1 and lesbians with other -- other groups in society, including  
2 women, African Americans.

3 **A.** I did.

4 **Q.** What were your conclusions regarding the comparison, in  
5 terms of the relative political power between gay men and  
6 lesbians, on the one hand, and women in the 1970s, for example?

7 **A.** So I -- I'll begin with the conclusion. I concluded that,  
8 relative to the position of women in the early 1970s, gay men  
9 and lesbians are more disadvantaged today than women were in  
10 the 1970s.

11 For starters, women constituted then and constitute  
12 today a majority of the population. And were they so  
13 motivated, they could determine most if not all political  
14 outcomes.

15 Second, while there were certainly sexism -- and I  
16 wouldn't want to, you know, understate the importance of that  
17 historically -- being a woman is not inherently controversial.  
18 Families don't hate their daughters. In fact, women are quite  
19 beloved by many, many people.

20 Third, there were women in public office.

21 (Laughter)

22 Some of whom are men, some of whom are women.

23 (Laughter)

24 There were women in public office.

25 But, perhaps most importantly, there was already



1 statutory protection. The 1963 Equal Pay Act, certain  
2 provisions of the 1964 Civil Rights Act, clearly protected  
3 women at the federal level.

4 So, in addition to having more political power, more  
5 votes, less or no hostility, there is also the matter that they  
6 enjoyed statutory protection.

7 **Q.** What were your conclusions regarding the relative  
8 political power between gay men and lesbians on the one hand,  
9 and African Americans on the other hand, before the Civil  
10 Rights Act of 1964?

11 **A.** This is a -- this is a comparison which is a little bit  
12 more complex to explain, so I would want to try to separate out  
13 the political circumstances on the one hand from the social and  
14 economic circumstances on the other.

15 Let me begin by saying that being an African American  
16 prior to the enactment of civil rights legislation was a very  
17 difficult thing to do in this country. And the quality of life  
18 and the day-to-day experiences of African Americans,  
19 particularly in the south, is something that we should take  
20 quite seriously as historically quite damaging.

21 That notwithstanding, I would turn my focus to the  
22 political circumstances, which is what I was asked to evaluate.

23 At the time that suspect classification was extended  
24 to cover racial and ethnic minorities, there were three  
25 amendments to the United States Constitution that formally

1 established civil equality for racial and ethnic minorities.

2           Admittedly, these were not enforced. Admittedly,  
3 there was all sorts of statutory nonsense that took place in  
4 the wake of those amendments. But the establishment, at the  
5 Constitutional level, of equality was complete.

6           There were any number of statutes that had taken  
7 place to protect the interest of African Americans. All of the  
8 New Deal legislation, for example, was explicitly race neutral,  
9 and made a point of -- of making it clear that  
10 African Americans were entitled to the activities of the New  
11 Deal.

12           Immediately prior to the second World War,  
13 President Roosevelt issued Executive Order 8803, which  
14 prohibited the government contracting, the War Department  
15 especially, with any business that was engaged in  
16 discriminatory practices against African Americans.

17           And, of course, the government is the largest single  
18 purchaser of all products in this society, so that had a fairly  
19 substantial ripple effect in the manufacturing sector.

20           And in 1948, President Truman desegregated the  
21 United States military.

22           So, again, I think it would be fair to say that  
23 socioeconomic conditions were very bad for African Americans in  
24 the middle part of the 20th century. But there were a number  
25 of instances of statutory protection and even

1 constitutionally-established equality that African Americans  
2 enjoyed. And, at that point, it was the -- the civil rights  
3 movement was an effort to bring the social reality in  
4 countenance with the constitutional establishment.

5 By contrast, gays and lesbians are in a different  
6 position. So they're subject to statutory disadvantage.

7 Some would suggest that gays and lesbians aren't as  
8 oppressed as African Americans were, and there might be good  
9 reason to suggest that that's true for at least some gays and  
10 lesbians in more open social environments.

11 But the hour is moving in the opposite direction. So  
12 in 1990, there was not a single constitutional establishment of  
13 inequality for gays and lesbians, and today there are -- in  
14 about three-fifths of the states, there is  
15 constitutionally-established inequality.

16 So as a constitutional matter, gays and lesbians are  
17 moving in the opposite direction than African Americans were in  
18 the 1940s.

19 **Q.** How about group size, in terms of African Americans and  
20 gay men and lesbians, in terms of populating jurisdictions?

21 **A.** So, African Americans in the 1940s were approximately 10  
22 or 11 percent of the national population. Today, that number  
23 is closer to 13 percent.

24 That varies quite widely by jurisdiction. There are  
25 a number of southern states where the black population is well

1 north of 30 percent. In some cases around 40 percent.

2 Certainly, many cities in which African Americans are a  
3 majority of the population.

4 By contrast, there is no jurisdiction with which I'm  
5 familiar -- there might be, you know, a small resort town here  
6 or there, but there's no jurisdiction of any size, with which I  
7 am familiar, that has a gay majority.

8 **Q.** Bringing us forward to today, how do the manifestations of  
9 political powerlessness of African Americans compare to the  
10 manifestations of political powerlessness of gay men and  
11 lesbians?

12 **A.** So thinking a little bit more broadly about the subject  
13 matter of race and ethnicity, there are now 69 persons of color  
14 serving in the House of Representatives. There have been as  
15 many as four senators.

16 That's not the case right now. Some people left to  
17 join the administration.

18 And so, obviously, that compares favorably to the six  
19 gay and lesbians who have ever served, and the three who  
20 currently serve in the House of Representatives.

21 Minorities are elected to public office in many parts  
22 of the United States. The 1965 Voting Rights Act, and  
23 particularly the judicial implementation of Section 2, as it  
24 was amended in 1982, have provided numerous opportunities for  
25 persons of color to elect members of their community to public

1 office.

2           And, in fact, have even been interpreted as an  
3 affirmative responsibility, particularly under  
4 Section-5-covered jurisdictions, that they have to provide  
5 opportunities for racial and ethnic minorities to vote for  
6 first-choice candidates.

7 **Q.** How about the presidency?

8 **A.** Oh, yeah, there's that.

9           (Laughter)

10           We do have our first Hawaiian president. But,  
11 obviously, the election of an African American to the  
12 presidency is a big deal.

13           I would also go so far as to say, however -- and I  
14 don't want to provide the impression that I don't think  
15 African Americans and the category of race and ethnicity isn't  
16 still of significant concern in our society. And, indeed, a  
17 significant portion of my scholarship addresses that. Just  
18 that in terms of political power today, compared to gays and  
19 lesbians, they are doing quite well.

20 **Q.** Finally, I would like to display demonstrative number 8,  
21 and ask, Professor Segura, whether you have any opinions  
22 regarding the deposition and report and opinions expressed by  
23 proponents' proffered expert on political power, Dr. Miller.

24 **A.** So -- I do.

25           **MR. THOMPSON:** Your Honor, we would object that the

1 witness has not put in any report that addresses  
2 Professor Miller's analysis. And we haven't had an opportunity  
3 to depose him on it.

4 **THE COURT:** Well, I assume, Mr. Boutrous, you had the  
5 witness read Mr. Miller's deposition.

6 **MR. BOUTROUS:** He attended it, Your Honor.

7 **THE COURT:** He attended it?

8 **MR. BOUTROUS:** Yes.

9 **THE COURT:** Objection overruled.

10 **BY MR. BOUTROUS:**

11 **Q.** Professor Segura, if you could give us kind of the broad  
12 outlines of your critique of Dr. Miller's opinions and  
13 approach.

14 **A.** Sure.

15 Professor Miller approached the question of political  
16 power of gays and lesbians somewhat differently than I did.  
17 And in his deposition, a number of things became clear about  
18 both his analytical structure and the breadth of the  
19 information that he considered.

20 The first point is that Professor Miller, frankly,  
21 doesn't know anything about gay and lesbian politics.

22 During the course of his deposition, he could not  
23 identify many of the critical historical figures in the early  
24 part of the movement; was not familiar with political science  
25 work, including very prominent political science work that had

1 focused on gays and lesbians.

2           He was aware of some judicial scholarship on gays and  
3 lesbians because that is -- is his field of endeavor, but, even  
4 there, wasn't familiar with some of the key pieces on -- on how  
5 political science would address gays and lesbians.

6           It was also curious that he was unfamiliar, at all,  
7 with the political science work on prejudice; of which there is  
8 an enormous amount, and of which was well-known.

9 **Q.** How about his -- sorry.

10 **A.** Go ahead.

11 **Q.** How about his knowledge concerning the presence or absence  
12 of legal protections relating to gay men and lesbians?

13 **A.** Uhm, I think it's fair to say that Professor Miller did  
14 not look beyond the boundaries of California.

15           He focused exclusively on California statute. And  
16 when he was asked about other states, he had almost no answer  
17 for anything. And, in fact, even proceeded to suggest that he  
18 would be shocked if it were the case that a majority of the  
19 states have no legal protections for gays and lesbians. Which,  
20 of course, is the case.

21           When asked how many of the top ten states don't have  
22 any protection, he didn't know the answer.

23           With respect to the protections that have been passed  
24 in California, he actually didn't really know the legislative  
25 history of most of those, as well.

1           So it was -- it was really quite striking how little  
2 information he had on this.

3           To put it in starkest terms, in 29 states, there is  
4 no anti-discrimination protection for gays and lesbians. And  
5 Professor Miller concluded that gays and lesbians possessed  
6 political power, without being aware of that fact.

7 **Q.** Did you agree with Professor Miller's definition of  
8 political power as he applied it in reaching his opinions?

9 **A.** There were a couple of problems with Miller's definition  
10 of power. First, what there was of a definition was actually  
11 quite vague. And he was asked about it in deposition.

12           He arrived at a definition that said that a group had  
13 political power if they received a fair hearing from the  
14 lawmakers.

15           But he -- there was no investigation in his report as  
16 to whether or not gays and lesbians had in fact received a fair  
17 hearing from the lawmakers.

18           And, of course, this is an initiative process. So  
19 who are the lawmakers? The lawmakers are the proponents of the  
20 ballot initiative and the voters.

21           So in the absence of any investigation, I don't  
22 understand how, even under his definition, he could conclude  
23 that the threshold for political power had been met.

24           But in the case of the statutory enactments, where he  
25 wanted to say, well, these -- these pieces of legislation



1 constituted evidence of political power, some of those pieces  
2 of legislation were actually pursuant to court cases that --  
3 decisions that had already been handed down.

4           And the attorney deposing him actually asked him, so,  
5 are -- are favorable court decisions an element of political  
6 power? And he said yes.

7           Well, judicial intervention on -- on behalf of  
8 insular minorities cannot be considered an element of political  
9 power, in a fair sense, if the measure of political power is  
10 what we're using to decide whether or not judicial intervention  
11 is appropriate.

12 **Q.** Finally, Professor Segura, how did Dr. Miller's testimony  
13 and report square with his own writings regarding ballot  
14 initiatives?

15 **A.** Professor Miller's scholarship focuses on how the  
16 judiciary has reacted to ballot initiatives. So he spent a  
17 fair amount of time researching those.

18           In his actual published research, he has suggested,  
19 first, that ballot initiatives are very likely to result in bad  
20 law because they are not as deliberative as the legislative  
21 process, and that ballot initiatives frequently target  
22 minorities.

23           And on both of those things, I'm highly inclined to  
24 agree with him.

25           **MR. BOUTROUS:** No further questions, Your Honor.



1 Q. Okay. And do you recall that the subject of Prop 8 came  
2 up during that discussion?

3 A. It certainly did.

4 Q. And do you recall your colleague saying that you felt very  
5 strongly about Prop 8?

6 A. I don't remember exactly what he said. I don't have it  
7 committed to memory. It wouldn't surprise me.

8 Q. You do feel very strongly about Prop 8, don't you?

9 A. I believe in the equality of persons under the law. And  
10 as a consequence, the constitutional establishment of  
11 inequality is something I find deeply offensive.

12 Q. And I'd like to nail down some terms that you used during  
13 your direct.

14 When an individual answering a poll is asked about  
15 gays or lesbians, a variety of things might enter their mind;  
16 is that correct?

17 A. Presumably, yes.

18 Q. It might mean sexual conduct to some, correct?

19 A. It may.

20 Q. Or it could be some sort of behavioral trappings of what  
21 the person might stereotypically believe to be gay or lesbian,  
22 correct?

23 A. It may.

24 Q. Or it may be associated with an individual person, a  
25 member of the family or co-worker, correct?

1 **A.** That's correct.

2 **Q.** It is really hard to say what jumps into someone's mind  
3 when they hear the term "gay or lesbian," correct?

4 **A.** Hard to say in the sense that there's more than one notion  
5 that could enter their mind. We could define the universe of  
6 likely items that would be considered by a respondent, so  
7 that's not particularly hard to say.

8           But to ask what any individual is thinking of when he  
9 or she answers the question, it could be a fairly limited set  
10 of options.

11 **Q.** All right. Now let's talk about the definition of  
12 political power. The exercise of power, in your opinion, is  
13 moving someone from opposition or fence-sitting into your own  
14 column, correct?

15 **A.** Uhm, that would be part of it. Another possibility would  
16 be persuading them to stand down, to no longer oppose, even if  
17 they themselves haven't changed their opinion. Or it may be  
18 mustering the political forces necessary to circumvent them.

19 **Q.** And under your definition of power, if the group had  
20 power, it would be able to cajole or compel members of the  
21 legislature to produce an outcome that they may not have been  
22 predisposed to produce, correct?

23 **A.** That would be part of it. I would also want to be  
24 concerned about secure. So it's not just achieving an outcome  
25 but sort of securing it from likely reversal.

1 Q. And you believe that gays and lesbians have to rely almost  
2 exclusively on allies who are regularly shown to be  
3 insufficiently strong or reliable to achieve or protect their  
4 interests, correct?

5 A. I believe as a general proposition that that's true, that  
6 there are allies, even reliable allies. But that if we looked  
7 across the universe of potential allies, that the number of  
8 allies is smaller than is necessary, and that many of those  
9 allies are unreliable.

10 Q. And applying your definition of political power, you  
11 believe the NAACP had had a meaningful degree of political  
12 power even when Newt Gingrich was the Speaker of the House,  
13 correct?

14 A. I think it is the case that they had less power when Newt  
15 Gingrich was the Speaker than when the Democrats controlled the  
16 House of Representatives. But even under those circumstances,  
17 I would say that they had a fair degree of influence.

18 Q. All right.

19 MR. THOMPSON: Your Honor, we'd like to pass out some  
20 binders, if we may?

21 THE COURT: Very well.

22 MR. THOMPSON: Thank you, Your Honor.

23 THE COURT: I wondered where the binders were.

24 (Laughter)

25 MR. THOMPSON: May I approach, Your Honor?

1           **THE COURT:** You may.

2 **BY MR. THOMPSON:**

3 **Q.** Professor, I'd like to direct your attention to tab 7.  
4 And in particular -- this is the 2007 annual report of the  
5 Human Rights Campaign. It's DIX1330.

6           And the Human Rights Campaign is a leading gay rights  
7 advocacy group; is that correct?

8 **A.** That's correct.

9 **Q.** And I'd like to direct your attention to page 4 of this  
10 document. It's actually the sixth page of the exhibit. It has  
11 a little 4 in the bottom left-hand column.

12 **A.** I'm there.

13 **Q.** Okay. And directing your attention to the third  
14 paragraph, it says in the second sentence:

15           "We were named by the well-respected national  
16 journal the single most effective nonunion  
17 progressive organization working in the 2006  
18 midterm elections."

19           Using your definition of political power, do you  
20 think the Human Rights Campaign had a meaningful degree of  
21 political power in the 2006 midterm elections?

22 **A.** I do not.

23 **Q.** All right. And in the next sentence the annual report  
24 says:

25           "We played a decisive role in electing

1 fair-minded majorities to the U.S. House and  
2 Senate, and to legislatures from Oregon to  
3 New Hampshire."

4 But using your definition of political power, you  
5 don't believe the Human Rights Campaign has a meaningful degree  
6 of political power, correct?

7 **A.** I don't.

8 **Q.** And in California the incoming speaker is John Perez; is  
9 that correct?

10 **A.** That's correct.

11 **Q.** Of the Assembly?

12 **A.** Yes.

13 **THE COURT:** I think he's already taken office; hasn't  
14 he?

15 **THE WITNESS:** He may have, actually.

16 **MR. THOMPSON:** Thank you, Your Honor.

17 **BY MR. THOMPSON:**

18 **Q.** And Mr. Perez is openly gay; is that correct?

19 **A.** That's my understanding.

20 **Q.** And he was unanimously elected to the speakership of the  
21 California Assembly, is that correct, by the Democratic caucus?

22 **A.** After the alternative candidates withdrew, yes.

23 **Q.** And -- but under your definition of political power, gays  
24 and lesbians do not have a meaningful degree of political power  
25 in the California Assembly, even though the speaker is openly

1 gay, correct?

2 **A.** That's correct, because, again, outcome does not reveal  
3 process.

4 **Q.** Applying your definition of political power, Biblical  
5 literalists have more political power in the California  
6 legislature than the gay and lesbian community, correct?

7 **A.** If we looked at their representation among the elected  
8 officials, that would be my conclusion.

9 **Q.** And if we look at outcomes, would that be your conclusion,  
10 as well?

11 **A.** Again, outcomes are a particularly difficult thing to rely  
12 upon because we have to understand how the outcome came about.

13 **Q.** Well, if we look at domestic partnerships, the gay and  
14 lesbian community supported those in 1999 in California,  
15 correct?

16 **A.** That would be my assumption, yes.

17 **Q.** And the Biblical literalists opposed it, correct?

18 **A.** That's correct.

19 **Q.** And the gay and lesbian community won that fight, correct?

20 **A.** Again, process matters. But, yes, the answer to that is:  
21 That's correct.

22 **Q.** And then in 2003, there was an expansion of the domestic  
23 partnership law in California, correct?

24 **A.** That's what I understand.

25 **Q.** And the gay and lesbian community supported that



1 expansion?

2 **A.** I'm sure they did.

3 **Q.** And the Biblical literalists opposed it?

4 **A.** I would assume.

5 **Q.** And even though the gay and lesbian community won that  
6 fight, you say they have less power in the California  
7 legislature than Biblical literalists, correct?

8 **A.** I say that they have less power in the California  
9 legislature because they're less represented. Their  
10 representation is augmented by Democratic control. Should  
11 there be Republican control, they would have no power,  
12 whatsoever.

13 **Q.** If a group is successful in getting legal protections  
14 against discrimination aimed at that group, that would be a  
15 positive factor that you would weigh in assessing political  
16 power, correct?

17 **A.** It would be a positive factor with the consideration that  
18 the discrimination exists in the first place.

19 **Q.** And gays and lesbians in California have many legal  
20 protections against discrimination, correct?

21 **A.** Uhm, I'm sorry, "many"? I don't under- -- you'd have to  
22 be specific about what that term means.

23 **Q.** Well, haven't there been over 50 pieces of legislation  
24 over the last ten years, that have sought to protect the legal  
25 rights of gays and lesbians in California?

1 **A.** I don't think it would be a fair statement to say that in  
2 50 cases, the interests of gays and lesbians were codified into  
3 law.

4 I think it would be fair to say that there are  
5 anti-discrimination lines in at least 50 pieces of legislation.

6 Now, you are correct that some of those pieces of  
7 legislation did, in fact, grant protection from discrimination  
8 to gays and lesbians. And as I indicated in my direct, some of  
9 that was in response to court decisions.

10 **Q.** Can you identify any state in the union that has more  
11 legal protections for gays and lesbians than California?

12 **A.** I cannot.

13 **Q.** Using your definition of political power, can you give any  
14 examples of the Hispanic community in Congress exercising  
15 political power during the last ten years?

16 **A.** Uhm, well, I could think of the role they may have played  
17 in attempting to stop immigration legislation when the current  
18 minority was the majority.

19 They certainly played a role in rallying forces to  
20 stop the attempt to criminalize the presence in the  
21 United States of undocumented persons. That would be an  
22 example.

23 **Q.** Any other examples?

24 **A.** Uhm, I'm sure if I thought for a while, I could.

25 **Q.** Now, in New Hampshire, gays and lesbians have secured

1 through the legislative process the right to same-sex marriage,  
2 correct?

3 **A.** That's my understanding, yes.

4 **Q.** But using your definition of political power, your initial  
5 reaction would be that gays and lesbians do not have a  
6 meaningful degree of political power in New Hampshire, correct?

7 **A.** Uhm, that would be my initial reaction because I would  
8 need to understand the legislative history and the legislative  
9 circumstances surrounding the enactment of that protection. I  
10 would also want to know whether or not that protection is  
11 likely to be subject to reversal.

12 **Q.** And so do you have an opinion on whether gays and lesbians  
13 in New Hampshire have a meaningful degree of political power?

14 **A.** I don't have sufficient information in my hand to answer  
15 that.

16 **Q.** And in Vermont, gays and lesbians have secured through the  
17 legislative process the right to same-sex marriage, correct?

18 **A.** Uhm, again, I'm uncomfortable with this notion that gays  
19 and lesbians have "secured." The Vermont legislature has, in  
20 fact, passed same-sex marriage legislation. That's my  
21 understanding.

22 **Q.** At the urging of the gay and lesbian community?

23 **A.** Well, certainly not with their opposition, but they  
24 weren't in a position to compel the legislature to do so, but  
25 certainly they asked.

1 Q. But using your definition of political power, you would  
2 suggest that gays and lesbians do not have a meaningful degree  
3 of political power in Vermont, correct?

4 A. Again, it would be difficult for me to make a full-length  
5 statement about the circumstances in Vermont without knowing  
6 the legislative history and the circumstances of gays and  
7 lesbians in the various state and county governments.

8 I also want to reiterate that my understanding of  
9 political power is very nationally oriented. That is, that  
10 those gays and lesbians newly enfranchised with the right to  
11 marry in New Hampshire and Vermont don't have those marriages  
12 recognized by the federal government.

13 Nor can the domestic partners registered in  
14 California visit ill domestic partners in Nevada or Louisiana.  
15 There's no guarantee those rights are accepted.

16 So we need to think of this not solely on a  
17 jurisdiction-by-jurisdiction basis, but also across layers of  
18 government.

19 Q. Well, is a jurisdiction-by-jurisdiction basis irrelevant  
20 to your analysis?

21 A. It's not irrelevant, but we certainly would have to  
22 consider both.

23 Q. Okay. Now, gays and lesbians have the right to marry in  
24 Massachusetts, correct?

25 A. That is correct.

1 Q. And gays and lesbians were able to defeat an effort to  
2 restore the traditional definition of marriage in  
3 Massachusetts, correct?

4 A. "Defeat" is an interesting term. My understanding was  
5 that in the legislature there was some maneuvering to prevent  
6 it from coming up for a vote.

7 I'm sorry, I don't have an exhaustive command of the  
8 Massachusetts legislature.

9 Q. And at present in Massachusetts, there is no effort to  
10 repeal same-sex marriage, because any such effort would be  
11 futile, correct?

12 A. Again, I don't know if I could conclude that. I would  
13 think as long as the Democrats retained the majority in the  
14 commonwealth lower house, that it would be difficult to do  
15 that. But I -- I can't say for sure that there would be none.

16 Q. But using your definition of political power, gays and  
17 lesbians do not have a meaningful degree of political power in  
18 Massachusetts, correct?

19 A. To the extent that they, mustering their own resources,  
20 cannot defend their basic rights and that those rights do not  
21 travel with them across state lines, no, they do not.

22 Q. And would the same answer obtain for Connecticut, that  
23 even though there's same-sex marriage, under your definition,  
24 gays and lesbians do not have a meaningful degree of political  
25 power in Connecticut?

1 **A.** And Iowa.

2 (Laughter)

3 **Q.** Okay. Thank you.

4 In Washington, D.C, the D.C. City Council passed a  
5 bill that would legalize same-sex marriage in the District of  
6 Columbia, correct?

7 **A.** That's my understanding.

8 **Q.** But using your definition of political power, gays and  
9 lesbians do not have a meaningful degree of political power in  
10 Washington, D.C, correct?

11 **A.** Again, thinking of the context moving across levels of  
12 government, I would say that no gay and lesbian in the  
13 United States enjoys a meaningful degree of political power.

14 **Q.** And in Houston, where there's an openly lesbian mayor,  
15 your opinion would be that there's not a meaningful degree of  
16 political power in Houston for gays and lesbians; is that  
17 correct?

18 **A.** Nor are there even domestic partner benefits for city  
19 employees, so that is correct.

20 **Q.** Now, Mayor Sanders has testified that two out of the eight  
21 city council members in San Diego are openly gay. Are you  
22 aware of that?

23 **A.** I am.

24 **Q.** And Mayor Sanders, himself, is an ally of the LGBT  
25 community, correct?

1 **A.** I would say that he is today, yes.

2 **Q.** And using your definition of political power, gays and  
3 lesbians do not have a meaning full degree of political power  
4 in San Diego, correct?

5 **A.** That is correct, because gays and lesbians in San Diego --  
6 in two ways. Gays and lesbians in San Diego remain  
7 constitutionally established as second-class citizens.

8 And, as Mayor Sanders testified, the gay and lesbian  
9 group in San Diego is not sufficiently powerful to prompt fear  
10 or any sort of compliance from its legislators.

11 **Q.** And turning your attention to tab 15, please, in your  
12 binder.

13 **A.** Uh-huh.

14 **Q.** There is a *New York Times* --

15 **MR. THOMPSON:** Oh, and, by the way, Your Honor, I  
16 believe I neglected to request permission to move into evidence  
17 DIX1330, which is the Human Rights Campaign annual report of  
18 2007.

19 **MR. BOUTROUS:** No objection, Your Honor.

20 **THE COURT:** Very well. 1330 is admitted.

21 (Defendants' Exhibit 1330 received in evidence.)

22 **BY MR. THOMPSON:**

23 **Q.** And turning your attention to tab 13 in your binder,  
24 Professor, it's DIX2554. This is a *New York Times* article  
25 entitled "Gay Candidates Get Support That Causes May Not." And

1 it's dated December 28, 2009.

2 And in the fifth paragraph, it states:

3 "There are currently at least 445 openly gay  
4 and lesbian people holding elected office in  
5 the United States, up from 257 eight years  
6 ago."

7 And are those numbers accurate, to the best of your  
8 knowledge?

9 **A.** I have no basis on which to evaluate them. I have no  
10 reason to believe that they're inaccurate.

11 **Q.** Didn't you have numbers like that in your opening report?

12 **A.** I did, but my numbers were disaggregated by level of  
13 government.

14 **Q.** And turning to the third paragraph from the bottom, it  
15 talks about:

16 "Charles Pugh, an openly gay former  
17 broadcaster, swept to victory as city council  
18 president in Detroit in his first bid for  
19 public office."

20 Using your definition of "political power," gays and  
21 lesbians do not have a meaningful degree of political power in  
22 Detroit, even though the president of the city council is  
23 openly gay, correct?

24 **A.** That would be correct, because I would look at the  
25 preferences of the remaining members of the city council, the



1 attitudes of the State of Michigan's legislature, the absence  
2 of any form of non-discrimination legislation in Michigan, and  
3 the absence of protective legislation at the federal level.

4           So residents of the City of Detroit reside not just  
5 in Detroit, but in Wayne County, in Michigan, in the United  
6 States.

7 **Q.** Now, if we turn to the second page of this article, which  
8 is actually the third page behind the tab, we can see that in  
9 the seventh paragraph it starts, "In Detroit."

10 **A.** Yes.

11 **Q.** It says:

12           "In Detroit Mr. Pugh's sexuality never became  
13 an issue in his race for city council.

14           Quote, I thought I would be attacked during  
15 the campaign for being gay, close quote, he  
16 said in an interview. I wasn't. It was a  
17 pleasant surprise."

18           Isn't it true that in many big cities it's in  
19 increasingly irrelevant whether a candidate is gay or lesbian?

20 **A.** I think that would depend on which big city. So I  
21 would -- I would respond to this in two ways.

22           First, the candidate did expect to be attacked for  
23 his sexuality.

24           And, second, in the previous example you mentioned in  
25 the City of Houston, her sexuality was very much at issue. Her

1 opponent used it to try to diminish her support.

2           So I don't think it is the case that being gay or  
3 lesbian is a footnote of no interest to voters in many big  
4 cities. There are certainly big cities where it is less  
5 important than it might previously have been or than in other  
6 cities, but I don't think it's fair to say that it is an  
7 insignificant element of a candidate's identity today.

8           **MR. THOMPSON:** Your Honor, we would move the  
9 admission of DIX-2554.

10           **MR. BOUTROUS:** Your Honor, I'm going to object on  
11 hearsay grounds. I have no objection to it coming in for the  
12 fact of the article, but not for the truth of the matter  
13 asserted.

14           **MR. THOMPSON:** Your Honor, it relates to a  
15 legislative fact.

16           **THE COURT:** I think the witness has opened the door  
17 to this. 2554 will be admitted.

18           (Defendants' Exhibit 2554 received in evidence.)

19           **MR. THOMPSON:** Thank you, your Honor.

20 **BY MR. THOMPSON:**

21 **Q.** Turning your attention, Professor, to tab 16, this is a  
22 story in the *Atlanta Journal Constitution* dated October 10,  
23 2009. It's entitled "Gay Votes Can Make A Difference." And  
24 it's an interview with Jeff Graham, the executive director of  
25 Georgia Equality, one of the largest gay advocacy and lobbying

1 groups in the state.

2           And if you turn your attention to the fourth  
3 paragraph from the bottom, he provides the following answer to  
4 a question:

5           "I think we have certainly seen in the last  
6 20 years that I have lived here there have  
7 been a number of close elections and runoff  
8 scenarios when both the winners and the  
9 losers have conceded that strength of the  
10 LGBT vote was a deciding factor in those  
11 races. When you have a voting history that  
12 goes back 20 years or more, the political  
13 establishment begins to realize that it  
14 actually is a vote that can make a  
15 difference."

16           But using your definition of political power, gays  
17 and lesbians don't have a meaningful degree of political power  
18 in Atlanta, correct?

19 **A.** That's correct. And I would actually go on to suggest  
20 that there are a number of problems with the claims being made  
21 here.

22           The first problem is that this claim is being made by  
23 an advocate for a gay and lesbian action organization. Not  
24 surprisingly, as you can imagine yourself, advocates for  
25 organizations want to present the power of their organization

1 in the most positive light, because their job is to raise money  
2 and to mobilize forces on behalf of the group.

3           People historically don't give money to the, "Donate  
4 to us, we are very unlikely to make a difference."

5           (Laughter.)

6 **A.** So the strategy that he would use -- and, indeed, any  
7 advocate would use -- would be to overstate to the extent  
8 possible the political influence you have.

9           Now, actually, I know a little bit about Atlanta. So  
10 Atlanta, of course, was one of the locations where there were  
11 violent attacks on a gay bar by an individual who was  
12 subsequently identified as potentially involved in the Olympics  
13 bombing, you will all recall.

14           I also know that Georgia is one of the top 10 states  
15 that does not have an anti-discrimination provision in its  
16 state statute.

17           So I don't think we can look at the certainly  
18 well-intended boast of a political advocate and conclude that  
19 this is a convincing analysis of the political circumstances in  
20 the City of Atlanta's politics.

21 **Q.** Isn't it true that in the most recent runoff for mayor,  
22 both candidates were actively seeking the vote of the LGBT  
23 community?

24 **A.** That may well be the case. It still doesn't mean that the  
25 group is determinative of the outcome or that they have

1 particular important input on matters of city policy.

2 **Q.** Let's look at the sources of political power. I think you  
3 identified several.

4 One of them would be money, correct? That's a source  
5 of political power in the United States?

6 **A.** Yes.

7 **Q.** And that's one of the ways to cajole a legislator, is to  
8 make campaign contributions to him or her, correct?

9 **A.** Or threaten to make contributions to his or her potential  
10 opponent.

11 **Q.** Either way, you can get power that way?

12 **A.** Yes.

13 **Q.** And for some groups their biggest political resource is  
14 their cash, correct?

15 **A.** Yes, but I think that that varies a little bit by group.  
16 So, for example, things like trade associations. When we think  
17 of groups representing groups of corporations, they don't  
18 really have voters to mobilize. So money is their contribution  
19 to the political system.

20 In other cases votes are actually a much bigger deal.  
21 So we can think of some demographic groups who turn out to vote  
22 in large numbers, even though they don't have a particularly  
23 great amount of resources.

24 So it's an uneven balance, and it just depends on the  
25 type of group. It varies from group to group.

1 Q. And some groups have a meaningful degree of political  
2 power largely because of their financial resources, correct?

3 A. I would -- I would be willing to agree with that, yeah.

4 Q. In assessing the political power of a group, the size of  
5 the group is clearly an important factor, correct?

6 A. Clearly.

7 Q. And in terms of other factors that might be as important,  
8 one such other factor would be financial resources because they  
9 play such a large role in the political system, correct?

10 A. That's correct.

11 Q. And the LGBT community and their allies outraised the Yes  
12 On 8 groups, correct?

13 A. In nominal dollars donated to the campaign fund tracked by  
14 the FPPC, that's correct.

15 Q. They raised approximately 43 million, the No On 8 groups  
16 did, is that correct?

17 A. That's my understanding.

18 Q. And the Yes On 8 groups raised approximately 40 million,  
19 is that correct?

20 A. In nominal dollars, yes, that's my understanding.

21 Q. All right. And now let's turn to tab 18, which is  
22 DIX-1329. It's the 2008 annual report for the human rights  
23 campaign.

24 And I would like to direct your attention to page 14.

25 The page numbers appear at the bottom left-hand part of the

1 page in microscopic font?

2 **A.** Microscopic print.

3 **Q.** Tell me when you are there, sir.

4 **A.** To the extent I can see it, I am there.

5 **Q.** And turning your attention to the right-hand series of  
6 numbers under "Revenue and Support," it lists total revenue and  
7 support, \$45.97 million for the year 2008; do you see that?

8 **A.** Yes.

9 **Q.** All right. And that's a lot more than the NAACP raised in  
10 2008, isn't it?

11 **A.** I have no idea.

12 **MR. THOMPSON:** Your Honor, we would move the  
13 admission of DIX-1329.

14 **MR. BOUTROUS:** No objection, your Honor.

15 **THE COURT:** 1329 is admitted.

16 (Defendants' Exhibit 1329 received in evidence.)

17 **BY MR. THOMPSON:**

18 **Q.** Political participation in the form of resource  
19 contributions is a luxury item in economic terms, correct?

20 **A.** Yes. So if you have scarce resources and you need to  
21 allocate them across food, rent, health insurance, then  
22 political contributions for most people would rank lower on the  
23 list.

24 **Q.** Than food?

25 **A.** Than food.

1 Q. You would want to look at the disposable income of  
2 individuals in a group to know their ability to contribute  
3 financially, correct?

4 A. That would be one issue you would look at, that's correct.

5 Q. But you have not undertaken an economic analysis of what  
6 the disposable income available to gays and lesbians is in the  
7 United States, correct?

8 A. I have not.

9 Q. You do not have an opinion as to what the median income is  
10 for gay men in the United States, correct?

11 A. I do not.

12 Q. And you do not have an opinion as to what the median  
13 income is for lesbians in the United States, correct?

14 A. No.

15 Q. And you do not have an opinion on whether gays and  
16 lesbians have less disposable income than heterosexuals,  
17 correct?

18 A. I don't have an opinion on that.

19 Q. But one factor that affects the level of disposable income  
20 is the number of dependents in a household, because that --  
21 dependents absorb resources, correct?

22 A. That's true.

23 Q. And it's true that on average gay male couples are less  
24 likely to have children in their household than heterosexual  
25 couples, correct?



1 **A.** That seems likely.

2 **Q.** And, in fact, I'd like to direct your attention to tab 19,  
3 which is DIX-1162. This is a report authored by Lee Badgett  
4 and others, March, 2009.

5 And directing your attention to page six, top of the  
6 page, it states:

7 "About half, 48.7, of married couples have  
8 children under 18 years old, compared to  
9 27.3 percent of lesbian couples and  
10 11.3 percent of gay male couples."

11 And you don't have any reason to doubt those numbers,  
12 do you?

13 **A.** I don't know their source, so I can't speak to them in any  
14 way.

15 **MR. THOMPSON:** Your Honor, we would move the  
16 admission of DIX-1162.

17 **MR. BOUTROUS:** No objection, your Honor.

18 **THE COURT:** Very well. 1162 is admitted.

19 (Defendants' Exhibit 1162 received in evidence.)

20 **BY MR. THOMPSON:**

21 **Q.** But you would agree that the number of gays and lesbians  
22 who actually make contributions to political causes is quite  
23 high, correct?

24 **A.** I would have to ask, quite high with respect to what? So  
25 if you are asking as a percentage of the known population of

1 the group, while I haven't undertaken an analysis of that, my  
2 suspicion would be that that's correct. That among gays and  
3 lesbians we could observe, a higher proportion of them would  
4 give money to politics, for all the reasons we have already  
5 discussed here today, the frequency with which their identity  
6 is a source of political contestation.

7           The relative size of the contributions and the  
8 relative numbers of individuals giving contributions, I'm less  
9 confident about. Because gays are such a small portion of the  
10 population, a very small group of people has to make an awful  
11 lot of donations.

12 **Q.** Now, you would agree though that the internet has made it  
13 easier for gays and lesbians to mobilize politically, correct?

14 **A.** I believe that the internet has made it easier for  
15 everyone to mobilize politically.

16           Political scientists have seldom observed such a  
17 change in political circumstances as we have in the last 20  
18 years.

19 **Q.** But isn't it -- the internet particularly useful for  
20 groups who wish to remain invisible?

21 **A.** I would think that it certainly makes life a little bit  
22 simpler for them, that's true.

23 **Q.** Now, with the \$43 million that the No On 8 groups were  
24 able to raise, did they spend a lot of that on TV ads?

25 **A.** I actually don't know the internal workings on the           No

1 On 8 campaign. My own perusal of the television suggests that  
2 they spent a fair amount of money on television, yes.

3 **Q.** And they were able to get their message out to the voters,  
4 to get the voters' attention; is that fair to say?

5 **A.** They were able to get a message out. The reason I'm a  
6 little bit caution here is that campaign activities take place  
7 in a variety of different contexts. So some of them are an  
8 advertising. Some of them are precinct walking. Some of them  
9 are get-out-to-vote efforts immediately before and on election  
10 day. Some of them are absentee ballot efforts.

11 So when I look at the total amount of effort put  
12 forward, it's much harder to say whether or not the campaign  
13 feels it was conducted effectively or whether they would do  
14 things differently or whatever.

15 I think it is fair to say that many Californians saw  
16 a commercial on the subject of Prop 8 from the No campaign.

17 **Q.** Now, let's turn our attention to access.

18 You would agree that it's a good thing for a group in  
19 terms of its political power if it has regular access to  
20 important political figures, correct?

21 **A.** That would depend on a definition of "access," which I  
22 believe we have to be careful in defining.

23 So "access" implies the meaningful opportunity to  
24 strongly signal to a decision maker what your preferences are  
25 and to have that decision maker responded to that cue.

1           Nevertheless, certainly meeting with an elected  
2 official is better for the group than not meeting with the  
3 elected official.

4 **Q.** Access to federal officeholders is the most valuable favor  
5 that a party is able to give in exchange for large donations,  
6 correct?

7 **A.** Hmm, I'm inclined to agree with that, but I'm trying to  
8 think if there are other things within the law -- boundaries of  
9 the law that a party could agree to provide in exchange for a  
10 contribution. So, it seems reasonable.

11 **Q.** All right. And access in itself shows that in a general  
12 sense an officeholder favors someone or that someone has  
13 influence on the officeholder, correct?

14           **MR. BOUTROUS:** Objection, your Honor. Compound  
15 question.

16           **MR. THOMPSON:** All right. I'll break it apart.

17 **BY MR. THOMPSON:**

18 **Q.** Access in itself shows that in a general sense an  
19 officeholder favors someone, correct?

20 **A.** No.

21 **Q.** Or, access shows in a general sense that someone has  
22 influence on the officeholder, correct?

23 **A.** I'm going to say no again. And the reason I'm resistant  
24 to both of those things is that there's a fine tradition in  
25 both Washington and Sacramento of providing access to both

1 sides in order to accept their contributions, et cetera.

2           So it's not clear that just access alone suggests  
3 that the person favors your viewpoint.

4 **Q.** You can't identify a single issue on which the leaders of  
5 the LGBT community have been unable to get a hearing before  
6 Nancy Pelosi on, correct, during her speakership?

7 **A.** Of course, I don't know the private communications in  
8 Speaker Pelosi's office, so as a factual matter I don't know  
9 the answer to the question.

10           If you are asking me do I believe that gays and  
11 lesbians are able to meet with Speaker Pelosi, I would assume  
12 that that is so. She's a Democratic representative  
13 representing the City and County of San Francisco, so it would  
14 seem unlikely that she would refuse to meet them.

15           And she has been vocally supportive of a number of  
16 gay issues, though. She is now -- she is resisting bringing  
17 some things to a vote, but I think that that's a -- that's what  
18 I know about that.

19 **Q.** All right. Now, I would like to direct your attention to  
20 tab 20 in your binder.

21 **A.** Okay.

22 **Q.** And do you have a chart before you?

23 **A.** I do.

24 **Q.** And you spoke in terms of political power, that one thing  
25 you need to assess is the feeling that the general public has

1 towards a group, correct?

2 **A.** Correct.

3 **Q.** And you made reference to a feeling thermometer, correct?

4 **A.** That's correct.

5 **Q.** And if we look at this chart, we can see that in the sixth  
6 column it says "GL Mean Temp." And that's the temperature for  
7 the gay and lesbian community, correct?

8 **A.** That's correct.

9 **Q.** And in 1984 it stood at 30, is that right?

10 **A.** Because I can't see the wording of the questions, I don't  
11 know for sure that it's always the same question. But if you  
12 represent to me that it is, then, yes, it appears that the mean  
13 thermometer score was 30 in 1984.

14 **Q.** And today it's at 49.4, correct?

15 **A.** That's correct.

16 **Q.** And so that we see that there's been a consistent trend in  
17 terms of a more favorable, more warm feeling towards gays and  
18 lesbians in the United States over the last 25 years, correct?

19 **A.** Correct, with a footnote; and that is that there is a  
20 possibility of a secular trend in the feeling thermometers of  
21 all respondents on all groups. So I would want to net that  
22 out. Because I don't have all that data at my hands, I  
23 can't -- I can't do it out of thin air.

24           But there could be a secular trend in favor of  
25 warmth; but it is the case that those numbers have gone up,

1 yes.

2 **THE COURT:** Is that in the form of global warming?

3 (Laughter.)

4 **THE WITNESS:** Among the electorate, your Honor, yes.

5 We like everybody better now.

6 **BY MR. THOMPSON:**

7 **Q.** Now, let's talk about allies. You referenced the  
8 importance of allies during your direct testimony, correct?

9 **A.** I did.

10 **Q.** And you would agree that allies can be a source of  
11 political power, correct?

12 **A.** Umm, yes, with constraints. So not every ally is in the  
13 position to provide the assistance of the group needs at a  
14 particular time. So it's going to be particular to the area of  
15 contestation.

16 For example, a state legislative ally can't help you  
17 in Congress, as a simple example.

18 And, then, the second would be that some allies are  
19 more reliable than others, as I have indicated.

20 **Q.** And, in your opinion, an ally is a group or individual who  
21 is repeatedly embracing the gay position from the perspective  
22 of gays and lesbians, correct?

23 **A.** Umm, I would go a step further and say that an ally is an  
24 individual or group who are willing to expend political capital  
25 on behalf of that position, not merely embrace it.

1 Q. And I would like to actually -- I think this will be the  
2 only time I make you do this -- go back in your binder, for  
3 which I apologize, but back to tab 14.

4 And this is a book entitled *Gays And Lesbians In the*  
5 *Democratic Process*. And you contributed a chapter to this  
6 book, is that right?

7 A. I did.

8 Q. And we can see it on the third page, behind the tab, your  
9 chapter is called "Institutions Matter, Local Electoral Laws,  
10 Gay and Lesbian Representation and Coalition Building Across  
11 Minority Communities," correct?

12 A. That's correct.

13 Q. And I would like to direct your attention to page 236.

14 A. Okay.

15 Q. And the last paragraph on the page starts:

16 "The value of coalition building is clearly  
17 not lost on the gay and lesbian leadership,  
18 who have worked for years to build  
19 partnerships with racial and ethnic groups,  
20 friendly religious groups, such as Jews,  
21 organized labor, and other organized  
22 interests."

23 And that's a true statement, correct?

24 A. Yes.

25 Q. Okay. Now, I would like to direct your attention to tab



1 21 in your binder, which is DIX-1331 --

2 **A.** I'm sorry. Tab number again?

3 **Q.** Tab 21.

4 **A.** Thank you.

5 **Q.** It's DIX-1331, which is the Human Rights Campaign Annual  
6 Report for 2009.

7 **A.** I'm there.

8 **Q.** And it starts on the second page of this document in all  
9 caps:

10 "FINALLY, with strong allies in the White  
11 House and Capitol Hill and across the  
12 country."

13 Would you agree that the Obama administration is more  
14 favorable to the political interests of gays and lesbians than  
15 the Bush administration was?

16 **A.** So that -- that was a nice little switch.

17 So I would agree, yes, that Obama is more favorable  
18 than Bush, though I think the degree of difference is far  
19 smaller than most progressive voters anticipated.

20 I would not agree with the capitalized notion that  
21 finally there are strong allies, et cetera.

22 **Q.** Let's turn to page five of this document, and to the first  
23 bullet point which says:

24 "The President launched a national Aids  
25 strategy and set key goals to lower the

1           number of new HIV infections, increase the  
2           number of people receiving care and reduce  
3           racial disparities."

4           And that's evidence that President Obama is an ally  
5 of the LGBT community, correct?

6 **A.**    It strikes me that that is not a particularly persuasive  
7 point, because -- for a number of reasons.

8           The first is that an equally plausible explanation is  
9 that the president is an ally of public health.

10          Second, and this is going to sound strange, but  
11 actually HIV prevention, particularly in the lesser developed  
12 world, was an area of strength for President Bush. In fact,  
13 it's one of the more laudable aspects of his administration  
14 that groups both gay and straight gave him substantial credit  
15 for.

16          So I don't -- I'm not able to evaluate the Bush  
17 administration's anti-HIV strategy vis-a-vis the Obama's, but  
18 it's not clear on its face that this is necessarily a big step  
19 on behalf of gays.

20 **Q.**    Do you know what this is talking about? Are you familiar  
21 with the initiatives and strategies that are referenced here?

22 **A.**    The specifics of them, no, I'm not.

23 **Q.**    Okay. And now let's turn to the second bullet point:

24           "We are on our way to eliminating the HIV  
25 travel ban. To get here HRC lobbied Congress

1           effectively, resulting in the vote that paved  
2           the way. Then when the Department of Health  
3           and Human Services issued a proposed  
4           regulation, HRC members submitted 17,000 of  
5           the 19,000 public comments that HHS received.  
6           Soon the process will be complete and the  
7           discriminatory ban will be gone."

8           And that's been something that the LGBT community has  
9           sought, correct?

10       **A.**    That is something that the LGBT community has sought in  
11       concert with the scientific community.

12       **Q.**    And that's evidence of the political power of the LGBT  
13       community, correct?

14       **A.**    I would not go quite so far. So the first is that we are  
15       talking about a letter writing campaign to an administrative  
16       oversight agency, which is not a particularly highly salient  
17       undertaking. Kind of flies under the political radar.

18                The second is that there was huge pressure on the  
19       part of university medical centers receiving NIH grants to  
20       eliminate the HIV travel ban because it put U.S. Aids  
21       researchers, who are among the world's leading Aids  
22       researchers, in the uncomfortable position of not being able to  
23       host the international Aids conference in the United States  
24       because individuals with HIV could not actually attend.

25                So there was a lot of different forms of public

1 pressure on this issue prior to the proposed regulation change,  
2 which did, in fact, go into effect.

3 **Q.** And turning to the next bullet point, it says:

4 "We advocated for the administration to ban  
5 discrimination on the basis of gender  
6 identity in the nation's largest work force,  
7 the federal government, and they did."

8 And that's something that the LGBT community has  
9 sought, correct?

10 **A.** It is something that they sought.

11 **Q.** And it's evidence of the political power of the LGBT  
12 community, correct?

13 **A.** It is certainly one outcome that would weigh positively.  
14 My understanding was that this was done in the form of a  
15 presidential directive, so I'm not sure of the legislative  
16 vibrancy of this, if it will survive this administration; but  
17 it's certainly a positive consideration.

18 **MR. THOMPSON:** Your Honor, would it be possible to  
19 take a short break?

20 **THE COURT:** You mention lunch and breaks and so  
21 forth, Mr. Thompson. I think we are all grateful for your  
22 suggestions.

23 **MR. THOMPSON:** Thank you, your Honor.

24 **THE COURT:** Why don't we take 10 minutes? Is that  
25 enough?

1           **MR. THOMPSON:** Yes. Thank you, your Honor.

2           (Whereupon there was a recess in the proceedings  
3           from 3:10 p.m. until 3:25 p.m.)

4           **THE COURT:** Very well, Mr. Thompson. I trust the  
5 break helped shorten your cross-examination.

6           **MR. THOMPSON:** Yes, your Honor. Thank you.

7           Now, we would like to move the admission of DIX-1331,  
8 which was the document we were just discussing, the Human  
9 Rights Campaign Annual Report.

10           **MR. BOUTROUS:** Your Honor, I just -- I want to  
11 object. I'm a little concerned that at some point proponents  
12 are going to cite these documents as somehow stating truthful  
13 facts. They haven't called witnesses on these issues,  
14 statements in these documents. They are opinion. They are  
15 hearsay.

16           I don't think we have an objection to judicial notice  
17 so they are available to the Court to refer to, but I do object  
18 to this type of document going into substantive evidence.

19           **THE COURT:** I understand your position. The witness  
20 is being asked about these documents.

21           I think in fairness for all parties and the  
22 completeness of the record, it's appropriate to admit these.

23           The testimony is what it is. And I realize that  
24 these statements are not -- do not necessarily establish the  
25 truth of the content, but they certainly provide a basis for of

1 the witness's testimony and the witness's cross-examination by  
2 Mr. Thompson, so I think it's appropriate.

3 And however they are characterized, as either  
4 admitted or judicial notice, I think is essentially immaterial.

5 **MR. THOMPSON:** Thank you, your Honor.

6 (Defendants' Exhibit 1331 received in evidence)

7 **BY MR. THOMPSON:**

8 **Q.** So we would like to, with the Court's permission, play a  
9 short clip from a speech from President Obama. I would like  
10 you to watch this clip and react.

11 **THE COURT:** Well, this is the 20th of January, isn't  
12 it?

13 (Videotape played in open court.)

14 **BY MR. THOMPSON:**

15 **Q.** Using your definition of a political ally, does President  
16 Obama, does he count as a political ally to the gay and lesbian  
17 community?

18 **A.** Given my concerns about the unreliability of allies in the  
19 illustrations I have used, I think President Obama is, perhaps,  
20 the best illustration of an ally who cannot be counted upon, an  
21 ally whose rhetoric far exceeds his actions.

22 Surely, you would agree that there's a difference  
23 between giving a nice speech and actually accomplishing some  
24 sort of policy change.

25 **Q.** You believe, in fact, that President Obama is, at best,

1 lukewarm and maybe even indifferent to gay rights, correct?

2 **A.** I believe that he has some significant reservations about  
3 the issue, particularly on same-sex marriage. He articulated  
4 repeatedly during the 2008 campaign that he was not in favor of  
5 same-sex marriage.

6 Since his inauguration into office, there has been no  
7 administrative action on suspending discharges under "Don't  
8 ask, Don't tell."

9 His words notwithstanding, the Employment  
10 Nondiscrimination Act is not on its way to final passage.

11 He has -- his administration has defended the Defense  
12 of Marriage Act in court and continues to do so in multiple  
13 lawsuits.

14 When the Prop 8 sister resolution emerged in the  
15 State of Maine, he -- Organizing For America, which is the  
16 remnants of his campaign from a year ago, sent emails into  
17 Maine asking for them to make calls into the New Jersey and  
18 Virginia gubernatorial races, but without a single mention of  
19 the same-sex ballot initiative that was on the ballot at the  
20 very same time. The same was true for the Washington state  
21 initiative.

22 So, in fact, most gay activists with whose work I am  
23 familiar and the leadership of most gay organizations, with the  
24 possible exception of the Human Rights Campaign notably, feel  
25 that President Obama has been particularly disappointing as an

1 erstwhile ally.

2 **Q.** Now, he did sign the hate crimes legislation, correct?

3 **A.** He did sign the Defense Authorization Act on which hate  
4 crimes was an amendment, yes.

5 **Q.** And then he had a signing ceremony in the rose garden,  
6 correct?

7 **A.** He did.

8 **Q.** And in determining whether President Obama was an ally of  
9 gays and lesbians, one thing you would look to is whether he  
10 has spoken publicly about the adverse treatment of gays and  
11 lesbians in society, correct?

12 **A.** That's correct. And on that dimension, President Obama is  
13 a very good speechmaker.

14 **Q.** And another factor you would consider in assessing whether  
15 President Obama was an ally of gays and lesbians is whether he  
16 had introduced legislation on behalf of LGBT political goals,  
17 correct?

18 **A.** Well, strictly speaking, of course, the administration  
19 doesn't introduce legislation; but, yes, if his administration  
20 was working with an author on the Hill to submit a piece of  
21 legislation that he pledges upfront to sign, that would be a  
22 positive factor to consider.

23 **Q.** And he has pledged to sign the Employment  
24 Nondiscrimination Act, correct?

25 **A.** He has. I heard the video.



1 Q. And that's passed the House of Representatives, correct?

2 A. It has.

3 Q. Now, using your definition of ally, Senator Feinstein is  
4 only a soft ally of gays and lesbians, correct?

5 A. I think given her -- the record over the course of her  
6 political career, that's the way I would describe it.

7 Q. And in considering whether gays and lesbians have reliable  
8 allies, you would define a reliable ally as one who, when faced  
9 with political threat, when faced with alternative agenda  
10 items, is willing to set side alternative items and sale into  
11 stiff winds in order to act on behalf of gays and lesbians,  
12 correct?

13 A. I think that that would be one aspect I would want to  
14 consider.

15 For example, as the opinion polls in support of the  
16 Democratic administration have waned over the course of the  
17 last 12 months, the speaker -- who, as we recall from the  
18 earlier question represents the City and County of  
19 San Francisco -- the speaker has indicated that particularly  
20 controversial social matters, including gay rights issues, that  
21 the House of Representatives would not take them up until the  
22 Senate acted first. That's an example of not wanting to sale  
23 into stiff winds.

24 Another example might be, for example, the setting  
25 aside of any question of the "Don't ask, Don't tell" or Defense

1 of Marriage Act issues until after the economy or healthcare is  
2 dealt with, et cetera.

3           So one of the tropes that people would use to not  
4 enact protections for gays and lesbians is that there are other  
5 priorities or to do so would endanger our coalition behind Bill  
6 X or Bill Y.

7           And so this is a fairly constant refrain, that gay  
8 and lesbian advocacy leaders hear when they are asking for  
9 legislation to be moved forward.

10 **Q.** Now, using your definition of "reliable political ally,"  
11 you are not even sure the ACLU would qualify as a reliable  
12 ally, correct?

13 **A.** Well, I'm actually willing to concede that the ACLU is a  
14 pretty reliable ally, because sailing into stiff winds appears  
15 to be what they are willing to do.

16           That's not to say that they have never shrank from an  
17 issue, they may have. But I think they are probably more  
18 reliable than most other groups.

19 **Q.** But when I asked you during your deposition -- and I would  
20 like to direct your attention to, I believe, it's tab three of  
21 your binder and page 88.

22           We were talking about the definition of reliability  
23 on 88, line six. And then towards end of 88 you mention that  
24 there may be some allies who are willing to pay costs to  
25 support gay and lesbian causes.

1 And then when we go to 89, I said:

2 **"QUESTION:** Well, now, you said very few.

3 **"ANSWER:** Well, I said there could be  
4 individuals in my answer.

5 **"QUESTION:** Okay.

6 **"ANSWER:** But in terms of large organized  
7 forces in the society, maybe the American  
8 Civil Liberties Union, I don't know. I mean,  
9 I'm struggling. I'm sure if I spent all day,  
10 I could probably think of an ally or two."

11 And you gave that testimony, correct?

12 **A.** I did, which I believe is consistent with what I just  
13 said; that the ACLU is probably an ally, yeah.

14 **Q.** Now, you don't have sufficient information to know whether  
15 Speaker Pelosi meets your definition of a reliable ally,  
16 correct?

17 **A.** I don't have maybe all the pertinent information. I would  
18 see her as more likely than not an ally, but her level of  
19 reliability I would condition by her responsibility and desire  
20 to protect the Democratic majority and, perhaps, put off  
21 controversial votes.

22 **Q.** And that could be a sound strategy even from the  
23 perspective of the LGBT community, correct?

24 **A.** Well, that depends. It could be a sound strategy if it  
25 creates the opportunity for the majority to live to fight

1 another day.

2           Alternatively, it could be -- and I think there is  
3 some evidence to suggest -- that by delaying certain priorities  
4 of court constituencies or groups that you have a long-term  
5 representational relationship with, that, in fact, on the claim  
6 that you do so to live to fight another day, that when the next  
7 day comes, you are no longer there and so the -- the  
8 legislative priority was sacrificed for no gain.

9           So I think it remains an open question, whether this  
10 is a sound strategy or not.

11 **Q.** All right. Now, let's talk about the importance of the  
12 media.

13           The media can be important in terms of figuring out  
14 the political power of a group, correct? It's relationship to  
15 the media?

16 **A.** You would have to be a little bit more specific, I'm  
17 afraid, to which media you are speaking.

18 **Q.** Well, television could be important to -- the way in which  
19 a group is portrayed on television could be important?

20 **A.** Entertainment television or news?

21 **Q.** News.

22 **A.** Television news?

23 **Q.** Yes.

24 **A.** Yes. I would say that TV news might be relevant.

25 **Q.** Okay. And one of the materials you deemed relevant in

1 this case is a book by John Zaller entitled *The Nature and*  
2 *Origins of Mass Opinion*, correct?

3 **A.** That's correct.

4 **Q.** And I would like to direct your attention to tab 23, which  
5 has the first few chapters of that book, which is DIX-296.

6 And the thesis of Mr. Zaller is that public opinion  
7 responds more directly to lead cues than bubbling up from the  
8 masses, correct?

9 **A.** That's a fair version, yeah.

10 **Q.** And you would agree that he is right in the general sense  
11 that the stories that the media covers raises the salience of  
12 an issue, correct?

13 **A.** Within constraints, yes. There are some issues that,  
14 whether the media covers or not, remain present; and then there  
15 are some issues that the media might devote a lot of attention  
16 to, and even political leads might cure a great deal that the  
17 public never buys on to. So it's certainly not a perfect  
18 relationship.

19 But, in general, if the media covers a story more  
20 frequently and with greater intensity, the public is likely to  
21 respond by thinking it more important.

22 **MR. THOMPSON:** Your Honor, we move the admission of  
23 DIX-296.

24 **MR. BOUTROUS:** No objection, your Honor.

25 **THE COURT:** Very well. DIX-296 is admitted.

1 (Defendants' Exhibit 296 received in evidence.)

2 **MR. THOMPSON:** Excellent.

3 **BY MR. THOMPSON:**

4 **Q.** And turning to the next tab, Professor. This is an  
5 article entitled *Minority Group Interests and Political*  
6 *Representation - Gay Elected Officials in the Policy Process.*  
7 And it's DIX-1102.

8 And this was an article you considered?

9 **A.** I'm sorry. I -- my next tab is a 2005 report by the HRC.

10 **Q.** Okay. Let me -- and if the binder is missing that  
11 information, we can provide that later.

12 **A.** Okay. So you are under tab A.

13 **Q.** Yes, sir.

14 **A.** Okay. I'm with you.

15 **Q.** And this is an article you considered in reaching your  
16 opinions in this case, correct?

17 **A.** One of several, yes.

18 **Q.** All right. And I would like to direct your attention to  
19 page 575, the second paragraph. And the article states here:

20 "Most important, gay political representation  
21 significantly influences the adoption of  
22 domestic partner benefits. However, unlike  
23 the registration model, it is not the most  
24 influential factor. Instead, elite support  
25 has the greatest influence."

1           Is that consistent with the point Zaller is making?

2 **A.**    It would be consistent, but unless I look at the results  
3 directly, I'm going to have a tough time giving you a sort of  
4 specific response to the claim.

5           **MR. THOMPSON:** Your Honor, we would move the  
6 admission of DIX-1102.

7           **MR. BOUTROUS:** No objection, your Honor.

8           Though I will make a standing objection concerning  
9 the hearsay nature of these documents, but I will not make it  
10 again.

11          **THE COURT:** Very well. 1102 is admitted.

12          (Defendants' Exhibit 1102 received in evidence.)

13          **MR. THOMPSON:** Thank you, your Honor.

14 **BY MR. THOMPSON:**

15 **Q.**    Now, Professor, you would agree that the frequency of  
16 media coverage has increased in recent years for issues  
17 relating to gays and lesbians, correct?

18 **A.**    I would. I'm still grappling with your last question.  
19 But, yes, I would agree that media coverage is higher.

20 **Q.**    And, therefore, the salience or the visibility of the gay  
21 and lesbian community, at least on that dimension, has  
22 increased, correct?

23 **A.**    That's probably true, yes.

24 **Q.**    And I would like to direct your attention to tab 24. This  
25 is the Human Rights Campaign 2005 Annual Report. It's

1 DIX-1327.

2           And I would like to direct your attention to page 19.

3 And the pagination appears in the upper right-hand corner of  
4 the even pages. We did not paginate it.

5 **A.** I see.

6 **Q.** Are you there, sir?

7 **A.** I'm with you.

8 **Q.** In the second paragraph on page 19 it states.

9           "In 2005 our message of fairness has reached  
10           90 percent of Americans with a quote in at  
11           least one newspaper every day."

12           And that would be an indication that the gay and  
13 lesbian community is able to get its message out through the  
14 media on a regular basis, correct?

15 **A.** It would be a claim that the gay and lesbian community can  
16 get its message out on a regular basis.

17 **Q.** Do you have any basis to dispute that claim?

18 **A.** Oh, yes.

19           (Laughter.)

20 **Q.** You don't think that they are getting a quote in the paper  
21 once a day?

22 **A.** I believe they are getting a quote in the paper once a  
23 day.

24 **Q.** Okay. That's what they claim here.

25 **A.** Well, no. Their claim is that 90 percent of Americans



1 have seen the quote.

2 **Q.** It has reached 90 percent of Americans now?

3 **A.** Newspaper readership in the United States is significantly  
4 below 50 percent of the population.

5 So newspaper media is certainly -- and, certainly,  
6 news stories about gays and lesbians is not likely to yield a  
7 90 percent contact rate.

8 Now, does that mean that newspapers serving  
9 localities that have 90 percent of the population have  
10 published at least one quote about gays and lesbians?

11 Absolutely.

12 But does it mean that 90 percent of Americans have  
13 been reached with the HRC message? I think we have political  
14 advocates again advertising their importance.

15 **MR. THOMPSON:** Your Honor, we would move the  
16 admission of DIX-1327.

17 **THE COURT:** Very well. 1327 is admitted.

18 (Defendants' Exhibit 1327 received in evidence.)

19 **BY MR. THOMPSON:**

20 **Q.** And during the year and a half that you have lived in this  
21 area, you can't recall any editorial from the *San Francisco*  
22 *Chronicle* that was hostile to the interests of gays and  
23 lesbians, correct?

24 **A.** I do not read the *Chronicle* every day, but I would find it  
25 unlikely.

1 Q. But you do read the *New York Times*, correct?

2 A. Again, not every day, but I read it fairly frequently,  
3 yes.

4 Q. And in the last 10 years you don't recall any instance in  
5 which the *New York Times* took a hostile position to the  
6 interests of gays and lesbians, correct?

7 A. I don't recall one.

8 Q. You do recall editorials in the *New York Times* advocating  
9 for the dissolution of "Don't ask, Don't tell," correct?

10 A. I do.

11 Q. And advocating for the Employment Nondiscrimination Act,  
12 correct?

13 A. Yes.

14 Q. And I would like to direct your attention to the next tab,  
15 which is DIX-1323. And it's the Human Rights Campaign Annual  
16 Report for the year ended March 31, 2000.

17 And turning your attention to page three, which is  
18 the fifth page behind the tab, the third paragraph from the  
19 bottom, the second sentence states:

20 "Reporters and editorial boards view our  
21 advocacy as common sense rather than special  
22 interest."

23 Is that a true statement that editorial boards view  
24 the positions of the gay and lesbian political community as  
25 common sense?

1 **A.** It's a blanket statement. And like most academics, I am  
2 deeply uncomfortable with blanket statement.

3 I would be willing to represent that it would be my  
4 belief, my belief in the absence of analysis, that the majority  
5 of editorial boards, with some regional variation accounted  
6 for, probably tend to favor some protections for gays and  
7 lesbians.

8 I don't believe that that's uniform across the issue.  
9 So you would have more editorial boards, for example, favoring  
10 a hate crimes law than a nondiscrimination law, and more  
11 favoring a nondiscrimination law than same-sex marriage, for  
12 example.

13 I also think that there would be dramatic variation  
14 by region. So there would be parts of the country where this  
15 would clearly not be true.

16 So I guess I'm -- I'm at a loss for information to  
17 evaluate this, but it strikes me as particularly overbroad.

18 **MR. THOMPSON:** Your Honor, we would move of the  
19 admission of DIX-1323.

20 **THE COURT:** Very well. 1323 is admitted.

21 (Defendants' Exhibit 1323 received in evidence)

22 **THE COURT:** And remind me, Mr. Thompson, what page  
23 were you looking at?

24 **MR. THOMPSON:** I was looking at page three, your  
25 Honor.

1           **THE COURT:** Page?

2           **MR. THOMPSON:** Page three. We have Xeroxed the  
3 cover, so it's actually the fifth page in the exhibit.

4           **THE COURT:** But it's marked page three?

5           **MR. THOMPSON:** Yes, your Honor.

6           **THE COURT:** Thank you, sir.

7           **MR. THOMPSON:** Certainly.

8 **BY MR. THOMPSON:**

9 **Q.** And now directing your attention, Professor Segura, to tab  
10 26.

11           This is an editorial from the *New York Times* dated  
12 September 29, 2008, and it's entitled "Preserving California's  
13 Constitution."

14           And in the third paragraph it -- and it's addressing  
15 Proposition 8.

16           And in the third paragraph the third sentence says:

17           "It is our fervent hope that Californians  
18 will reject this mean-spirited attempt to  
19 embed second-class treatment of one group of  
20 citizens in the state constitution."

21           Is it fair to say that the *New York Times*  
22 emphatically supports the rights of gays and lesbians to marry?

23 **A.** Well, I would certainly conclude from this editorial that  
24 they certainly fervently oppose Proposition 8.

25           I would assume, in the absence of an editorial to the

1 contrary, that they would extend that to other states as well.

2 **Q.** And let's turn your attention to tab 33.

3 **A.** I'm there.

4 **Q.** And this is a document that appeared on the *L.A. Times*,  
5 one of their blogs.

6 And in the first bullet point under the picture there  
7 is a quote from the L.A. times editorial, and it says:

8 "It's the same sentence as in 2000, only  
9 marriage between a man and a woman is valid  
10 or recognized in California. Yet, the issue  
11 that will be put before voters November 4th  
12 is radically different. This time the  
13 wording would be used to rescind an existing  
14 constitutional right to marry. We fervently  
15 hope that voters, whatever their personal or  
16 religious convictions, will shudder at such a  
17 step and vote no on Proposition 8."

18 And is this a reflects that the *L.A. Times*  
19 emphatically supported the No On 8 campaign?

20 **A.** It would appear to be a reflection of both the *L.A.*  
21 *Times's* support for the No On 8 campaign and the fondness for  
22 the word "fervently" in editorials.

23 (Laughter.)

24 **Q.** Now, another factor that is a source of political power is  
25 the cohesion and size of a political group, correct?

1 **A.** I think that's true.

2 **Q.** And you believe that four to seven percent of the U.S.  
3 population is openly gay or lesbian, correct?

4 **A.** Umm, as you and I discussed during my deposition, there is  
5 a broad scholarly disagreement over the size of the gay and  
6 lesbian population.

7           And I believe my answer in deposition is the same one  
8 I will give now, which is that it is my belief that the answer  
9 is somewhere between four and seven percent based on some  
10 marketing polling that I have observed, places that are not  
11 particularly political, so we tend to get a few more honest  
12 answers.

13           I have seen numbers as low as two and as high as ten,  
14 both of which I think to be unlikely, were sort of too  
15 conservative and too permissive.

16           So I think four to seven is a more accurate estimate,  
17 but, again, that's based on reading literally dozens of stabs  
18 at this in both the scholarly's and the marketing literature.

19 **Q.** All right. And that doesn't include bisexuals, correct?

20 **A.** No, no.

21 **Q.** With respect to the percentage of the U.S. population that  
22 is predominantly bisexual, you've only seen numbers in the  
23 neighborhood of two percent, correct?

24 **A.** Two percent or even less. But, again, that's another  
25 number that has some definitional problems with it.

1           So I know the Court heard some testimony yesterday on  
2 this issue, but is a bisexual someone who has only engaged in  
3 sex with alternating partners or do -- are we defining it in --  
4 with their sexual behavior in the last year or the last five  
5 years?

6           So I think that's a little bit more of a porous  
7 category, a little bit harder to define.

8 **Q.** In terms of cohesion, 23 percent of gays and lesbians are  
9 estimated to have voted in favor of George W. Bush in 2004,  
10 correct?

11 **A.** That's correct, yes.

12 **Q.** So, in fact, gays and lesbians are much less politically  
13 cohesive than African-Americans, correct?

14 **A.** As a practical matter, it's hard to imagine a single  
15 political group that is not less cohesive than  
16 African-Americans, who vote Democratic somewhere between 89 and  
17 95 percent in most elections.

18           So 77 percent voting Democrat and 23 percent voting  
19 Republican would be less cohesive than African-Americans, a  
20 significant degree more cohesive than Latinos, and certainly  
21 than Anglos.

22 **Q.** A small group can be politically powerful, correct?

23 **A.** It depends on what you mean by "group." Are we talking  
24 about a demographic group here? Are we talking about, like, an  
25 organization or association?

1 Q. Well, a small demographic group can be politically  
2 powerful. The Jewish community has a meaningful degree of  
3 political power in the United States, correct?

4 A. I would say the Jewish community has a meaningful degree  
5 of political power based on their representation in public  
6 office and their resources.

7 But I'm not sure -- I haven't undertaken an analysis  
8 of that community, but that would be my conclusion, at least,  
9 at the of -- without anything about it a lot.

10 Q. And a small group could be powerful in a closely divided  
11 electorate, correct?

12 A. Well, that's always true. So the closer an election, the  
13 more likely it is that smaller segments of the population can  
14 make a difference. For a group to make a credible claim that  
15 they played a role in the outcome of the election, the margin  
16 within the group would have to exceed the margin of victory  
17 overall.

18 Q. So when then Senator Obama and Senator Clinton were  
19 battling it out for the Democratic primary, they both actively  
20 sought the support of the gay and lesbian community, correct?

21 A. I think it's fair to say that that's true. I think it's  
22 also fair to say that in the very close primary contest, they  
23 actively sought the support of every person with a pulse and a  
24 voter registration card.

25 Q. But they had special attention to the gay and lesbian



1 community because of the financial resources, correct?

2 **A.** By "special attention," are you suggesting that they paid  
3 more attention to gays and lesbians than they did to other  
4 Democratic constituencies? Because I actually don't know that  
5 to be true.

6 **Q.** Well, to anyone with a pulse. In other words, they  
7 weren't indifferent. You just said, Oh, well they wanted  
8 everyone with a pulse.

9           Isn't it true that they were more focused on the gay  
10 and lesbian community than just anyone with a pulse off the  
11 street?

12 **A.** I don't have evidence of that. I mean, I -- I think it  
13 would certainly would be fair to say that both then Senator  
14 Obama and then Senator Clinton actively courted organized  
15 labor, actively courted gays and lesbians, actively courted  
16 environmentalists, African-Americans, Latinos, et cetera.

17           It's the term "special" that I'm reacting to, I'm  
18 afraid, because the term "special" appears to suggest that they  
19 paid more attention to gays and lesbians than to other  
20 Democratic constituencies, and I actually just don't know that  
21 to be true.

22 **Q.** Are the gay and lesbian community, is that a Democratic  
23 constituency?

24 **A.** I think by any measure it's a majority Democratic  
25 constituency, yes.

1 Q. All right. Now, persuasion can also be a source of  
2 political power, correct?

3 A. That's a more complex question. So Dahl speaks about  
4 persuasion and he identifies persuasion as one of the weakest  
5 forms of political power.

6 Persuasion has multiple components to it. So it is  
7 more than merely a group saying, Please, pass a piece of  
8 legislation for us, or, It's the right thing to do.

9 Persuasion involves -- particularly for this  
10 instance -- the need to identify an external deeply-held norm  
11 in the society to which you can appeal.

12 So, for example, this society has norms of equality  
13 or norms of fairness. And in order for persuasion to be used,  
14 what a group would have to do is say, you know, We all believe  
15 in equality. We all believe in fairness. Those norms should  
16 apply to us. And if you apply those norms to us, then you  
17 should change your vote and be persuaded of the rightness of  
18 our position.

19 So persuasion actually relies not only on the  
20 oratorical skills of the group, but, also, the degree to which  
21 the audience holds the deeply-internalized norms about what the  
22 society thinks and is willing to assign the -- include the  
23 subject group in those norms.

24 It's a much more tenuous undertaking and for that  
25 purpose, I think, that's why Dahl sees it as the weakest form

1 of power.

2 **Q.** But you would agree a group might cajole a legislator by  
3 appealing to a societal norm of justice or fairness, correct?

4 **A.** I would if believe that a group would certainly make the  
5 effort and may actually yield some number of changed cards,  
6 yes.

7 **Q.** And the abolitionists in the 19th century were able to  
8 make claims on norms of fairness, correct?

9 **A.** They were, but I wouldn't look at that as the principal  
10 source of power for the abolitionists.

11 **Q.** But you would agree that among the strategies that the  
12 black civil rights movement used was an intellectual or  
13 idea-based appeal to the internalized national norm of  
14 fairness, correct?

15 **A.** I believe that that was a strategy, but it would hardly be  
16 the most important or even the most frequently used.

17           If we peruse the history of the black civil rights  
18 movement, African-American activists fighting for their civil  
19 rights engaged in a whole host of strategies, including  
20 boycotts of businesses, boycotts of the Montgomery bus line,  
21 sit-down strikes at southern lunch counters, freedom rides  
22 where northerners -- northern blacks and northern whites --  
23 boarded buses and road into the south to defy the segregation  
24 of southern facilities; a strategy that took them into the  
25 courts, a strategy that took them into the television sets.

1           Serendipity, frankly, played a role. One of the  
2 reasons we have the Voting Rights Act is that the attack by  
3 Alabama officials on African-American activists at the Edmund  
4 Pettus Bridge happened to be televised live by CBS and spill  
5 into people's living rooms.

6           So there are many more strategies and tactics used by  
7 the black civil rights movement. Certainly, the idea of  
8 justice played an important role. It was not the only role.

9 **Q.** And gays and lesbians make appeals to the norm of fairness  
10 in pursuing their political agenda, correct?

11 **A.** Yes, they do.

12 **Q.** And such appeals to fairness may, in fact, persuade some  
13 number of people, correct?

14 **A.** They may, in fact, persuade some number of people, yes.

15 **Q.** Now, in terms of sources of political power, another would  
16 be tactics. The tactics that a group uses can have  
17 ramifications for the amount of power they have, correct?

18 **A.** Yes, with the following qualification. Sometimes  
19 tactic -- you are suggesting that tactics shape how much power  
20 a group has, and I would think that normally the causal arrow  
21 is in the reverse; that how much power a group has really  
22 shapes the tactics that they choose.

23           So I wouldn't put a causal relationship in the way  
24 that you are suggesting.

25 **Q.** Are you saying that tactics are irrelevant to the

1 political power of a group?

2 **A.** I did not. I said that there was a non-recursive  
3 relationship.

4 **Q.** Well, you've read press reports suggesting that the  
5 No On 8 people themselves felt like they did not do a  
6 particularly good job on reaching out to blacks and Latinos,  
7 correct?

8 **A.** I have read reports suggesting that they felt like they  
9 had maybe not done the best outreach there, yes.

10 **Q.** And you have no reason to doubt those reports, correct?

11 **A.** I don't know enough about the internal organization of the  
12 Prop 8 campaign, but I have no reason to question it.

13 **Q.** All right. Now, let's talk about how violence pertains to  
14 the political power of a group.

15 In the Democratic process, violence is usually  
16 negatively perceived, correct?

17 **A.** That is usually the case, yes.

18 **Q.** And within a Democratic process, violence historically  
19 backfires, correct?

20 **A.** Yes, depending on the willingness of external authorities  
21 to become involved.

22 So there have been moments, frankly, when violence  
23 was effectively used, for example, by segregationists around  
24 the turn of the century, the Klan and others, to disenfranchise  
25 large numbers of people.

1           So there have been unfortunate moments in our history  
2 when political forces have used violence to actually achieve  
3 their goals.

4           As a general question, I think I would certainly not  
5 favor it and I think it's a fundamentally anti-Democratic thing  
6 to do.

7 **Q.**   Sympathy is a tool to help secure political outcomes by  
8 seeking to activate internalized norms of fairness and equity,  
9 correct?

10 **A.**   Again, a qualified yes. And the reason is that certainly  
11 the audience, in this case the electorate, being sympathetic to  
12 your goals or to your personal circumstances is better than  
13 their being hostile.

14           But the way you say sympathy as a tactic suggests  
15 that there is sort of a premeditation that a particular  
16 political force goes out and maybe, I don't know, cries  
17 "Whoa is me" on the corner.

18           Sympathy as a tactic is something I'm having a little  
19 bit of trouble wrapping my mind around.

20 **Q.**   Well, if a group is trying to use an appeal to an  
21 internalized norm of fairness or equity, the moment it engages  
22 in violence, much of that appeal dissipates; "yes" or "no"?

23 **A.**   Well, again, these are matters of degrees. So it was  
24 certainly of the case during the black civil rights movement,  
25 that there was a very strong emphasis on non-violence in order

1 to retain the positive support of white northerners, for  
2 example.

3           So in general, if the group is enjoying sympathy,  
4 then violence could ameliorate that sympathy to some degree. It  
5 would depend on how much violence and who it was directed at  
6 and the circumstances under which it arose and whatnot.

7 **Q.** Well, I would like to direct your attention to your  
8 deposition in this case, and to page 190, line 13. This should  
9 appear behind tab three in your binder.

10 **A.** Yes.

11 **Q.** Okay. And so if we look at page 190, line 13, you  
12 said:

13           **"ANSWER:** In the Democratic process violence  
14 is usually negatively received; that in some  
15 respects" -- if we go back to your question  
16 about ideas -- "if a group is trying to use  
17 an appeal to an internalized norm of fairness  
18 or equity, the moment it engages in violence,  
19 much of that appeal dissipates."

20           And you gave that testimony, correct?

21 **A.** I did.

22 **Q.** Okay. Now --

23           **THE COURT:** How are you doing on time, Mr. Thompson?

24           **MR. THOMPSON:** Well, your Honor, I appreciate  
25 Professor Segura's fulsome answers. I'm not getting "yes" or

1 "no" answers, so I'm running behind schedule and I'm afraid  
2 there is no possible way that I could finish this evening.

3 **THE COURT:** Well, can you get in another half hour?

4 **MR. THOMPSON:** I'm happy to keep going, your Honor.  
5 Absolutely.

6 **BY MR. THOMPSON:**

7 **Q.** Now, so one of the political resources that a group may  
8 have is goodwill, correct?

9 **A.** Correct.

10 **Q.** All right. And if we are looking at sources or barriers  
11 to political power, you would also want to look to see if a  
12 group had been disenfranchised, correct?

13 **A.** Yes.

14 **Q.** All right. And you are not aware of any specific form of  
15 intimidation aimed at prohibiting gays and lesbians from  
16 voting, correct?

17 **A.** With the caveat that there may have been some number of  
18 gays and lesbians who were kept out of the franchise as a  
19 consequence of felony charges associated with gay harassment in  
20 the 50's and 60's. It is possible under those circumstances  
21 that some number of gay and lesbian voters lost their right to  
22 vote as a consequence of anti-gay enforcement policies in the  
23 states.

24 With that caveat, in the recent sense, there may have  
25 been an isolated incidence of intimidation with which I'm not



1 familiar, but I don't know of a concerted effort to drive down  
2 the gay electorate.

3 **Q.** You can't point to any such instance, let's say, in the  
4 last 30 years of any government official anywhere in the United  
5 States targeting gays and lesbians to disenfranchise them so  
6 they can't vote, correct?

7 **A.** I don't have an example off the top of my head, so, no, I  
8 cannot recall any.

9 **Q.** All right. Now, let's talk -- we have talked about the  
10 sources of political power. Let's talk about some of the  
11 indicia of political power.

12           And would you agree that one reflection of political  
13 power is a group's ability to convince Congress to allocate  
14 funds to issues that are important to the group?

15 **A.** Again, with the footnote that I would want to see evidence  
16 that the group was bringing resources and pressure to bear in  
17 order to get Congress to allocate funds it otherwise wouldn't  
18 have, yes. That would be a positive outcome that I would want  
19 to look at.

20 **Q.** And in assessing the political power of a group, another  
21 factor you would look at would be the presence of statutory  
22 protections for their equality, correct?

23 **A.** Yes.

24 **Q.** And you would also want to look at whether they had the  
25 ability to elect candidates of their choice, correct?

1 **A.** That would be a measure, yes.

2 **Q.** All right. And with respect to the gay and lesbian  
3 community, you have not assumed that only a gay or lesbian  
4 could be a candidate of choice for the gay and lesbian  
5 community, correct?

6 **A.** No, I am not.

7 **Q.** And the voting rights literature has always focused on the  
8 notion of first choice without regard to the demographic  
9 characteristics of the candidate, correct?

10 **A.** That's correct.

11 **Q.** And in the California legislature there are four openly  
12 gay officials, correct?

13 **A.** To the best of my knowledge, that number is correct.

14 **Q.** And that's out of 120, correct?

15 **A.** Yes, that's correct.

16 **Q.** And so that's 3.3 percent, if I'm doing my math right?

17 **A.** I'm sorry. I can't do the math that quick in my head, but  
18 if you represent that, I will take that on --

19 **Q.** On redirect Mr. Boutrous can correct me.

20 Now, let's talk about political power in California.

21 And is it true that Equality California is one of the leading  
22 gay rights groups in the State of California?

23 **A.** I, actually, can't really answer that because what do you  
24 mean by "leading gay rights groups"? There are a number of  
25 groups active.

1 I would assume that Equality California is among the  
2 largest, if not the largest; but I don't have the basis -- I  
3 don't know the budget of every group in the state.

4 **Q.** Equality California raised more money for the No On 8  
5 campaign than any other group, is that right?

6 **A.** That sounds correct, yes.

7 **Q.** Okay. Now, let's turn to tab 35, which is the 2009  
8 legislative scorecard for Equality California.

9 And directing your attention to the first page of  
10 text it says:

11 "Despite a tough legislative session and the  
12 worst budget crisis in California history,  
13 this year has been one of Equality  
14 California's best yet in Sacramento. We  
15 passed a record 11 pieces of Equality  
16 California-sponsored legislation that will  
17 improve the lives of LGBT Californians."

18 Is it true that last year there were 11 pieces of  
19 legislation passed that were sought by the LGBT community?

20 **A.** With the caveat that some of that legislation was, in  
21 fact, non-binding resolutions that were senses of the  
22 legislature, then I have no reason to dispute their number.

23 **Q.** And so this was a good legislative session for the LGBT  
24 community, correct?

25 **A.** I think that's a different question. So what constitutes

1 as good legislative session is whether or not high priority  
2 items were, in fact, acted upon in a positive sense and were  
3 ultimately signed into law.

4           So, again, I would have to know what the rate of bill  
5 passage was in all other years, what the number of bills passed  
6 in all other years was.

7           I take on -- on faith that their report, that they  
8 feel pretty good about it; that they are happy with it.

9 **Q.** All right. Now, let's look at their scorecard that they  
10 give to different legislators.

11           If we look at the Senate scorecard -- and you just  
12 flip the page -- it has ratings of 100 percent. And I'll  
13 represent to you that 21 out of 40, a majority of the  
14 California Senate, has a 100 percent approval rating from  
15 Equality California.

16           Is it fair to assume that any state senator who  
17 receives a 100 percent rating from Equality California is an  
18 ally of the LGBT community?

19 **A.** That would depend on which items were used to score.

20           So, for example, we might find in a year where there  
21 were several sort of procedural issues that came up, you could  
22 get 100 percent from a particular representative; and in a  
23 subsequent year, in which maybe there was a much more  
24 contentious issue that came up, you would get less than  
25 100 percent.

1           So it's important to always keep in mind that the  
2 scorecard is relative to what the agenda was in the legislature  
3 that year. Some agendas are more vexing than others.

4 **Q.** Can you point to any of these legislators who received  
5 100 percent rating and provide evidence that any of them are  
6 not allies of the LGBT community?

7 **A.** Again, I don't have the legislature and all of their  
8 activities committed to memory. I couldn't possibly.

9 **Q.** Well, I'm just asking for one. Can you point to one piece  
10 of evidence that one of these individuals with a 100 percent  
11 rating is not an ally of the LGBT community?

12 **A.** I cannot. I can point to the fact that there is an awful  
13 lot of zeros on the page as well; that the minority party,  
14 should they gain control of the Senate, would reverse many of  
15 the items that you've just identified.

16 **Q.** All right. Now, let's turn to the assembly scorecard.  
17 And, again, I will represent to you that 41 out of the 80 --  
18 again a majority -- have a perfect 100 percent score.

19           Can you point to any evidence that any of these  
20 individuals who received a 100 percent rating were not allies  
21 of the LGBT community?

22 **A.** Once again, no. I do not have an exhaustive command of  
23 the behavior of each legislator.

24 **Q.** Okay. Now, let's look at some other officials in the  
25 State of California. It's reasonable to assume that Barbara

1 Boxer was a candidate-of-choice for gays and lesbians, correct?

2 **A.** In a general election sense, I think the answer to that is  
3 yes. I don't remember the last time she had a meaningful  
4 primary challenge; maybe not since '92, when she was first  
5 elected.

6 **Q.** Right. But in her recent elections, she has been a  
7 candidate-of-choice for the gay and lesbian community, correct?

8 **A.** Yes, yes.

9 **Q.** And Senator Dianne Feinstein's recent elections for U.S.  
10 Senate, she has been a candidate-of-choice for the gay and  
11 lesbian community, correct?

12 **A.** Given the choices that they have been provided, yes.

13 **Q.** Right. I understand.

14 And Attorney General Brown is the candidate-of-choice  
15 to be the next governor of California among gays and lesbians,  
16 correct?

17 **A.** Well, as we previously discussed, approximately 77 percent  
18 of self-identified gays and lesbians identify as Democrats.  
19 And the last time I checked, he's the only Democrat in the  
20 field.

21 So I would assume that approximately 77 percent have  
22 a predisposition to support him.

23 **Q.** Can you identify any general election for state-wide  
24 office in California in the last 10 years where the LGBT  
25 community supported the Republican candidate rather than the

1 Democratic candidate?

2 **A.** I cannot.

3 **Q.** And can you identify any Democrat running for state-wide  
4 office in California in the last 10 years who won the  
5 Democratic primary over the opposition of the LGBT community?

6 **A.** That I'm going to -- I'm afraid I have to plead ignorance  
7 on. I lived external to the state from 2001 until 2008, so I  
8 wasn't privy to primary politics here.

9 **Q.** Okay. So Senator Boxer is an ally of the gay and lesbian  
10 community, correct?

11 **A.** I think that's a fair assessment.

12 **Q.** And let's talk about labor unions. Labor unions were part  
13 of the coalition, the Democratic coalition in the State of  
14 California, correct?

15 **A.** That's correct.

16 **Q.** And you would agree that there certainly have been a  
17 number of moments where labor unions supported the gay and  
18 lesbian political position on matters of concern to the  
19 community, correct?

20 **A.** I believe a distinction I would want to make is that labor  
21 union leaders have supported a variety of issues of concern to  
22 the community.

23 **Q.** You can't think of any instance in the last decade where  
24 labor unions have opposed the gay or lesbian community,  
25 correct?

1 **A.** I cannot think of an instance where labor union leaders  
2 have opposed the gay and lesbian community.

3 The reason I'm differentiating these things is  
4 there's a difference between a coalition built at the elite  
5 level and the mass behavior of voters. So while you could  
6 probably show me an endorsement of No On 8 from a particular  
7 union, I don't actually know how the rank and file of that  
8 union voted in November of 2008.

9 **Q.** And I would like to direct your attention to tab 41. This  
10 is a press release produced to us by Equality California. It's  
11 dated October 6, 2008. It's DIX-2502.

12 And it says in the first paragraph:

13 "The Unite Here International Union on  
14 Saturday made a \$100,000" -- presumably  
15 contribution -- "to Equality California's No  
16 on Proposition 8 campaign committee and  
17 announced its opposition to Prop 8, which  
18 eliminates the right of same-sex couples to  
19 marry in California."

20 And then turning to the third paragraph it  
21 says:

22 "'Endorsing the No On 8 campaign is  
23 consistent with the long-held positions of  
24 this union,' said Cleve Jones."

25 Do you have any reason to doubt that Mr. Jones's



1 statement that supporting the rights of the gay and lesbian  
2 community was consistent with Unite Here, the international  
3 union?

4 **A.** I don't. And I'm actually not surprised to see Unite Here  
5 endorsing the No On 8 campaign.

6           Unite Here represents both needle trades and hotel  
7 and restaurant employees. And gays and lesbians are a somewhat  
8 larger percentage of the work force, particularly in the hotel  
9 and restaurant employees union, than they are in many other  
10 trade unions. So this is not surprising.

11 **Q.** Okay. And then if we turn to the last paragraph, there's  
12 a statement by Geoff Kors, and he is the executive director of  
13 Equality California, is that right?

14 **A.** That's correct.

15 **Q.** And he states in the second to last sentence of this press  
16 release:

17           "This contribution reflects the longstanding  
18 relationship the LGBT community has had with  
19 our union partners."

20           And that's a fair statement, isn't it?

21 **A.** I presume it's a fair statement of his belief.

22 **Q.** Well it's an accurate statement, is it not?

23 **A.** Once again, I don't know that that's true. I think that  
24 it's fair to say that union leadership has been supportive of  
25 gay and lesbian causes in the state in recent decades.

1           And Mr. Kors is commenting on that, but you are  
2 asking me to say whether or not there is a longstanding  
3 relationship between the community and the union's membership,  
4 I don't -- I don't really know that.

5           **MR. THOMPSON:** Your Honor, we would move the  
6 admission of DIX-2502.

7           **THE COURT:** Very well -- wait a minute, DIX --

8           **MR. THOMPSON:** 2502, your Honor.

9           **THE COURT:** Very well. DIX-2502?

10          **MR. THOMPSON:** Yes, your Honor.

11                   (Defendants' Exhibit 2501 received in evidence.)

12 **BY MR. THOMPSON:**

13 **Q.** Now, turning your attention to the next tab, Professor  
14 Segura, this is a printout of the union contributions that we  
15 pulled off of the California Secretary of State's website.

16 **A.** Uh-huh.

17 **Q.** If we did our math right, there was \$1.7 million worth of  
18 contributions by unions to the No On 8 campaign.

19                   Do you know of a single union that contributed money  
20 to the Yes On 8 campaign?

21 **A.** I do not.

22 **Q.** And does it surprise you that all of the unions that gave  
23 were giving to the No On 8 campaign?

24 **A.** When -- you didn't ask me. I don't know if any union gave  
25 to the Yes On 8 campaign. I haven't come across that. So it's

1 possible that one has.

2 **Q.** All right.

3 **A.** If I take as a given that all the union contributions went  
4 to No On 8, it does not surprise me, given the longstanding  
5 relationship between union leadership on the one hand and the  
6 gay and lesbian movement on the other.

7 **Q.** All right. Well, now, let's turn your attention to the  
8 next tab in your binder. This is a story dated October 26,  
9 2008 from the *Sacramento Bee*.

10 And if we look at the last line on the page, the last  
11 sentence talks about influential Latinos, including the Los  
12 Angeles mayor. And can you help me with the pronunciation,  
13 Professor, Antonio?

14 **A.** Villaraigosa.

15 **Q.** That's what I meant to say.

16 "...and leaders of the United  
17 Farmworkers Union are spreading the word  
18 that Proposition 8 is anti-civil rights."

19 Isn't it true that unions did not confine their  
20 support to giving money, but their leadership was also out  
21 there actively working to defeat Proposition 8?

22 **A.** That's a blanket statement. I don't know of the actual  
23 activities of all the union leaders involved in the State of  
24 California. I couldn't speak to that.

25 Were there some union leaders who were active? Yes.

1 Q. Active in opposing Proposition 8?

2 A. That's correct.

3 Q. And you can't identify any union leaders who were actively  
4 supporting Proposition 8?

5 A. No, I cannot.

6 Q. If we look at tech companies in California, you would  
7 agree that many of the Silicon Valley technology companies  
8 express pro-gay positions, correct?

9 A. I think it's fair to say that the Silicon Valley industry  
10 has intended to be more pro-civil rights on many dimensions,  
11 and this being one of them. I think that's a fair statement.

12 Q. All right. And large corporations in California have a  
13 meaningful degree of political power, correct?

14 A. They do, with respect to the issues that concern them.

15 So, for example, we might find that oil companies are  
16 particularly influential on environmental regulation, energy,  
17 pricing or some form of emissions control and things such as  
18 that.

19 Oil companies are not particularly influential on  
20 things like kindergarten policy or classroom size, for example.

21 So we don't identify a group as being powerful and  
22 then they are powerful in all circumstances across all issues.  
23 They are powerful with respect to the issues that discern them.

24 I think it would be fair to say that Silicon Valley  
25 firms and large corporations are powerful here, as they are

1 everywhere in the United States, in terms of having lots of  
2 lobbyists and making lots of campaign contributions and things  
3 such as that.

4 **Q.** And you were not aware of circumstances in which Silicon  
5 Valley technology companies have worked against the interests  
6 of gays and lesbians, correct?

7 **A.** Again, I don't have an exhaustive list of their political  
8 behavior over time. I don't have an example to suggest that  
9 they haven't been.

10 **Q.** Okay. Now, let's -- I would like to direct your attention  
11 to tab 44, which is the 2006 annual report of the Human Rights  
12 Campaign, and the --

13 **A.** I'm beginning to think you are on their mailing list,  
14 Mr. Thompson.

15 **Q.** My new favorite website.

16 (Laughter.)

17 **Q.** It's DIX-1328, and it's page 13. I would like to direct  
18 your attention to the last bullet point.

19 And tell me when you are there sir.

20 **A.** I'm there.

21 **Q.** It says:

22 "Big businesses, like Microsoft, backed state  
23 legislation that would protect GLBT workers.

24 Plus, more and more businesses are supporting

25 fair-minded legislators working to pass

1           important bills for same-sex couples, as Nike  
2           did when it backed a civil union's bill in  
3           the Oregon legislature in 2006."

4           Do you have any reason to doubt these statements,  
5           that Microsoft and Nike and other large corporations actively  
6           are working for the rights of the LGBT community?

7   **A.**    I would clarify the statement.  So there would be a number  
8           of objections I would offer.

9           The first is that, again, this is the advocacy  
10          organization speaking on how wonderfully effective they are,  
11          which is, of course, in their interests in order to maintain  
12          their membership and their contribution base.

13          The second is that the statement itself sort of  
14          illustrates its internal problem.  By saying more and more  
15          businesses are supporting fair-minded legislators, what it's  
16          suggesting is that there are many businesses that do not.  
17          Otherwise, we couldn't have any change.  If they are suggesting  
18          change, we couldn't have a uniform level of support.

19          The third is that it's not clear to me that each of  
20          these organizations are contributing to those legislators  
21          because they support same-sex interests.  We would want to  
22          investigate that.

23          So those would be the things that I would sort of  
24          throw in as a caveat.

25          As a general rule, I would not object to the

1 statement that the trend in major businesses has moved from  
2 opposition to neutrality to support in a number of instances.  
3 I don't have an estimation of what the distribution of that is.

4 **MR. THOMPSON:** Your Honor, we have come to a  
5 convenient stopping point. I hate to be the one who looks like  
6 a slacker here, always suggesting that we take breaks, but --

7 **THE COURT:** I don't think anyone would make that  
8 suggestion.

9 (Laughter.)

10 **MR. THOMPSON:** But if it's --

11 **THE COURT:** Let me ask one question and then you can  
12 follow-up, if you like, and then Mr. Boutrous, also. One  
13 question or, perhaps, one or two follow-on.

14 Does losing elections or failing to obtain  
15 legislation denote political powerlessness to require  
16 extraordinary protection against majoritarian political  
17 processes?

18 **THE WITNESS:** Losing an individual election, in my  
19 view, would not because in the Democratic process someone  
20 losses all contests.

21 The initiative process, however, is a little bit  
22 different because it is the only circumstance where we put  
23 individual rights up to a popular vote.

24 So we have 150 or more instances in a decade and a  
25 half where anti-discrimination protections are voted on by the

1 population and overturned, even though the legislature or its  
2 city council or county board had granted them.

3           We have uniform passage of constitutional amendments  
4 to exclude one group of citizens from a civil institution. And  
5 that's extraordinary, in my view.

6           Now, does -- would each individual act by itself be  
7 determinative of whether or not there should be judicial  
8 intervention? I would say, just as I said to Mr. Thompson,  
9 that an outcome by itself is a piece of information, but we  
10 would want to know the context in which it passed.

11           So if we look at the passage of a particular bill in  
12 the Assembly, if we have the passage of a bill where the  
13 majority party votes for it and the minority party votes  
14 against it, then we might reasonably expect that should that  
15 majority change, we could see a reversal on that. We could  
16 contrast that with an outcome which is bipartisan, for example.

17           We can see examples where a legislature passes a bill  
18 and the public then files an initiative to overturn it.

19           So I would want to look at the range of events rather  
20 than a single event. And in my view when you look at the range  
21 of events that have occurred in terms of the, you know, public  
22 voting directly on questions of gay and lesbian rights, that  
23 their loss rates suggests that longstanding prejudice against  
24 gays and lesbians is shaping what their political opportunities  
25 are.



1           **THE COURT:** Follow-up, Mr. Thompson?

2           **MR. THOMPSON:** No follow-up, your Honor.

3           **THE COURT:** All right. Very well. Then why don't we  
4 break today at this point?

5           How much longer do you have with Professor Segura?

6           **MR. THOMPSON:** I think maybe, you know, an hour and a  
7 half more. So it depends on the length of the answers, of  
8 course, to some extent.

9           **THE COURT:** Well, perhaps you can do as you have done  
10 before and spend some time this evening and hone those  
11 questions.

12           **MR. THOMPSON:** I will endeavor to do so, your Honor.

13           **THE COURT:** So we can move along.

14           And with that, who do we expect as our witnesses  
15 tomorrow?

16           Mr. Boies?

17           **MR. BOIES:** Your Honor, we are working on that.

18 After this witness completes, we basically, for the completion  
19 of our case, have probably two witnesses; Professor Hewitt and  
20 Mr. Tam.

21           Professor Hewitt, who was planning to be our next  
22 witness, has been ill today and so if he can make it tomorrow,  
23 we are going to put him on. Otherwise, we are going to go  
24 with -- I may be mispronouncing, it's Herek.

25           **THE COURT:** Herek, yes.

1           **MR. BOIES:** Herek. I'm pronouncing his name wrong.  
2 Professor Herek is the one that is ill. If he is available, we  
3 would put him on following this witness. Other than that, we  
4 would put Mr. Tam on.

5           But those are the two witnesses that we have, and  
6 then we have a number of documents to offer before we rest.

7           **THE COURT:** Okay. And after those two witnesses  
8 testify, do you plan to present any other live witnesses?

9           **MR. BOIES:** We do not. Those are our two live  
10 witnesses that we plan at the present time.

11           There is a possibility that we still may need to call  
12 Mr. Prentice to authenticate some materials, or one of the  
13 other people to authenticate materials.

14           But the only other live witnesses we would be calling  
15 would be just for the purposes of authentication of documents,  
16 which we hope we are going to work out without the necessity of  
17 calling them.

18           **THE COURT:** I understand that the magistrate judge  
19 has, I believe, resolved the matter that was discussed before  
20 the break this morning involving some of the documents.

21           Can counsel inform me what that situation is?

22           **MR. BOIES:** I cannot, your Honor, but somebody --

23           **THE COURT:** Mr. McGill, I think you were involved in  
24 that proceeding, were you, Mr. McGill?

25           **MR. MCGILL:** Yes, your Honor, I was.

1           The motion to amend the core group order was -- as  
2 your Honor indicated, was granted in part and denied in part.  
3 And the defendant-intervenors have produced, and we are  
4 currently reviewing all of the documents that they were  
5 withholding pursuant to that motion to amend that they had  
6 made.

7           **THE COURT:** Is it the plaintiffs' intention to  
8 introduce some of those documents in their case in chief?

9           **MR. BOIES:** Obviously, your Honor, we are reviewing  
10 the documents to see, but it is our intention to introduce some  
11 of those, if we can resolve the authentication issues before we  
12 rest.

13           **THE COURT:** All right. Well, then, it's -- is it  
14 unduly optimistic to think that the plaintiff may rest  
15 tomorrow?

16           **MR. BOIES:** Your Honor, I think it would be  
17 optimistic. I think it is possible, but I think it would be  
18 optimistic.

19           I think it is certain we will rest before the end of  
20 the day on Friday, but I think that with -- with the documents  
21 that we're still getting and sort of working on parallel  
22 tracks, I think it will be challenging to finish tomorrow, but  
23 we still think that's a possibility.

24           **THE COURT:** All right. Well, then, that means that  
25 under a very optimistic scenario, the defendants may be called

1 upon to begin their case tomorrow; and if not, in all  
2 probability on Friday?

3           **MR. THOMPSON:** Yes, your Honor. We'll have Professor  
4 Ken Miller ready to go, your Honor. We would expect Friday  
5 morning, so.

6           **THE COURT:** Very well. All right.  
7 Any housekeeping matters we need to attend to?

8           **MR. BOUTROUS:** Your Honor, just one issue to update  
9 the Court on.

10           The magistrate did deny the motion to quash -- deny  
11 the motion to quash that was filed by Pastor Garlow and Pastor  
12 McPherson. So that was the other issue that he was addressing.

13           **THE COURT:** All right. Well, also, unless that's  
14 brought here, that should be the end of that matter.

15           **MR. BOUTROUS:** Thank you, your Honor.

16           **THE COURT:** Very well, counsel. I will see you  
17 bright and early tomorrow at 8:30.

18           (Whereupon at 4:34 p.m. further proceedings  
19 in the above-entitled cause was adjourned  
20 until Thursday, January 21, 2010 at 8:30 a.m.)

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I N D E X

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**CERTIFICATE OF REPORTERS**

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, **Kristin M. Perry, et al. vs. Arnold Schwarzenegger, in his official capacity as Governor of California, et al.**, were reported by us, certified shorthand reporters, and were thereafter transcribed under our direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

\_\_\_\_\_  
/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR  
U.S. Court Reporter

\_\_\_\_\_  
/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR  
U.S. Court Reporter

Wednesday, January 20, 2010