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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

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

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

) San Francisco, California
Defendants.) Tuesday
) January 26, 2010

TRANSCRIPT OF PROCEEDINGS

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Official Reporters - U.S. District Court

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P R O C E E D I N G S

JANUARY 26, 2010

1:11 P.M.

THE COURT: Very well. Mr. Cooper, please call your next witness.

MR. COOPER: Yes, Your Honor. Thank you. We call David Blankenhorn, Your Honor.

And we have a binder to hand out. May I approach the witness with it?

THE COURT: You may, indeed.

THE CLERK: Raise your right hand, please.

DAVID BLANKENHORN,

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

THE WITNESS: I do.

THE CLERK: Thank you. State your name.

THE WITNESS: David Blankenhorn.

THE CLERK: And spell your last name, please.

THE WITNESS: B-l-a-n-k-e-n-h-o-r-n.

THE CLERK: And your first name.

THE WITNESS: David.

THE CLERK: Spell it out, please.

THE WITNESS: D-a-v-i-d.

THE CLERK: Thank you.

DIRECT EXAMINATION

1
2 **BY MR. COOPER:**

3 **Q.** Good afternoon, Mr. Blankenhorn.

4 **A.** Hi.

5 **Q.** Mr. Blankenhorn, I would like you to turn to tab 1 in the
6 binder that's in front of you.

7 **MR. COOPER:** And, Your Honor, this is the declaration
8 of Mr. Blankenhorn.

9 **BY MR. COOPER:**

10 **Q.** And I'd like you to turn back to -- actually, it's not a
11 numbered page, but it's right behind page 25. And is that your
12 CV, Mr. Blankenhorn?

13 **A.** Yes, sir.

14 **MR. COOPER:** Okay. Your Honor, behind tab A in the
15 binder we have created a new exhibit that is just
16 Mr. Blankenhorn's CV. It's exhibit DIX2693. And we would move
17 that into evidence.

18 **MR. BOIES:** No objection, Your Honor.

19 **THE COURT:** Very well. DIX2693 is admitted.

20 (Defendants' Exhibit 2693 received in evidence.)

21 **BY MR. COOPER:**

22 **Q.** Mr. Blankenhorn, would you please briefly describe your
23 educational background for the Court.

24 **A.** I graduated from high school in Salem, Virginia, in 1973.
25 I graduated from college from Harvard College, in 1977, with a

1 degree in social studies. And I graduated in 1979, with an
2 M.A. in history from the University of Warwick in Coventry,
3 England.

4 **Q.** And did you receive any honors?

5 **A.** As an undergraduate, I received the honor of magna cum
6 laude, and it's with -- my M.A. degree, they called it "with
7 distinction."

8 **THE COURT:** I didn't hear what you said.

9 **THE WITNESS:** It was called "with distinction," M.A.
10 with distinction.

11 **BY MR. COOPER:**

12 **Q.** And did you receive any fellowships?

13 **A.** I received the John Knox fellowship as an undergraduate
14 to -- for a year of study abroad.

15 **Q.** And were you on that fellowship at the University of
16 Warwick?

17 **A.** Yes, sir.

18 **Q.** After your graduation from the University of Warwick, what
19 did you do then?

20 **A.** I served two years in the VISTA program, Volunteers In
21 Service to America, where I worked as a community organizer in
22 several communities in Boston, Massachusetts. And, then, for
23 the next four years, I worked as a -- after VISTA, I continued
24 my work as a community organizer in several different
25 communities in Massachusetts and in Virginia.

1 Q. Okay. And what -- what did your work in these
2 neighborhoods entail?

3 A. Well, it was working -- working and living in low-income
4 communities, where there were a lot of challenges. And our job
5 as organizers were to create grassroots organizations in those
6 communities to increase their voice in the political system and
7 to advocate for reforms that they thought were important.

8 Q. You mentioned challenges. What did you mean by
9 "challenges" in those communities?

10 A. Well, you -- you see a lot of the problems firsthand when
11 you live and work in, you know, in poor communities where there
12 are lots of issues that need addressed.

13 And I think, for me, seeing the weakening of the --
14 seeing the weakened state of community and family institutions
15 in those communities in some ways was -- especially the role
16 of -- especially how children were living without their
17 fathers, it caused me to be particularly interested in that
18 issue and to -- then led me to my next round of work.

19 Q. Okay. And what was that?

20 A. Well, I started -- with some colleagues, I started an
21 organization called -- this is -- we're now up to 1987.

22 I started an organization called Institute for
23 American Values, which is a nonpartisan think tank, that it
24 works on -- their primary focus is on issues of marriage,
25 family, and child well-being.

1 Q. And what -- what is your position in the Institute for
2 American Values?

3 A. I'm the president.

4 Q. And could you explain the type of work that -- that the
5 Institute does?

6 A. Well, we commission research, usually by putting together
7 teams of scholars that would work on projects for one, two,
8 three or -- years, or more. Then we would release the findings
9 of that work.

10 We hold conferences and we -- I would say, perhaps,
11 our signature product is what we call "Report to the Nation."
12 And that's where an interdisciplinary team of scholars tries to
13 tackle what we consider to be an important issue, working very
14 intensively for a fair period of time. And then they jointly
15 release these -- these findings and these recommendations.

16 Q. Are you one of the -- what are the subject matters that
17 the Institute focuses on?

18 A. Well, as I mentioned, the main subjects would be
19 fatherhood, marriage, family structure, child well-being.

20 In recent years, we have added several other issues
21 to our agenda. But that has -- was -- has always been our
22 primary area of concentration.

23 Q. And does the Institute produce any regular publication?

24 A. We produce an annual report called "The State of Our
25 Unions," which is a report on the state of marriage in America.

1 And we produce a periodic report. We're working on the third
2 edition now, called "Why Marriage Matters: Conclusions from
3 the Social Sciences."

4 **Q.** And that latter report, what does it address, seek to
5 address?

6 **A.** We've got -- we pulled together about 15 scholars from
7 different fields in the social sciences and from different
8 points of view on the political spectrum, and had them work
9 together very carefully to come up with a consensus statement
10 on what they felt were the social -- the principal social
11 science findings regarding marriage as an institution.

12 And we've published the two editions now. We renew
13 them as more research becomes available. And now we are
14 working on the third edition.

15 **Q.** Mr. Blankenhorn, are you personally involved in the
16 Institute's research and publications in its other work?

17 **A.** Yes, sir. Either, in some cases, as a principal writer or
18 investigator, and in other cases more as the -- in the capacity
19 of iden- -- identifying the teams of scholars and working with
20 them to refine the topic, and then working with -- with them in
21 a non-leadership capacity as they do their work and as they
22 then release the results of their work.

23 **Q.** And is there a subject matter or field that you devote
24 your personal efforts to in connection with that -- with --
25 with your personal involvement in those projects?

1 **A.** Marriage, fatherhood, family structure.

2 **Q.** Mr. Blankenhorn, have you authored any books?

3 **A.** Yes, sir. I authored -- relevant to this topic, I
4 authored a book in 1995, called *Fatherless America*. That was a
5 study or a book about the consequences of having approximately
6 35 percent of U.S. children living apart from their fathers.
7 And it pointed to -- I argued that this was a serious social
8 problem.

9 And then in 2006, I published a book called -- 2007,
10 rather, published a book called *The Future of Marriage*, that
11 just looks at what is happening to marriage today, and how we
12 might take steps to -- to strengthen it in the future.

13 **Q.** Okay. I want to explore a little further both of those --
14 both of those books.

15 Let's start with the *Fatherless America*. Describe
16 the research you undertook in connection with writing that
17 book.

18 **A.** I did interviews with fathers in six different cities
19 around the country, and used the transcripts of those
20 interviews as bases for writing portions of the book.

21 And I conducted a literature review of the
22 scholarship at that time, on the role of fathers in the lives
23 of children. That was a basis.

24 And, thirdly, I convened scholarly conferences or
25 gatherings where commissioned papers were produced. And we

1 would discuss these papers on different aspects of fatherhood
2 and father absence. And those discussions and working with the
3 scholars in that way also furthered my -- my thinking about the
4 topic.

5 **Q.** And did your book, *Fatherless America*, receive any
6 commentary? Or what kind of reaction did it receive when it
7 was published?

8 **A.** I think it's fair to say that it was widely and generally
9 respectfully reviewed, in the *New York Times*, and *Washington*
10 *Post*, *Book World*, and *L.A. Times*, *Chicago Tribune*, *Wall Street*
11 *Journal*, *Newsweek*, *U.S. News & World Report*. It was featured
12 on the CBS Evening News. It was -- it was -- it was widely
13 reviewed.

14 **Q.** And did it occasion any appearances, on your part, in
15 connection with discussion of the book?

16 **A.** It led to quite a bit of public speaking at university and
17 civic groups, and elsewhere.

18 **Q.** And I think you said it was reviewed. A Dr. Michael Lamb
19 has testified in this case. Did he review your book?

20 **A.** Yes, he reviewed it in one of the professional journals.
21 And he disagreed with some of its findings, but said some
22 respectful things about it as well.

23 **MR. COOPER:** Well, and, in fact, I'd like to publish
24 to the screen, Your Honor, if I may, Demonstrative number 1.

25 (Document displayed.)

1 **BY MR. COOPER:**

2 **Q.** Now, on the screen, Mr. Blankenhorn, is this the -- is
3 this among the things that Mr. Lamb said?

4 **A.** This is among the nicer things he said, yes.

5 (Laughter)

6 **MR. BOIES:** Your Honor, may I inquire whether the
7 review is in evidence?

8 **MR. COOPER:** I don't know.

9 **MR. DUSSEAULT:** It is.

10 **THE COURT:** It rings a bell, I must say.

11 **MR. THOMPSON:** I believe I used it with Dr. Lamb,
12 Your Honor, and moved it into evidence. We can check.

13 **THE COURT:** I think we have seen this before. I
14 could be mistaken, of course.

15 **MR. THOMPSON:** We have seen it, Your Honor.

16 **THE COURT:** All right. Mr. Thompson and I have seen
17 it before.

18 (Laughter)

19 **MR. COOPER:** And, Your Honor, I believe
20 Mr. Blankenhorn's book, *Fatherless America*, is in evidence. I
21 think there may have been some confusion about its exhibit
22 number, but I believe it's in evidence.

23 **THE COURT:** The witness's book or the Lamb article?

24 **MR. COOPER:** The witness's book, *Fatherless America*.

25 **THE COURT:** And that's exhibit number?

1 **MR. COOPER:** Your Honor, it's defense Exhibit 103.

2 **THE COURT:** Thank you.

3 **MR. COOPER:** DIX103.

4 **THE COURT:** Very well.

5 **BY MR. COOPER:**

6 **Q.** Now, I'd like to turn to the other book you mentioned, *The*
7 *Future of Marriage*. Would you turn to tab 2 of your book -- I
8 mean, of your witness binder here.

9 **A.** Yes.

10 **Q.** And would you describe what you find there?

11 **A.** Well, that's a picture of the cover of the book, *The*
12 *Future of Marriage*.

13 And, as I said, it was from 2007, and talks about
14 what is happening to marriage, and what the consequences of
15 these trends are. And it makes recommendations on how we
16 might, as a society, seek to strengthen the institution.

17 **Q.** And could you describe how you researched and prepared
18 to -- to author this book?

19 **A.** I spent some concentrated period of time, with some
20 guidance from some colleagues, trying to immerse myself and
21 become familiar, a literature review, conduct a literature
22 review of the anthropological literature related to fatherhood
23 as -- sorry, marriages as a cross-cultural institution.

24 And I conducted a series of consultations with an
25 interdisciplinary group of scholars, three of them in different

1 parts of the country, to discuss the issue.

2 And then I just also consulted my own accumulated
3 body of having read and written and spoken about this issue for
4 about the past 20 years.

5 **Q.** And this book, *The Future of Marriage*, did it receive
6 commentary when it was published, as well?

7 **A.** It did. It was not as widely reviewed as *Fatherless*
8 *America*, but it did receive some attention from reviewers.

9 And it also caused me to be invited to do quite a bit
10 of public speaking and to engage in conversation with -- in the
11 book, I argue that we should not adopt same-sex marriage, and
12 so the book caused me to be invited to participate in lots --
13 quite a number of conversations with proponents of adopting
14 same-sex marriage.

15 And I think, in a way, that might have been the most
16 interesting and important outcome, in terms of the public
17 impact or public -- you know, the results of the book.

18 **Q.** I would like to publish now Demonstrative number 2, with
19 respect to the commentary on your book.

20 (Document displayed.)

21 **MR. COOPER:** And, Your Honor, for the record, if the
22 Court please, I'll just read that Mr. Dale Carpenter, Professor
23 Dale Carpenter, a University of Minnesota law professor, said
24 of the book:

25 "Probably the best single book yet written

1 opposing gay marriage. Blankenhorn is a
2 serious scholar and thinker."

3 And then Professor Francis Fukuyama had this to say:

4 "David Blankenhorn enormously deepens the
5 current debate on same-sex marriage by
6 recovering the historical understanding of
7 marriage as a public institution designed to
8 promote and foster procreation and the
9 raising of children, an understanding based
10 not on religious conviction but on
11 observation of how our species has resolved
12 over time. It is a thoughtful and important
13 addition to the contemporary debate."

14 **BY MR. COOPER:**

15 **Q.** Are these among the comments that your book generated?

16 **A.** These are -- these mean something important to me because
17 Fukuyama is an internationally-respected scholar, author of
18 many books.

19 Professor Carpenter is a prominent law professor who
20 is a very active proponent of gay marriage. So when he says
21 it's the best book against, he might have been dampening his
22 praise a little bit, from his point of view. But it was a very
23 generous thing for him to say.

24 **MR. COOPER:** Your Honor, I would like to introduce
25 Mr. Blankenhorn's book, *The Future of Marriage*. It is marked

1 as DIX956.

2 **THE COURT:** Hearing no objection.

3 **MR. BOIES:** No objection, Your Honor.

4 **THE COURT:** 956 is admitted.

5 **MR. COOPER:** Thank you.

6 (Defendants' Exhibit 956 received in evidence.)

7 **MR. COOPER:** Thank you.

8 **BY MR. COOPER:**

9 **Q.** I'd also now like to publish to the screen Demonstrative
10 number 3, and in that connection ask you if you have edited any
11 books on subject matters relevant to your testimony today?

12 (Document displayed)

13 **A.** Yes, sir. Well, I thought there were four. The *Black*
14 *Fathers in Contemporary American Society*, which I co-edited
15 with Obie Clayton and Ron Mincy, who were two prominent
16 African American sociology professors.

17 *The Book of Marriage*, which I co-edited with Dana
18 Mack, who worked with me at the Institute at the time.
19 *Promises to Keep* and *Rebuilding the Nest*, are both groups of
20 essays which I co-edited, and each essay -- each of these books
21 is a compilation of scholarly essays examining the status and
22 future of marriage.

23 **Q.** Have the books that you have written or edited been
24 reviewed in any peer-reviewed academic journals?

25 **A.** Well, I counted up recently, and there were over 50

1 citations in peer-reviewed academic journals. And I believe
2 there were reviews in seven -- book reviews in seven journals,
3 including the *Journal of Marriage and the Family*, and social --
4 *Family Relations*, and those -- journal of *Family Relations*
5 being -- *Journal of Marriage and the Family* being the most
6 prominent journal in the field of -- when it comes to sociology
7 of the family.

8 So, yes, there were some -- a number of reviews, and
9 also a number of citations in peer-reviewed journals.

10 **Q.** And I just to be clear, if I understood your testimony
11 correctly, your book has been actually reviewed, and you say
12 seven times. But it's been cited over 50 times in
13 peer-reviewed journals?

14 **A.** Yes. Seven -- seven reviews, and I think about 53
15 citations of the works in peer-reviewed journals.

16 **Q.** And has your scholarship ever been cited in any reported
17 judicial opinions?

18 **A.** It's been cited five times in court cases, including by
19 the California Supreme Court and by the Massachusetts Supreme
20 Judicial Court.

21 **Q.** And were those citations in the same-sex marriage cases in
22 those?

23 **A.** Both of the latter two were with respect to the same-sex
24 marriage cases, yes, sir.

25 **Q.** I see on your CV you are a member of the National

1 Commission on America's Urban Families. Could you describe
2 that commission, please.

3 **A.** That commission was appointed by President George Bush,
4 the 41st president, in 1992, to examine the state of America's
5 urban families and to issue a report to the President.

6 I was one of about seven members. The chairman of
7 that committee was then Governor John Ashcroft, of Missouri.
8 The vice-chairwoman was former mayor, Annette Strauss, from
9 Dallas. And we met six or seven times, when we issued our
10 report in January of '03 -- of '93, excuse me.

11 **Q.** Have you ever served in any other advisory role to federal
12 governmental officials?

13 **A.** I was asked during the -- President Clinton's
14 Administration, I was asked by Vice President Al Gore to work
15 with him in a program called Family Reunion, which was focused
16 on family issues. And it was a conference that the vice
17 president sponsored and chaired in Nashville, Tennessee, each
18 summer during that period of time.

19 And I was asked -- I was one of a number of people to
20 be asked by him to meet with him, to help him develop the
21 agenda, and to participate in that conference. The theme at
22 the conference that year was "fatherhood."

23 **Q.** And the National Fatherhood Initiative is listed on your
24 CV. What is that?

25 **A.** That is a group that was founded by me and several other

1 people in 1995, I believe was the first time we had a meeting.
2 '96, perhaps.

3 It's to raise consciousness and to really, I guess,
4 inform public opinion about the importance of active, involved
5 fathers in the lives of children. I was the founding chairman.

6 **Q.** Earlier in your testimony you mentioned that you had done
7 some speaking. Have you delivered lectures in academic
8 settings?

9 **A.** Yes, I have. Quite often over the years, yes.

10 **Q.** And have these been on the subject matters that we're
11 discussing now?

12 **A.** Marriage, fatherhood, family structure.

13 **Q.** And have you been invited to participate in debates or
14 panel discussions on the subject specifically of marriage
15 and/or same-sex marriage?

16 **A.** Yes. I'd say quite a few times, I've had a chance to meet
17 and engage in conversation on this issue with some of the
18 leading proponents of same-sex marriage, Evan Wolfson, Andrew
19 Sullivan, Jonathan Rauch, others.

20 **Q.** So you've engaged in debates with them over the years, on
21 this subject matter?

22 **A.** Yes, sir. We -- we try to call them conversations now,
23 but, yes, that's the -- that's the issue.

24 **Q.** And have you provided legislative testimony in these
25 areas?

1 **A.** Uhm, I believe I've testified either -- I've testified
2 three times before either a congressional committee or a state
3 legislative committee, on subjects of marriage and fatherhood.

4 **Q.** Thank you, Mr. Blankenhorn.

5 **MR. COOPER:** Your Honor, I would like to tender
6 Mr. Blankenhorn as an expert on the subject of marriage,
7 fatherhood, and family structures.

8 **THE COURT:** Very well. Voir dire?

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

10 **VOIR DIRE EXAMINATION**

11 **BY MR. BOIES:**

12 **Q.** Good afternoon, Mr. Blankenhorn.

13 **A.** Hello.

14 **Q.** We haven't met, but my name is David Boies, and I
15 represent the plaintiffs.

16 You got a master's degree, and that degree was in
17 history; is that right?

18 **A.** Yes, sir. Comparative labor history.

19 **Q.** And you did a thesis for that master's?

20 **A.** Yes, sir.

21 **Q.** And what was that thesis in?

22 **A.** Labor history.

23 **Q.** Was it a particular subject?

24 **A.** Yes, sir. It was a study of two cabinetmakers' unions in
25 19th century Britain. And it was published in a peer-reviewed

1 academic book several years after I wrote it.

2 **Q.** Now, "peer-reviewed," you just said. What is your
3 understanding of what a peer-reviewed publication is?

4 **A.** It's a publication that prior to it being published is
5 reviewed by competent persons to give -- to give their views on
6 whether or not -- first, whether or not the article should be
7 published. And then, if it should, whether it requires
8 revisions.

9 **Q.** Now, other than the thesis that you wrote on cabinetmakers
10 in Britain, have you ever had a peer-reviewed publication?

11 **A.** Yes, sir.

12 **Q.** And what was that?

13 **A.** Well, I co-edited a book with Obie Clayton and Ron Mincy,
14 called *Black Fathers in Contemporary American Society*, that was
15 published by Russell Sage Press. That was a peer-reviewed
16 publication.

17 **Q.** Anything else?

18 **A.** No, sir. To the best of my memory, that's it.

19 Except it might be of interest to note that in my own
20 organization, where over the past 20 years many of my pieces of
21 work have been published, we have, to the best of our ability,
22 instituted our own peer-review process. And we've been very
23 scrupulous about carrying that out because of our high regard
24 for the entire process.

25 **Q.** But you do understand that "peer-reviewed," as is normally

1 used --

2 **A.** I am using it as it's normally used.

3 **Q.** "Peer-reviewed," as it is normally used does not refer to
4 something that you do internally. It's done by somebody
5 independent, correct?

6 **A.** All of our peer reviews are done by external people that
7 have no connection to the Institute or the work that we're
8 doing.

9 **Q.** And are you saying that those independent people
10 peer-reviewed your work?

11 **A.** Yes, sir.

12 **Q.** Okay. Now, I thought I had two pieces of peer-reviewed
13 publications.

14 **A.** I thought that the import of your question was to exempt
15 from our consideration things that were published by my own
16 organization, for reasons that you're implying.

17 And I'm happy to stipulate that let's bracket that
18 and just say that, apart from anything that was published by my
19 own organization, where you could question, if you wish, the
20 integrity of the peer-review process -- although, I think, if
21 you were familiar with it you would not question it; but as an
22 outsider you may question it -- let's bracket that for a moment
23 and just say everybody else. We're looking at two publications
24 only.

25 **Q.** And those two publications didn't have anything to do with

1 same-sex marriage or the effects of same-sex marriage, correct?

2 **A.** No, sir.

3 **Q.** In other words, I'm correct?

4 **A.** You're correct. They did not.

5 **Q.** Okay. Thank you.

6 Now, you have never taught a course in any college or
7 university on marriage, correct?

8 **A.** No, sir.

9 **Q.** And you have never taught a course in any college or
10 university on fatherhood, correct?

11 **A.** No, sir.

12 **Q.** And you've never taught a course in any college or
13 university on family structure?

14 **A.** No, sir.

15 **Q.** And do you understand that the fields of psychology and
16 sociology and anthropology are relevant to the subjects of
17 marriage and fatherhood and family structure?

18 **A.** That is my understanding, yes, sir.

19 **Q.** And you've never gotten any kind of degree in psychology,
20 correct?

21 **A.** No, sir.

22 **Q.** Or in psychiatry?

23 **A.** No, sir.

24 **Q.** Or in sociology?

25 **A.** No, sir.

1 Q. Or in anthropology?

2 A. I think we could go through the whole list because I've
3 enumerated for you all the degrees I have.

4 Q. And you've never taught any course in any college and
5 university --

6 A. I have never been employed by a university or a college to
7 teach --

8 Q. In any capacity?

9 A. -- in any way, ever.

10 Q. And you said you had testified three times. Were any of
11 those three times relating to the effects of same-sex marriage?

12 A. No, sir.

13 Q. In preparation for your testimony, did you undertake any
14 scientific study of what the effects of permitting same-sex
15 marriage had been in any jurisdiction in which same-sex
16 marriage had been permitted?

17 A. Specifically in preparation for my testimony, did I
18 undertake such study? The answer to that would be, no, sir, I
19 did not.

20 Q. Okay. Independent of the preparation for your testimony,
21 have you conducted any scientific study as to what the effects
22 of permitting same-sex marriage were in any of the
23 jurisdictions where same-sex marriage was permitted?

24 A. Well, I have undertaken a study of that question in the
25 best way I know how. Whether or not it would meet your

1 definition of "scientific" is probably something we might have
2 to explore. I would be happy to tell you what I did.

3 **Q.** Let me explore it. You are saying that you undertook a
4 attempt to study what the effects were of permitting same-sex
5 marriage in various jurisdictions where same-sex marriage was
6 permitted; is that your --

7 **A.** No, sir.

8 **Q.** Okay.

9 **A.** I want to say what I did do, though, if I may be
10 permitted.

11 **Q.** Let me be sure I've got answers to my questions first,
12 though, okay, sir.

13 **A.** I thought you were asking me did I undertake independent
14 of this preparation from testimony, I thought your question
15 was: Did I undertake any effort to understand the likely
16 consequences of adopting same-sex marriage? And I wish to tell
17 you that I did.

18 **Q.** No. I'm sure you would like to answer questions that I'm
19 not asking, sir.

20 (Laughter)

21 And you'll have a chance to do that with your
22 counsel. I would like you to listen to the question I'm asking
23 you, okay, because I think your question kind of slid over a
24 couple of words.

25 My question was whether you had conducted any study,

1 in connection with your expert work or otherwise, of the
2 effects of permitting same-sex marriage in the countries where
3 same-sex marriage was permitted? That begins with a yes or no
4 answer.

5 **A.** I don't think I'm able to answer that question yes or no,
6 if those are my only two choices.

7 **Q.** Well, the question is whether you have attempted to study
8 the effects of same-sex marriage in the jurisdictions where
9 they have been permitted. You have either attempted to do that
10 or not attempted to do that. It may very well have been that
11 you attempted to do something entirely different or even
12 related to it. But I'm not asking you about that. Do you
13 understand?

14 **A.** May I tell you what I did do?

15 **Q.** I would like you to answer my question, sir. Now, do you
16 understand what my question is?

17 **A.** No, sir, because --

18 **Q.** If you don't understand my question, anytime you don't
19 understand my question, please let me know.

20 **A.** I'm letting you know now.

21 **Q.** Okay. Let me try to be as clear as I can.

22 You are aware that there are some jurisdictions that
23 have permitted same-sex marriage?

24 **A.** I am so aware.

25 **Q.** Okay. Now, have you studied any of those jurisdictions to

1 try to determine what the effect of permitting same-sex
2 marriage in those jurisdictions has been, subsequent to the
3 time that same-sex marriage was adopted?

4 **A.** The answer to your question is: Yes.

5 **Q.** Okay.

6 **A.** If by --

7 **Q.** As long as you answer yes, then I can begin to ask more
8 questions.

9 **A.** I'm just afraid that you won't accept my definition of
10 "study." And I don't want to try to say something that is --
11 is -- that it doesn't meet your definition of a study.

12 **Q.** Well, I will explore that. I will explore that. But I
13 would like to do it in an orderly way.

14 And the first thing I'd like to do is, I'd like you
15 to identify which jurisdictions you have, in your
16 interpretation of the word "studied," studied.

17 **A.** I've tried to pay some attention to the evolution of
18 the -- of this phenomenon of same-sex marriage in the
19 Scandinavian countries. And I have tried to pay some attention
20 to the impact of same-sex marriage in Massachusetts.

21 But what I was trying to say before is that, I have
22 not engaged in a scientific study where I find data and -- and
23 write up an article that would be published of that nature. I
24 have not done those things. That's what I was trying to say.
25 I have not done those things.

1 I have just read articles and had conversations with
2 people, and tried to be an informed person about it. But that
3 is really the extent of it.

4 I haven't developed a methodology or a set of expert,
5 you know, findings about the topic that you're -- I have not
6 done that, the topic that you're asking me to address.

7 **MR. BOIES:** Okay. Your Honor, I would object.

8 **THE COURT:** The objection is that the witness is not
9 qualified to opine on the subject of marriage, fatherhood, and
10 family structure, correct?

11 **MR. BOIES:** Yes. And in particular -- and in
12 particular, with respect to the effect of same-sex marriage,
13 which is what he is being proffered to do within those general
14 subjects.

15 **THE COURT:** Mr. Cooper, any further foundation for
16 the opinion testimony that the witness is prepared to offer?

17 **MR. COOPER:** Your Honor, I think if the Court will
18 permit the witness to testify, the Court will observe and hear
19 the foundation for his judgments, and can certainly reserve
20 judgment. But --

21 **THE COURT:** Well, I understand. And I may very well
22 do that. But the question is whether you want to lay any
23 further foundation for his expertise.

24 **MR. COOPER:** In these subjects of marriage, family
25 structure, and fatherhood?

1 **THE COURT:** Yes, and same-sex marriage, as
2 Mr. Boies --

3 **MR. COOPER:** And same-sex marriage. No, Your Honor.

4 **THE COURT:** Okay. Well, the testimony is, of course,
5 governed by the rules of evidence concerning opinion testimony.

6 And the cases that the Supreme Court has laid down to
7 guide the Court in admitting such testimony, obviously, the
8 standards are somewhat different in the physical sciences than
9 they are in the social sciences.

10 Relevant to the social sciences, as I understand the
11 standards that have been adopted by the Supreme Court and by
12 the Courts of Appeal, the Court looks to whether the work that
13 the witness has done meets the standards of intellectual rigor,
14 using criteria much like those that have been developed in the
15 Daubert case and the Daubert line of cases; whether the
16 proffered testimony is based upon the expert's special skills,
17 and his special skills as opposed to the insights of an
18 intelligent layperson; and whether the proffered testimony will
19 assist the trier of fact to understand or determine a fact
20 which is in issue in the case.

21 With respect to Mr. Blankenhorn's qualifications,
22 were this a jury trial, I think the question might be a close
23 one.

24 But this being a court trial, I'm going to permit the
25 witness to testify; and, as Mr. Cooper has suggested, to weigh

1 that testimony in light of the witness's qualifications, his
2 background, training, and experience, and the reasons that he
3 offers for his opinions.

4 So you may proceed.

5 **MR. COOPER:** Thank you, Your Honor.

6 **DIRECT EXAMINATION RESUMED**

7 **BY MR. COOPER:**

8 **Q.** Mr. Blankenhorn, what is marriage?

9 **A.** Marriage is a socially-approved sexual relationship
10 between a man and a woman.

11 **Q.** And on what do you base that opinion?

12 **A.** I base that on the broad consensus findings of the
13 scholars, principally from the field of anthropology, but
14 others as well, who have carefully sought to investigate this
15 question in the modern era.

16 **Q.** And what does marriage do?

17 **A.** Marriage does a number of things, but the most important
18 thing it does is regulate filiation. It establishes who are
19 the child's legal and social parents.

20 **Q.** And on what do you base that opinion?

21 **A.** The same body of evidence, the -- the views that have been
22 drawn from scholarly investigations, principally from the field
23 of anthropology, but elsewhere as well, spanning across the --
24 the modern era of scholarship.

25 **MR. COOPER:** Your Honor, I would like to publish to

1 the screen Demonstrative number 4, and now present the
2 witness's testimony and his expert opinions which have been
3 disclosed, of course, to the -- to the plaintiffs.

4 (Document displayed)

5 And for purposes of the record, Your Honor, I would
6 like to read into the record proposition number one, and then
7 ask the witness questions about that.

8 **MR. BOIES:** Objection. Leading, Your Honor.

9 **MR. COOPER:** Beg your pardon?

10 **THE COURT:** It's a leading objection. I think it's a
11 well-taken objection. Maybe you could just jump right into the
12 subject.

13 **MR. COOPER:** Well, Your Honor, I would be happy to do
14 that. Although, I have to say that the plaintiffs led their
15 witnesses throughout the course of the presentation of their
16 case. And on the one occasion when we objected to it, we
17 recognized that it moved the pace of the --

18 **THE COURT:** It does move things along. I will let
19 you do some leading.

20 But rather than simply reading from the demonstrative
21 and then asking the witness whether he agrees with this or
22 doesn't agree with it, and so forth, it might be helpful if you
23 were to take him through in a somewhat more traditional manner.

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

25

1 **BY MR. COOPER:**

2 **Q.** Mr. Blankenhorn, what is the primary purpose of marriage
3 in human groups?

4 **A.** We're embodied as male and female. That's the basic
5 division in the species. We -- we reproduce sexually. We
6 don't -- you know, that's -- that's how -- how we reproduce.
7 And the -- marriage is the social institution that rests upon
8 those very primary biological facts.

9 In fact, the famous anthropologist, recently deceased
10 but very famous anthropologist, Claude Levi-Strauss, once
11 described marriage as a social institution with a biological
12 foundation. And this is really what he was referring to.

13 He was saying that in -- across societies, that we
14 have an interest in having it be, insofar as we can make it so,
15 that the man and the woman who -- whose sexual union makes the
16 child, who are the biological creators of the child, that those
17 same two individuals are also the social and legal parents of
18 the child.

19 And there is only one institution in the world that
20 performs the task of bringing together the three dimensions of
21 parenthood: The biological, the social -- that's the caring
22 for the child -- and the legal. That institution is -- is
23 marriage.

24 It -- it -- it -- we think of it, in a way -- if you
25 don't mind the poetry, we think of it as a gift that we give to

1 children. We say: You as a child are being given this gift of
2 being able to know and be known by the two people who brought
3 you into this world.

4 So this question -- this word "filiation," or the
5 word "affiliation," who is the child affiliated with, that,
6 according to the scholars, has been the primary cross-cultural
7 purpose of the institution. If it wasn't -- if that need was
8 not there, we -- we likely would not have the institution at
9 all.

10 So marriage does numerous things. There are numerous
11 dimensions to it, of course. And it changes historically, and
12 it evolves over time, and there's great diversity.

13 But the wonderful finding, from the scholars who
14 looked at it, is that it always is primarily organized
15 everywhere, around the globe, to achieve this goal of giving
16 the child -- of uniting the biological, social, and legal
17 dimensions of parenthood, in fixing that, because we know how
18 important this is for children.

19 That's really -- that's really the main rationale for
20 why we have the institution.

21 **Q.** What is the significance of the fact that marriage is a
22 cross-cultural, as you put it, institution and exists
23 everywhere?

24 **A.** The fact that it exists everywhere or at least nearly
25 everywhere, I think, suggests just how important the need must

1 be. Because marriage can look very different in different
2 places and different times. But what's so astonishing about
3 this is that it's always doing this thing. East, west, north,
4 south, a thousand years ago, today, it's doing this thing.

5 So this thing must be pretty important. It must be
6 pretty fundamental. It must be at the -- at the very species
7 level, critical to our -- to the society's success. It's not
8 just one thing among many, and so forth.

9 Because of its universality in the midst of
10 diversity, I think that's a good piece of evidence to suggest
11 the absolutely fundamentally important nature of the need that
12 is being addressed singularly by this institution.

13 **Q.** When you said earlier "this thing," I just want to be
14 clear, what do you mean when you say marriage addresses "this
15 thing"?

16 **A.** The need for the child to know and be known by the two
17 people, to make it as likely as we can, that the biological
18 parents are also the social and legal parents. That's what I
19 mean by the thing.

20 **Q.** Mr. Blankenhorn, I'd like you to turn to tab 3 in your
21 binder. And would you please identify that document.

22 **A.** This is from a book by Suzanne Frayser, called *Varieties*
23 *of Sexual Experience*." And she is a quite prominent
24 anthropologist.

25 **Q.** And now I would like to invite your attention to page 248,

1 which is the only page excerpted behind the tab there. And
2 it's the -- and, specifically, to the second full paragraph.
3 And if you will, please, Mr. Blankenhorn, would you read --
4 read the first three sentences, as I count them.

5 **A.** (As read)

6 "My own definition of marriage derives from a
7 review of the careful attempts to define it
8 made by other social scientists, for example,
9 Gough and Goodenough, as well as from my
10 analysis of ethnographic reports of marriage
11 in a variety of societies. I have found that
12 I can most consistently and usefully identify
13 marriage in cross-cultural context by using
14 the following definition: Marriage is a
15 relationship within which a group socially
16 approves and encourages sexual intercourse
17 and the birth of children."

18 **Q.** Is this among the scholars that you've previously cited
19 and on which you rely for your opinion in this subject matter?

20 **A.** This, because of her expertise and also because of its
21 consistency with many, many others.

22 **MR. COOPER:** Your Honor, I would like to introduce
23 plaintiffs' -- this is a Plaintiffs' Exhibit 1626, into
24 evidence.

25 **THE COURT:** 1626?

1 **MR. COOPER:** That's -- that's what I see here.

2 **MR. BOIES:** Plaintiffs Exhibit 1626 has additional
3 pages.

4 **MR. COOPER:** And I am happy to have additional pages
5 placed in the record.

6 **MR. BOIES:** I don't know how many pages. But
7 whatever 1626 is, we have no objection to it.

8 **THE COURT:** There is no objection. All right. 1626
9 is in.

10 (Plaintiffs' Exhibit 1626 received in evidence.)

11 **MR. BOIES:** A lot more than one page. I know that.

12 **THE COURT:** All right.

13 **MR. COOPER:** I just have one excerpted here in the
14 binder.

15 **BY MR. COOPER:**

16 **Q.** And would you please now turn to the document behind tab
17 4, Mr. Blankenhorn.

18 **A.** It's *A History of Marriage Systems*, by Robina Quale, who
19 is a historian.

20 **Q.** Okay. And would you turn your attention, please, to page
21 2 of the pages that are excerpted there. And, in particular, I
22 invite your attention to the fourth paragraph on that page.

23 If you read the two sentences that begin that
24 paragraph, if you would, please.

25 **A.** (As read)

1 "Marriage, as the socially recognized linking
2 of a specific man to a specific woman and her
3 offspring can be found in all societies.
4 Through marriage, children can be assured of
5 being born to both a man and a woman who will
6 care for them as they mature."

7 **Q.** Is this among the works on which you relied to form your
8 expert opinion?

9 **A.** Yes, sir.

10 **MR. COOPER:** Your Honor, I would like to move this
11 into evidence. This is DIX79.

12 **MR. BOIES:** No objection, Your Honor.

13 **THE COURT:** Very well. DIX79 is admitted.

14 (Defendants' Exhibit 79 received in evidence.)

15 **BY MR. COOPER:**

16 **Q.** Now, turn to document behind tab 5.

17 **A.** This is from the very distinguished sociologist Kingsley
18 Davis, whose book he edited, is called *Contemporary Marriage*.
19 And this is from his introductory chapter to that book.

20 **Q.** And if you'll turn to page 5, please.

21 **A.** Yes, sir.

22 **Q.** In the second full paragraph on that page, would you
23 please read the first two sentences.

24 **A.** (As read)

25 "Granted that the unique trait of what is

1 commonly called marriage is social
2 recognition and approval, one must still ask,
3 approval of what? The answer is that it is
4 approval of a couple's engaging in sexual
5 intercourse and bearing and rearing
6 offspring."

7 **Q.** And have you relied on this work in forming your opinion?

8 **A.** Yes, sir.

9 **MR. COOPER:** Your Honor, I would like to introduce
10 this exhibit, as well -- it's DIX50 -- into evidence.

11 **MR. BOIES:** No objection, Your Honor.

12 **THE COURT:** Very well.

13 (Defendants' Exhibit 50 received in evidence.)

14 **BY MR. COOPER:**

15 **Q.** Proceed, now, to tab 6, Mr. Blankenhorn.

16 **A.** This is from the 1951 -- which is the sixth and final
17 edition of a book -- a publication called *Notes and Queries on*
18 *Anthropology*. It's put out by the Anthropological Institute of
19 Great Britain, which is widely considered to be the most
20 respected group of anthropologists in the world.

21 **Q.** And if you'll turn to page 71 of that document, and the
22 first full paragraph if you'll read that sentence, please.

23 **A.** I meant to say that another thing that's interesting about
24 this book, despite its kind of banal title, is that this is a
25 dictionary and a field worker's training guide. These are

1 concepts that are used from senior anthropologists to train
2 young anthropologists as they go into the field for their work.

3 And a lot of it is providing definitions. And here
4 is what they say on marriage, quote:

5 "The family in this sense is based on
6 marriage, which is defined as a union between
7 a man and a woman such that children born by
8 the woman are recognized as the legitimate
9 offspring of both partners."

10 **Q.** And you relied on this, as well?

11 **A.** This is probably the most famous definition of marriage in
12 the history of anthropology. Yes, I did.

13 **MR. COOPER:** And, Your Honor, I would like to move
14 this exhibit, which is DIX73, as well, into evidence.

15 **MR. BOIES:** No objection, Your Honor.

16 **THE COURT:** Very well. 73 is admitted.

17 (Defendants' Exhibit 73 received in evidence.)

18 **BY MR. COOPER:**

19 **Q.** And if we could proceed to the document behind tab 7.

20 **A.** It's a book called *Human Family Systems*, by Pierre
21 van den Berghe, published in 1979. He's an anthropologist.

22 **Q.** And who is Mr. van den Berghe?

23 **A.** He's an anthropologist.

24 **Q.** Okay. Will you turn your attention to page 46 of that
25 document. And at the bottom of the page, the last paragraph,

1 read the four sentences there, beginning that paragraph, into
2 the record.

3 **A.** (As read)

4 "Here I shall argue that, while all this is
5 true, marriage is nevertheless the cultural
6 codification of a biological program.

7 Marriage is the socially-sanctioned pair-bond
8 for the avowed social purpose of
9 procreation."

10 **Q.** And you relied on this source, as well?

11 **A.** Yes.

12 **MR. COOPER:** Your Honor, I would like to move this
13 document, marked as DIX89, into evidence.

14 **MR. BOIES:** No objection, Your Honor.

15 **THE COURT:** 89, DIX89 is admitted.

16 (Defendants' Exhibit 89 received in evidence.)

17 **BY MR. COOPER:**

18 **Q.** Now, the document behind tab 8, if you'll describe that,
19 please.

20 **A.** This is from a book called *Sex, Culture and Myth*,
21 published in 1962 by Bronislaw Malinowski. Malinowski is, I
22 think, widely and fairly viewed as the father of kinship
23 studies in anthropology.

24 **THE COURT:** Of what, sir?

25 **THE WITNESS:** The father of kinship studies, the

1 study of kinship.

2 **THE COURT:** Kinship.

3 **THE WITNESS:** Kinship, yes, sir.

4 **BY MR. COOPER:**

5 **Q.** And if you'll turn to page 11 of that document. The first
6 lines on the page.

7 **A.** (As read)

8 "We are thus led at all stages of our
9 argument to the conclusion that the
10 institution of marriage is primarily
11 determined by the needs of the offspring, by
12 the dependence of the children upon the
13 parents."

14 **Q.** And you relied on this authority, as well, in forming your
15 opinions?

16 **A.** I made a pretty close study of Malinowski because of his
17 importance in the field. So, yes, sir.

18 **MR. COOPER:** Your Honor, I would like to introduce,
19 as well, this document, which is DIX66, into evidence.

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

21 **THE COURT:** Very well. 66 is admitted.

22 (Defendants' Exhibit 66 received in evidence.)

23 **BY MR. COOPER:**

24 **Q.** If you'll turn now to tab 9 -- I beg your pardon. Tab 9
25 has been left empty. Let's skip to tab 10.

1 **A.** This is a 1985 book called *The View From Afar*, by the
2 anthropologist Claude Levi-Strauss.

3 **Q.** I think you mentioned him earlier in your testimony?

4 **A.** He is one of the giants in the field.

5 **Q.** And on page 40 and 41, if you'll turn to those pages.

6 **A.** Yes, sir.

7 **Q.** At the bottom of the page, on 40, if you'll read the
8 passage that begins, "The family."

9 **A.** Yes.

10 "The family - based on a union, more or less
11 durable, but socially approved, of two
12 individuals of opposite sexes who establish a
13 household and bear and raise children -
14 appears to be a practically universal
15 phenomenon, present in every type of
16 society."

17 **Q.** And you relied on this authority, as well?

18 **A.** Yes.

19 **MR. COOPER:** Your Honor, I would like to move into
20 evidence this document marked DIX63.

21 **MR. BOIES:** No objection, Your Honor.

22 **THE COURT:** 63 is admitted.

23 (Defendants' Exhibit 63 received in evidence.)

24 **BY MR. COOPER:**

25 **Q.** Now, are these the only authorities on which you have

1 studied in -- in your examination of the issue of marriage?

2 **A.** No. These are what I view as representative -- I'm not
3 saying that every other person who's ever written about this
4 agrees with what these people are saying. But I view these as
5 representative of what the leading people in the field have
6 concluded about the meaning of marriage, what marriage is. I
7 view these as representative.

8 And I don't know how many we've discussed today, five
9 or six. But you could multiply by ten and you could get 50 or
10 60 distinguished people saying, in effect, this exact same
11 thing.

12 **Q.** And what conclusion do you draw from your review of these
13 and other similar authorities in these fields?

14 **A.** My conclusion is that they are correct, that this is what
15 marriage is, and that this is its primary role and contribution
16 to society.

17 **Q.** Is there an opposing view? Is there an alternative view
18 of marriage's purpose?

19 **A.** Yes, there is. And this view is significant. And this
20 opposing view is, I think it's fair to say, also of
21 significantly more recent vintage and more recent prevalence.
22 But it is certainly a well-developed and opposing point of view
23 about what marriage is.

24 **Q.** And what is that?

25 **A.** This view is that marriage is fundamentally a private

1 adult commitment.

2 **Q.** And on that subject, would you please turn to the document
3 behind tab 11 of your binder.

4 **A.** Yes. This is from a report called "Beyond Conjugal-
5 Recognizing and supporting close personal adult relationships."

6 And it was published by the Law Commission of Canada,
7 a distinguished group of Canadian legal professionals, in 2001.

8 **Q.** And what was the purpose of the -- of the publication of
9 this document?

10 **A.** To offer -- to make analyses and to offer recommendations
11 regarding marriage and family law in Canada.

12 **Q.** And was this in connection with Canada's adoption of
13 same-sex marriage?

14 **A.** Well, I would not say that this report was primarily
15 concerned with that topic, but it was certainly concerned with
16 that topic. That was one of the issues that the report
17 addresses.

18 **Q.** Would you turn your attention to Roman -- page Roman
19 xviii.

20 **A.** I've got it.

21 **Q.** And on the -- what appears to be the first full paragraph
22 there, or the first indented paragraph in the middle of the
23 page, would you please read the material that begins with the
24 second sentence.

25 **A.** (As read)

1 "The state's objectives and underlying
2 contemporary regulation" --
3 I'm sorry. I misspoke. I'm going to start again.
4 "The state's objectives underlying
5 contemporary regulation of marriage relate
6 essentially to the facilitation of private
7 ordering, providing an orderly framework in
8 which people can express their commitment to
9 each other, receive public recognition and
10 support, and voluntarily assume a range of
11 legal rights and obligations."

12 **Q.** And does this statement reflect the view you've described
13 previously as the private adult commitment view of marriage?

14 **A.** Yes, sir. And I believe it's significant because it was
15 developed in somewhat precise language by a group of prominent
16 lawyers who -- who were pretty, I think, determined to say what
17 they actually meant.

18 (Laughter)

19 **Q.** Now, turn to tab -- that's not always the case with
20 lawyers.

21 **A.** I didn't know that would get a laugh.

22 **Q.** If you would turn to the document behind tab 12, please.

23 **A.** This is from an article in the --

24 **MR. BOIES:** Excuse me, Your Honor, was this
25 introduced?

1 arrangement between parties committed to
2 love."

3 **Q.** And you relied on this, as well, for your opinion on this
4 subject?

5 **A.** Yes, sir. My understanding of this is that it's a more
6 colloquial way of restating exactly the views offered by the
7 Law Commission of Canada, as to the purpose of marriage.

8 **MR. COOPER:** Your Honor, this is DIX84, and we would
9 offer it now into evidence.

10 **MR. BOIES:** No objection.

11 **THE COURT:** Very well. 84 is in.

12 (Defendants' Exhibit 84 received in evidence.)

13 **BY MR. COOPER:**

14 **Q.** If you'll now turn to the document behind tab 13 of your
15 binder.

16 **A.** This is from a book called *The Case for Same-Sex Marriage*.
17 It was written by Professor William Eskridge, whose views were
18 discussed earlier today. He's a law professor from Yale
19 University.

20 **Q.** Is he one of the individuals you mentioned that you have
21 been invited to debate on this subject of same --

22 **A.** Yes, sir.

23 **Q.** Would you turn please to page 11 of that. And,
24 essentially, in the middle of the first -- of the first full
25 paragraph, beginning with "In today's society," would you read

1 that, please.

2 **A.** (As read)

3 "In today's society, the importance of
4 marriage is relational and not
5 procreational."

6 **Q.** And are there other authorities that you have studied that
7 articulate this adult-centric view of marriage, as you've
8 described it?

9 **A.** The view that marriage is fundamentally a private adult
10 commitment, yes, sir, there are very, very many examples of
11 this conclusion being proffered in the public discussion and in
12 the academic discussion. And these are merely a very few of
13 many, many possible representative examples of this -- of this
14 proposition.

15 **Q.** And do you believe that this adult-centered view of
16 marriage is an accurate view of the institution of marriage
17 today and in the past?

18 **A.** No, sir, I do not believe it's accurate. I believe that
19 the affective private dimensions of marriage are often, and
20 including in our own society a dimension of marriage, even an
21 important dimension of marriage. But I do not believe that it
22 has ever been the -- I do not believe that in the -- in the
23 history of societies, it has been understood to be the sum and
24 substance of marriage, the -- the heart and soul, the core, the
25 fundamental thing itself could be encapsulated with this idea

1 that marriage is a fundamentally a private adult commitment. I
2 do not believe that's consistent with -- with the human record.

3 **Q.** I think you used the words "the private affective
4 dimension of marriage." What did that mean?

5 **A.** It just means the tender feelings that the spouses have
6 for one another, the feelings of love and regard and
7 solicitude, and emotional commitments that the -- and
8 feelings -- feelings of commitment and obligation and love,
9 that the spouses feel to one another. That would be -- that's
10 the -- I'm using the term "affective dimension of marriage."

11 And that dimension, in many societies, of course,
12 it's very negligible. There are many societies where most
13 marriages are arranged or they've governed by kin groups.

14 In some societies, the affective dimension is not --
15 is a very negligible dimension of the institution. But in
16 ours, of course, that is not true.

17 In our western tradition in the United States, the
18 affective dimension is an important dimension and one that we
19 celebrate on Valentine's Day and so forth.

20 But it is never -- the idea that that is what
21 marriage is, that's how we understand the institution, is, I
22 think, first of all, what these analysts are saying. And I
23 think they are -- are incorrect. As a matter of our history
24 and our lives, I think they are incorrect in that assertion.
25 They may as a -- as a question of what they wish would happen

1 in the future, that's one question. But if we look at actual
2 lived experience of marriage in human groups, this is not an
3 accurate analysis, in my view.

4 **Q.** Now, I'd like to ask you a few questions about why
5 marriage regulates filiation as you put it.

6 **MR. COOPER:** And I would like to publish to the
7 screen, Your Honor, Demonstrative number 7.

8 (Document displayed.)

9 **BY MR. COOPER:**

10 **Q.** Mr. Blankenhorn, was -- what role has religion played in
11 defining the traditional institution of marriage?

12 **A.** If we start with the question of the customary man-woman
13 nature of the marital institution, the idea that marriage
14 brings together the man and the woman, I think the record is
15 completely clear that this concept which we know now, or as I
16 am saying, is a universal or nearly universal presence in human
17 societies, this feature of marriage simply is not the creation
18 of religion. It is not something that religion invented. It
19 does not depend upon religion for its rationale or its --
20 its -- people having allegiance to it.

21 Its evolution in our species cannot be explained with
22 reference to religion. And that fact is borne out by us
23 realizing that marriage is a natural human institution. That
24 is, it concerns itself with natural facts, not supernatural
25 facts.

1 And it exists in societies that have monotheistic
2 belief-based religions, societies that believe in what we in
3 the west might call magic or witchcraft. You know, the variety
4 of beliefs about the supernatural in the human experience is
5 breathtakingly diverse. And yet in all of these societies, the
6 man and the woman form something called marriage.

7 And it simply is erroneous to imagine that this
8 foundational aspect of the institution is the artifact of a
9 particular religious doctrine or a religion generally.

10 And I further believe that what I have just said is
11 noncontroversial amongst scholars. I simply do not think that
12 this is a controversial statement among people who have looked
13 at this.

14 **Q.** You don't -- you -- you don't disagree, do you, that
15 marriage is sacred to many religions, modern religions?

16 **A.** Well, of course. I mean, marriage -- religion is a very
17 powerful influence in human affairs in all areas of life. And
18 marriage is no exception.

19 And so, for example, in so many societies we see that
20 individuals who marry, they believe that that promise is, in
21 part, a sacred promise. They believe that they are promising
22 something to God or to a higher power, in addition to the
23 promise to the spouse.

24 And many people have a religious -- you know, they --
25 the marriage ceremony occurs in a church or a synagogue or a

1 mosque. And so, of course, in -- and sometimes religious
2 officials are also agents of the state, in actually legally
3 performing the -- the marriage -- legally performing the
4 marriage.

5 So there is -- in these and many other ways -- oh,
6 and many people draw from religion the -- the -- the
7 inspiration to live up to the calling of the marital vocation,
8 and so forth.

9 So with these and other ways there is a strong sense,
10 certainly in our nation, and I would say generally across the
11 world, there is a -- this interconnection or this, I guess you
12 might say, this strong influence of religion on this dimension
13 of life.

14 You might call marriage, in so many societies, a
15 religiously-informed institution in some ways. But I'm trying
16 to make the distinction between that and saying that the thing
17 itself, the marriage institution itself, particularly its
18 man-woman basis, which is universal -- I'm -- I'm -- I'm trying
19 to be very clear, that this does not derive from religious
20 doctrine. It does not derive from the concept of religion. It
21 does not derive from any ideas about the supernatural.

22 It is what scholars call a natural institution. It
23 derives from facts of our embodiment and reproduction that do
24 not call upon supernatural beliefs for their coherence.

25 **Q.** Do you believe that the customary man-woman definition of

1 marriage is attributable in some fashion or some way to
2 anti-homosexual prejudices or hostility?

3 **A.** I do not. I believe that homophobia is a real presence in
4 our society and, I'm pretty confident, in many, many other
5 societies around the world. And I regret and deplore it, and
6 wish it to go away.

7 As I have sought to look at the reasons for the
8 evolution of marriage in human societies, as I've sought to
9 understand and wrestle with the evidence about why marriage
10 evolved in the first place, how it became institutionalized
11 through law and custom, how it became universal in its reach
12 and impact, and how those custodians of the institution over
13 time, across time and around the world, have sought with words,
14 both written and oral, to state the reasons for the
15 institution, the purposes of the institution, the goals of the
16 institution, what the thing was trying to do and why it
17 mattered so much, I am not able to find any evidence that
18 animus toward gay and lesbian people or that hatefulness toward
19 homosexuality -- homosexual persons, I am not able to find
20 evidence that that was a central component of how they
21 understood their activities, how they understood their
22 commitment to the marital institution, why they justified their
23 participation in the marital institution, or why they
24 established the laws and customs surrounding the institution
25 that they did.

1 Now, I am not saying that no such evidence exists.
2 And if evidence -- such evidence exists, I would welcome -- I
3 would -- I want to know it. But I'm telling you that I have
4 looked for it, and I cannot find it.

5 **Q.** Well, to return now, then, to your earlier testimony that
6 marriage is designed, I think as you put it, to regulate
7 filiation, why does it matter whether the child is raised by
8 his or her own biological parents?

9 **A.** Well, it matters for two large clusters of reasons. And
10 I'll just go into this, very briefly.

11 But the first one somewhat accords with our
12 commonsense understanding of things. But the scholars have
13 given it a name called "kin altruism." And it really means,
14 you know, you care a lot about who you are related to. You
15 care about your relatives. You care about who your parents
16 are, who your child is.

17 And you would be -- they have measured this with
18 great precision. You typically sacrifice more for people to
19 whom you are related. You typically extend yourself, whether
20 it's risking your life or loaning money or inconveniencing
21 yourself, on their behalf.

22 They have really looked at this fairly carefully.
23 And this notion of kin altruism means that in humans because we
24 seem to be -- we seem to care a lot about where we came from
25 physically, and we seem to care a lot about the people to whom

1 we are related, particularly closely related.

2 So that if you have a -- a child to be cared for, if
3 you had your druthers and you would -- for this reason you
4 would want, if you wanted what was best for the child, you
5 would want that child -- other things being equal, of course,
6 you would want that child to be cared for by the two
7 individuals who are most closely related to the child. And
8 that would be the child's mother and the child's father. And,
9 of course, that's how we humans have organized ourselves for
10 millennia now.

11 The second body of evidence on this concerns child
12 outcome studies. And here we shift, now, to the field,
13 principally of sociology. And we are not looking at
14 motivation. We are not looking at the self-sacrificing nature
15 of kinship. We're just looking at outcomes for the children.

16 And, here, there is a very large body of literature.
17 My organization has been quite involved in this kind of work,
18 now, for 20 years. And there's many, many others, scholars and
19 researchers, who have pursued this quite carefully. And I
20 would say that there is a broad consensus among the scholars in
21 this field.

22 And I would further say that this consensus grows
23 stronger almost every year, because of the accumulating weight
24 of evidence that the optimal environment for children is if
25 they are raised from birth by their own natural mother who is

1 married to their own natural father.

2 And, of course, one wants to say that this isn't
3 always possible. Sometimes this family form fails. Sometimes
4 alternative family forms different than that succeed.

5 When we get to the level of specificity and
6 individual cases, there is quite a bit of complexity to the
7 situation, and the scholars have spent many years and many
8 effort trying to tease all of this out.

9 But if you just look at the weight of evidence and
10 you look at the most distinguished -- well, I think, among -- I
11 believe, the most distinguished scholars in this field, they
12 are increasingly clear and emphatic that based on the available
13 evidence today, it is clear that -- that the optimal outcome
14 for children, in terms of outcomes, the optimal environment for
15 children, in terms of outcomes, whether it be the likelihood of
16 living in poverty, whether it be the likelihood and mental and
17 emotional distress and suffering, whether it be juvenile
18 delinquency, or educational achievement, or occupational
19 success, or the likelihood of experiencing abuse and neglect,
20 that across the range of outcome measurements, that this family
21 form of the two biological parent, married couple home, in a
22 stable marriage, is the best model from the child's point of
23 view.

24 **Q.** In that connection, I'd like you to turn to the document
25 behind tab 15 in your binder. Will you identify that document

1 when you've reached it.

2 **A.** This is a -- a summary in the form of a research brief, of
3 research carried out by a group of scholars, a group of three
4 scholars from Child Trends. This is a nonpartisan research
5 group in Washington, D.C. And this brief, this summary of
6 research, was published in, I believe -- I believe 2002. And
7 it's called "Marriage from a Child's Perspective."

8 **Q.** Would you turn to page 6, please.

9 **A.** Yes.

10 **Q.** And in the right-hand column, about halfway down the page,
11 the paragraph beginning, "First," would you please read that
12 for the Court.

13 **A.** (As read)

14 "Research clearly demonstrates that family
15 structure matters for children. And the
16 family structure that helps children the most
17 is a family headed by two biological parents
18 in a low-conflict marriage. Children in
19 single-parent families, children born to
20 unmarried mothers, and children in
21 stepfamilies or cohabiting relationships face
22 higher risks of poor outcomes than do
23 children in intact families headed by two
24 biological parents. Parental divorce is also
25 linked to a range of poorer academic and

1 behavioral outcomes among children. There
2 is, thus, value for children in promoting
3 strong, stable marriages between biological
4 parents."

5 **Q.** And was this among the research that you have consulted
6 and relied upon in arriving at your opinions in this matter?

7 **A.** Yes, because of the reputation of the Child Trends
8 scholars, because it was a summation of work done by a number
9 of them over time, and because, you know -- well, I'll just
10 stop there. But, yes, it is.

11 **MR. COOPER:** Your Honor, this document is already in
12 evidence, is my understanding.

13 **THE COURT:** Very well. 26 is in.

14 **BY MR. COOPER:**

15 **Q.** Turn, now, to the document behind tab 16, please.

16 **A.** This is a book called *Growing Up With A Single Parent*.
17 It's by Sara McLanahan and her colleague Gary Sandefur. And it
18 was published by Harvard University Press in 1994.

19 McLanahan is one of the most prominent family
20 sociologists in the country. She teaches at Princeton.

21 **Q.** Please, turn to page 1 of the document. And in the second
22 full paragraph, the third sentence, will you read that sentence
23 to the -- about the middle of the paragraph, please.

24 **A.** (As read)

25 "We have been studying this question for ten

1 years. And our opinion -- and in our
2 opinion, the evidence is quite clear,
3 children who grow up in a household with only
4 one biological parent are worse off, on
5 average, than children who grow up in a
6 household with both of their biological
7 parents, regardless of the parents' race or
8 educational background, regardless of whether
9 the parents are married when the child is
10 born, and regardless of whether the resident
11 parent remarries."

12 **Q.** And was this document among those you have relied upon?

13 **A.** Yes, sir.

14 **MR. COOPER:** Your Honor, this, too, is in evidence
15 already.

16 **THE COURT:** Very well.

17 **BY MR. COOPER:**

18 **Q.** Mr. Blankenhorn, does the customary man-woman definition
19 of marriage benefit only the child?

20 **A.** Well, it certainly benefits the child. But it also
21 benefits the mother and the father and society as a whole.

22 The mother because it lessens the likelihood of her
23 having to raise the child alone and isolated. The father
24 because it connects him to his own child and to the mother of
25 his child, connects him to the process of generativity in a way

1 that would be unlikely for him to achieve any other way. And
2 society as a whole because these are the family units that are
3 most likely to produce good outcomes for children and, thus, be
4 the kind of seedbeds from which come good citizens and people
5 who are, you know, more likely to be, you know, positive
6 contributors to society.

7 So it's a human -- a kind of human capital question.
8 It's the highest level of investment that we can make in
9 children, is to give them the great gift, really, of growing up
10 in this family form.

11 It doesn't -- it doesn't guarantee success. And
12 growing up outside of this form certainly does not guarantee
13 failure. But it shifts the odds in a very dramatic way, that
14 has been very carefully documented by the scholars.

15 **Q.** I'd like to turn now to the concept of
16 deinstitutionalization.

17 **MR. COOPER:** I would like to publish to the screen,
18 Your Honor, demonstrative number 8.

19 (Document displayed.)

20 **BY MR. COOPER:**

21 **Q.** Mr. Blankenhorn, could you please describe this concept of
22 deinstitutionalization.

23 **A.** It's a term that comes from sociology. It has scholars
24 who study it. There is a literature on it. The first paper I
25 ever worked on at the Institute was called "Marriage in

1 America," published in 1995. And it anchored, it centered in
2 part, on large part, on the concept of deinstitutionalization.

3 I wish it was a prettier word to say or listen to.

4 But what it really means is, you have an institution
5 which can be briefly defined as a relatively stable pattern of
6 rules and structures intended to meet social needs. This is
7 what, in brief, we think of when we think of a social
8 institution.

9 Marriage is a social -- is one social institution.
10 The concept of deinstitutionalization is when -- to speak
11 briefly -- that institution weakens. That institution becomes
12 frailer.

13 Its rules become thinner or removed altogether, and,
14 therefore, the rules that govern the institution become less
15 comprehensible and clear and less -- therefore, less
16 authoritative.

17 And when its structures become less stable, less able
18 to give robust shape to the institution, it's like a -- kind of
19 a shrinking process. And as a result of
20 deinstitutionalization -- you don't have to think about
21 marriage. You could think about, you know, a baseball team or
22 a museum, or any -- any institution. When you take away its
23 rules and you weaken its structures, scholars say that you're
24 seeing deinstitutionalization.

25 And so that the people, the participants in the

1 institution or the possible participants in the institution
2 become over time less loyal to it, less -- they understand it
3 less. They -- they -- some of them -- they increasingly -- the
4 institution loses esteem in the society. It loses respect. It
5 loses its sense of being held in high regard. And the
6 institution becomes less and less able to carry out its
7 contributions to the society.

8 This concept of deinstitutionalization is, I think,
9 a -- a critical one for people who are studying the status and
10 future of any institution.

11 But, in particular, it has been of great value to
12 scholars looking at -- at recent trends in marriage, because in
13 the United States, particularly in recent decades, the last
14 three, four, five decades, there has been a marked process of
15 deinstitutionalization of marriage, with very numerous and
16 serious consequences for children and for society as a whole.

17 So it's an absolutely pivotal concept, if we want to
18 understand where the institution is going and what
19 opportunities we may have to -- to come to its aid.

20 **Q.** I think you did, just now, testify that the institution of
21 marriage is -- has been weakened, I think, to paraphrase your
22 testimony, by deinstitutionalization already.

23 What are some of the manifestations of that process?

24 **A.** Well, if you look, for example, at rates of out-of-wedlock
25 childbearing, you know, five or six decades ago only a small

1 fraction of U.S. children were born to unmarried parents.
2 Whereas, the most latest data tell us that today about
3 38 percent of children in the U.S. are born to unmarried
4 parents.

5 So that over, say, a five-decade period, if you go
6 back to 1960, that would be a very dramatic example. That rate
7 of growth over a five-decade period, I think, constitutes a
8 very dramatic example of the weakening of the marriage
9 institution.

10 You also would need to look at rates of divorce. The
11 United States has probably the highest divorce rate in the
12 world.

13 And so, as a result, people are -- the weakening of
14 the ideal of marital permanence suggests a lessening loyalty to
15 the institution, and the rise of nonmarital cohabitation; the
16 increasing mainstreaming of third-party participation in
17 procreation and artificial assisted reproductive technologies
18 that disturb the bond between the -- disturb the biological
19 bond between the genitor and the child; and, last, but for our
20 purposes certainly not least, the -- the spread of the idea and
21 reality of same-sex marriage in the view of -- I think, the
22 view of leading scholars, is another aspect or manifestation of
23 this current trend of deinstitutionalization.

24 And I meant to say just for our purposes today, you
25 know, heterosexuals, you know, did the deinstitutionalizing. I

1 mean, you know, if we go back and look at the trends I
2 described, it's very clear that this -- this was not --
3 deinstitutionalization is not something that just cropped up a
4 few years ago whenever we began discussing the possibility of
5 extending equal marriage rights to gay and lesbian people. It
6 predates all that.

7 But what I am saying is that the scholars are telling
8 us that the process of deinstitutionalization would be
9 furthered and accelerated significantly by adopting same-sex
10 marriage.

11 **Q.** Well, what impact, in your opinion, would redefining
12 marriage to include same-sex couples have on marriage, in this
13 deinstitutionalization process?

14 **A.** It's hard to know because you're in some important ways,
15 you know, predicting what will happen in the future.

16 My best judgment is that if we move toward a
17 widespread adoption of same-sex marriage, I believe the effect
18 will be to significantly further and in some respects culminate
19 the process of deinstitutionalization of marriage.

20 If -- if you take an institution that for all of its
21 long history has been understood to have defined public
22 purposes, and through changing its definition you transfer it
23 from the public -- you transfer it from a child-centered public
24 institution to an adult-centered private institution, a
25 question of private ordering among couples, you have in some

1 ways, you know, completed -- that's a culminating trend toward
2 the erasure of marriage's public defined contribution to
3 society.

4 And I think that it's likely that, you know, that --
5 as I say, this did not trigger the trend of
6 deinstitutionalization. Deinstitutionalization has been with
7 us now for a while. But it's a live issue, and there are many
8 people who would like to reverse the trend.

9 But I think the evidence is quite compelling that if
10 we move to a widespread adoption of same-sex marriage, we will
11 very significantly accelerate the process of
12 deinstitutionalization.

13 And the consequence of that will be to weaken the
14 role of marriage, generally, in society. And the consequences
15 of that will be felt by everyone in the society.

16 **Q.** You mentioned earlier other scholars who have recognized
17 the relationship between same-sex marriage or the prospect of
18 it and deinstitutionalization. I want you to turn, now, to the
19 document behind tab 17 of your binder.

20 **A.** Yes.

21 **Q.** And what is that, please?

22 **A.** This is an article by Andrew Cherlin, who's a prominent
23 family sociologist. He teaches at Johns Hopkins. He is a
24 proponent of same-sex marriage. And this article is entitled,
25 "The Deinstitutionalization of American Marriage."

1 Q. Would you turn to page 850 of that excerpt. And if you'll
2 look in the right-hand column of the page, first full paragraph
3 there, would you read the first sentence.

4 A. (As read)

5 "The most recent development in the
6 deinstitutionalization of marriage is the
7 movement to legalize same-sex marriage."

8 Q. And does this -- is this authority among those you've
9 relied upon to arrive at your judgment on this subject?

10 A. Yes.

11 MR. COOPER: Your Honor, this is -- this document is
12 marked as DIX49, and I'd like to offer it into evidence.

13 MR. BOIES: No objection, Your Honor.

14 THE COURT: DIX49 is admitted.

15 (Defendants' Exhibit 49 received in evidence.)

16 MR. COOPER: Thank you, Your Honor.

17 BY MR. COOPER:

18 Q. And if you'll continue in your binder to the document
19 behind tab 18.

20 A. Yes. This is a article called "The Struggle for Same-Sex
21 Marriage," written by Professor Norval Glenn, who's a prominent
22 family sociologist from the University of Texas at Austin.
23 This was published in 2004.

24 Q. Would you turn to page 26 of that document, please. And
25 in the right-hand column at the top of the page, if you'll read

1 the passage beginning with the word "however," please.

2 **A.** (As read)

3 "However, acceptance of the arguments made by
4 some advocates of same-sex marriage would
5 bring this trend to its logical conclusion.
6 Namely, the definition of marriage as being
7 for the benefit of the couple who enter into
8 it, rather than as an institution for the
9 benefit of society, the community, or any
10 social entity larger than the couple."

11 **Q.** And was this among the sources that you relied upon for
12 your thinking on this?

13 **A.** Yes.

14 And I -- it may be worth noting that these two
15 authors who have just -- I've just cited, are both prominent
16 scholars. But they are on opposite sides of the policy
17 question on whether we should adopt gay marriage.

18 **Q.** And are there others who -- who have identified this --
19 this phenomenon of deinstitutionalization of marriage in
20 connection with same-sex marriage?

21 **A.** Yes.

22 **MR. COOPER:** Your Honor, this document is marked
23 DIX60. And I'd like now to offer it into evidence.

24 **MR. BOIES:** No objection, Your Honor.

25

1 **THE COURT:** Very well. 60 is admitted.

2 And would you remind me just where on page 26 the
3 witness was referring.

4 (Defendants' Exhibit 60 received in evidence.)

5 **MR. COOPER:** Yes.

6 **THE COURT:** Missed that.

7 **MR. COOPER:** Very top of the page of the right-hand
8 column, begins with the word "however" there, the second word
9 on that column.

10 **THE COURT:** Thank you.

11 **MR. COOPER:** Yes.

12 **BY MR. COOPER:**

13 **Q.** Mr. Blankenhorn, how confident are you that redefining
14 marriage to include same-sex marriage, same-sex couples, would
15 further the deinstitutionalization of marriage?

16 **A.** It's impossible to be completely sure about a prediction
17 of future events. I don't think anyone can.

18 But I do have a great deal of confidence in the
19 likelihood of the weakening of marriage through the process of
20 deinstitutionalization to a greater degree than would be the
21 case otherwise, if we move toward the adoption, widespread
22 adoption of same-sex marriage.

23 And, you know, if you think about it, it's really
24 just hard to imagine how it could be otherwise.

25 If you change the definition of the thing, it's hard

1 to imagine how it could have no impact on the thing.

2 (Laughter)

3 If you change the structure of the thing, it's hard
4 to imagine how you could not have an effect on the content of
5 the thing.

6 And if you decisively move an institution from the
7 public realm to a question overwhelmingly of private ordering
8 rather than public purpose that can be specified, it's hard to
9 imagine a more textbook example of what scholars mean when they
10 say "deinstitutionalization."

11 And we do know, from evidence, that the process of
12 deinstitutionalization has already weakened marriage, and could
13 weaken it more in the future.

14 So while I don't think anyone here can say that they
15 know from scientific study based on data, that they know with
16 absolute certainty that this will happen, I sincerely believe
17 that this is the most -- this is a likely outcome, this is a
18 likely result of adopting same-sex marriage.

19 **MR. COOPER:** Your Honor, I'd like to publish, now,
20 demonstrative -- my next demonstrative, I think, is number 9.
21 Yes. And ask the witness a series of questions -- I'm getting
22 close to the end of the examination, Your Honor -- a series of
23 questions about the consequences that he believes will likely
24 flow from redefining marriage to include same-sex couples.

25 (Document displayed.)

1 **BY MR. COOPER:**

2 **Q.** And the first question I'd like to ask is this:

3 How, in your opinion, would the further
4 deinstitutionalization of marriage caused by the legalization
5 of same-sex marriage manifest itself in society?

6 **A.** I'm sorry. Would you mind restating the question?

7 **Q.** In what ways, in your opinion, will extending marriage to
8 same-sex couples and, therefore, in your opinion
9 deinstitutionalize further the deinstitutionalization of
10 marriage, manifest itself in society?

11 **A.** As we have discussed now, I think a likely consequence is
12 a -- an acceleration of deinstitutionalization or devaluation
13 that would help to produce higher rates of non-participation in
14 marriage, higher rates of fragility of one-parent homes,
15 divorce; the general -- you know, all of the consequences that
16 we have discussed in the last hour or so on -- of the weakening
17 of the institution relating to divorced non-marital
18 cohabitation or children outside of charge and so forth.

19 My -- my fear, you know, really, and my conclusion is
20 that this is a likely -- this is a likely outcome.

21 **Q.** How, in your opinion, would redefining marriage to include
22 same-sex couples impact the traditional view that a child needs
23 both its mother and its father?

24 **A.** Well, I have had some personal experience with this,
25 because since 1995 I may have spent as much time as anybody in

1 the country saying children need their fathers. And it seems
2 like it ought to be a simple idea that shouldn't get you in a
3 lot of trouble, but I can tell you it does.

4 And one of the things that I think will happen, and I
5 can already see it beginning to happen, is that simply saying
6 publicly that a child needs and deserves her father will go
7 from being what it is now, which is mildly controversial, will
8 go to being viewed as simply inappropriate public speech, as
9 really beyond the pale, as offensive, as divisive, as
10 mean-spirited.

11 And I -- I -- you know, if -- it's hard for me to see
12 how -- if you cannot speak publicly about a value, then it's
13 hard for me to see how that could do anything other than to
14 weaken the value over time if you cannot say its name.

15 And I have had personal experience with this, as well
16 as my observation. And I may sound simplistic, but simply
17 being able to say that children need -- a child needs its
18 mother and father, if that becomes just impermissible in any
19 venue, a church, a school, a civic group, a PTA meeting, I
20 think we lose something precious.

21 **MR. BOIES:** Your Honor, I object and move to strike.
22 That goes beyond even the most expansive definition of
23 expertise even in a bench trial, I respectfully submit.

24 **THE COURT:** Very well. I will overrule the
25 objection.

1 You indicated you are getting close to the end?

2 **MR. COOPER:** Your Honor, we're approaching it
3 rapidly. Thank you.

4 **BY MR. COOPER:**

5 **Q.** What impact, in your opinion, Mr. Blankenhorn, would
6 extending marriage to same-sex couples have on alternative
7 marriage forms and family structures?

8 **A.** I think it would have the impact of further mainstreaming
9 the acceptability and prevalence of these alternative family
10 forms.

11 **Q.** And what, in particular, do you have in your mind there?

12 **A.** You know, when Canada adopted same-sex marriage several
13 years ago, they struck the term "natural parent" from Canadian
14 law and replaced it with the term "legal parent." And the
15 implications of that, I think, are very profound in terms of
16 transfer of power to the state and so forth.

17 But it indicates that there is a growing trend for
18 family forms in which the child will not be raised by her -- by
19 her own biological parent.

20 So there is the diminution, the diminished likelihood
21 of -- there is a -- sorry, an increased likelihood of children
22 being raised in family forms other than her own two parents,
23 her own two natural parents.

24 There is also the possibility, you know -- there
25 could be the possibility of more public willingness to consider

1 family forms, such as polygamy that involve more than two
2 people.

3 **Q.** And what's the -- what's the basis of your concern about
4 that?

5 **A.** I think polygamist marriages are not in the interests of
6 women especially and, also, not really in the interests of
7 society.

8 There is already a standing history of this in our
9 society and many others. The concept that marriage involves
10 only two people is the -- probably the weakest of marriage's
11 core rules. It's already tested significantly by polygamy and
12 polyandry and polyamory.

13 So I think if the rule of -- if the concept of
14 opposites -- you know, the concept of man/woman goes, it's hard
15 to imagine, really -- and this is already being actively, you
16 know, reviewed by scholars in the journals and it's hard to --
17 well, I'll just put it this way.

18 It seems likely that over time this -- this aspect of
19 the institution as well will come under criticism and calls for
20 reform.

21 **Q.** And why would redefining marriage as an adult-centric
22 institution, as you have put it, increase the possibility of
23 this?

24 **THE COURT:** Of what?

25 **MR. COOPER:** Of polygamy being an acceptable

1 alternative family form.

2 **A.** Because the man/woman customary basis of marriage is
3 reinforced by and is, in turn, reinforces the idea of limiting
4 marriage to two. And if you knock out one of the pillars, the
5 other one becomes less comprehensible and, therefore, less
6 defensible.

7 **BY MR. COOPER:**

8 **Q.** Thank you.

9 Mr. Blankenhorn, I would now like to turn to the last
10 subject, and that is the issue of domestic partnerships.

11 And I would like to ask you what your position is on
12 domestic partnerships?

13 **A.** I support them. I think that they could be part of a kind
14 of a humane compromise in which, on the one hand, we protect
15 marriage and allow it to continue to carry out its distinctive
16 contribution to society, while at the same time extending
17 protections and recognition to gay and lesbian couples.

18 I don't think it's a perfect solution, but I do think
19 it's a possibly humane compromise on this issue. And I so
20 stated in an article that I wrote in the *New York Times*, I
21 co-authored Jonathan Rauch last year.

22 **Q.** Who is Jonathan Rauch?

23 **A.** He is a visiting scholar at the Brookings Institution. He
24 is a prominent proponent of same-sex marriage and his most
25 recent book is called *Gay Marriage: Why It's Good For Gays*,

1 *Good For Straights and Good For America.*

2 **Q.** And when did you publish this article you just referenced
3 in the *New York Times*?

4 **A.** I think it was February of 2009.

5 **Q.** Have you always held the view that you have just
6 articulated?

7 **A.** No. I have actually come pretty much full circle on the
8 issue. I really -- I really hadn't thought about it very much.
9 I was really focused on the topic of marriage and I had not
10 given the topic of domestic partnerships much thought. I
11 certainly hadn't given it any careful consideration until about
12 two years ago.

13 There was an event in Washington D.C., a debate -- we
14 call them conversations now, but we called it then a debate --
15 with Jonathan Rauch and he kind of publicly challenged me and
16 called me out on this topic and said, Your thinking about
17 domestic partnerships is immature and wrong and you have to
18 rethink it and, you know, it's -- I have also, speaking --
19 Jonathan said he also was evolving his position on the topic
20 and he really challenged me in that forum to consider more
21 carefully this idea, and I told him that I would, and I did.

22 And that began a kind of a journey with him
23 personally and, also, with other leaders in the push, who were
24 pro-same-sex marriage, where I tried to devote some real --
25 some real time to the topic and that led then to Rauch and I

1 writing the article endorsing civil unions or domestic
2 partnerships in the *New York Times*.

3 **Q.** Why hadn't you thought carefully about the issue of
4 domestic partnerships prior to that time?

5 **A.** I didn't really think I had -- I didn't feel that I had to
6 think about them carefully at that time.

7 I -- I went into my first conversations about this
8 with a kind of -- an instinctive or just a general feeling that
9 if you set up a comparable institution to marriage, that that
10 could have a weakening effect on marriage because --
11 particularly if that comparable institution was open to
12 opposite-sex couples as well, I was worried that you would have
13 kind of a, you know, smorgasbord effect of choosing -- and I
14 thought that that diversification would possibly weaken the
15 marital institution.

16 So I was -- I was very concerned that that not
17 happen, so I was personally suspicious of endorsing domestic
18 partnerships for that reason.

19 And the other reason was that Rauch and the others,
20 you know, the people that I was talking to were just very
21 vociferous in their denunciation of civil unions and domestic
22 partnerships. They just said it was a horrible idea; that it
23 was discriminatory; that it was -- that this was invidious;
24 this was demeaning, two gay and lesbian people; and this was a
25 form of unequal treatment.

1 And I -- I accepted that view. I was strongly
2 influenced by that view. In fact, I repeated that view. Back
3 of the bus, you know, discriminatory and wrong and unfair.

4 And so for those reasons, my concerns about diluting
5 marriage by setting up this dual institutional structure and,
6 also, the concerns about just the -- I guess you might say the
7 un- -- the unfairness, the idea that this would be
8 discriminatory, I embraced that -- I embraced both of those
9 points of view, just as an initial way of thinking about the
10 topic without having written or thought much about it, but --
11 and it was really then in the meeting with Rauch in 2007 and
12 then the next two years I tried to rethink it afresh. I tried
13 to think about it deeply and carefully with Rauch and others
14 and that led to the written article about the subject that I
15 published with him last year.

16 **Q.** I take it you no longer agree with the views that you had
17 on the subject before?

18 **A.** I still worry that domestic partnerships could -- could
19 possibly have a weakening effect on the marital institution,
20 but I think that it's something we should do anyway because of
21 other issues involved, and I have satisfied myself on this
22 question of fairness. That's been the big issue for me, you
23 know, personally. The issue of, is it unjust to have a
24 domestic partnership program? That's been really the core
25 journey and exploration that I have undergone on that issue.

1 So I -- my thinking on it now is that the core
2 principle that we can hold out for our understanding is that
3 marriage as a social institution is larger than the sum of its
4 legal incidents.

5 When we say the word "marriage," it's a big
6 institution that performs a very large contribution to society
7 and it's much bigger, much more powerful and potent as a role
8 in society than merely or only the enumeration of its legal
9 incidents. Marriage predates law. Marriage is not a creature
10 of law in the same way that other things are.

11 The law did not create marriage. We look to law to
12 recognize and support marriage and to give it support, but we
13 do not simply understand the institution only with reference to
14 its legal incidents.

15 So if you look at the legal -- the legal incidents of
16 domestic partnerships and then look at the legal incidents of
17 marriage, the fact that those legal incidents are comparable
18 does not mean that we are looking at the same institution, the
19 content of it.

20 The marital institution is differently purposed, is
21 specifically purposed. As I have tried to say today, probably
22 more times than you want to hear, the purpose of it is to bring
23 together the biological male and the biological female, to
24 bring together the two genitors of the child, to make it as
25 likely as possible that they are also the social and legal

1 parents of the child. That's the loadstar. That's the
2 distinctive contribution. There are others, but that's the
3 distinctive and core contribution of the institution of
4 marriage.

5 The domestic partnership institution is a differently
6 purposed institution with respect to this bringing together --
7 with respect to parenthood, particularly with respect to
8 parenthood.

9 The parenting process in the -- this loadstar notion
10 that animates the marital institution is not the same that is
11 operative in the domestic partnership institution.

12 It is discriminatory and un- -- and morally wrong in
13 my view, morally wrong to refuse to call two things that are
14 the same by the same name. That was my -- that was my -- that
15 was my -- that was what the big thing I had to grapple with in
16 my own mind to be able to look myself in the mirror.

17 And what I worked out with Rauch and others -- I'm
18 not saying he is responsible for my views. I'm saying that the
19 process I'm describing of developing this proposal with Rauch,
20 I had to be sure myself, personally, ethnically, that this
21 issue of is this discrimination to have an institution purposed
22 in this way as a domestic partnership institution. That was
23 the thing that I had to work out, and I have worked that out to
24 my satisfaction.

25 And it -- it means a lot to me personally, but I feel

1 that I have been able to understand this in a way that then
2 allows me as an advocate for customary marriage to say we can
3 have a compromise here. We don't all get everything we want,
4 but we all have a humane compromise on this issue.

5 **MR. COOPER:** Thank you, Mr. Blankenhorn.

6 **THE COURT:** Maybe we better take a very brief recess
7 for ten minutes and then we will resume with the
8 cross-examination of this witness.

9 **MR. BOIES:** Thank you, your Honor.

10 **MR. COOPER:** Thank you, your Honor.

11 (Whereupon there was a recess in the proceedings
12 from 3:23 p.m. until 3:31 p.m.)

13 **THE COURT:** New binders?

14 **MR. BOIES:** Not quite yet, your Honor, but soon.

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

16 **MR. BOIES:** Not quite yet, but soon. I'm going to
17 begin by asking some questions from the defendants' binders.

18 **CROSS EXAMINATION**

19 **BY MR. BOIES:**

20 **Q.** Good afternoon, Mr. Blankenhorn.

21 **A.** Good afternoon.

22 **Q.** Would you turn to tab 16 in your binder?

23 (Witness complied.)

24 **Q.** And this was one of the documents that you indicated that
25 you had relied on, is that correct?

1 **A.** Yes, sir.

2 **Q.** And Mr. Cooper directed your attention on the first page
3 to a quotation where it said:

4 "Children who grow up in a household with
5 only one biological person are worse off on
6 average than children who grow up in a
7 household with both of their biological
8 parents."

9 Do you recall that?

10 **A.** Yes, sir.

11 **Q.** Now, there are a number of questions that I want to ask
12 you about that, but did you understand the authors here to be
13 asserting that the fact that there was only one biological
14 parent was causally related to the fact that the children were
15 less well off?

16 **A.** Yes, sir. That was my understanding -- is my
17 understanding.

18 **Q.** That is your understanding?

19 **A.** Yes, sir.

20 **Q.** Now, did you read this entire chapter?

21 **A.** I read the entire book.

22 **Q.** Let me see if you remember reading the very next page, the
23 first full paragraph.

24 "But are single motherhood and father
25 absence, therefore, the root cause of child

1 poverty, school failure and juvenile
2 delinquency? Our findings lead us to say no.
3 While living with just one parent increases
4 the risk of each of these negative outcomes,
5 it is not the only or even the major cause of
6 them."

7 Do you recall reading that?

8 **A.** I do.

9 **Q.** Now, you referred a number of times in your of testimony
10 to biological parents; do you recall that?

11 **A.** Yes, sir.

12 **Q.** And you were not meaning to imply, were you, that
13 biological parents were any better parents than adoptive
14 parents?

15 **A.** No, sir.

16 **Q.** In fact, the studies show that all other things being
17 equal, two adoptive parents raising a child from birth will do
18 as well as two biological parents raising a child from birth,
19 correct?

20 **A.** No, sir, that's incorrect.

21 **Q.** Well, sir --

22 **A.** May I say another word on that, please?

23 **Q.** You will have an opportunity on redirect.

24 **A.** Okay. It was a clarifying thing and actually supports
25 something you just said.

1 The studies show that adoptive parents, because of
2 the rigorous screening process that they undertake before
3 becoming adoptive parents, actually on some outcomes outstrip
4 the biological parents in terms of providing protective care
5 for their children.

6 **Q.** Yes, I was going to come to that, and I appreciate your
7 getting there.

8 In addition, your Institute for American Values
9 publishes something called *The Marriage Index*, correct?

10 **A.** Yes, sir.

11 **Q.** And let me ask that you be handed Plaintiffs' Exhibit
12 2880. I didn't have this in the volume because I didn't know
13 it was going to come up.

14 (Discussion held off the record.)

15 **MR. BOIES:** I'm informed we were more perceptive than
16 I thought. It's in witness binder one, which we will hand out.

17 (Whereupon, binder was tendered
18 to the Court and the witness.)

19 **BY MR. BOIES:**

20 **Q.** Now, this is a document you recognize, is that correct,
21 sir?

22 **MR. COOPER:** I'm sorry. I --

23 **MR. BOIES:** 2880.

24 **MR. COOPER:** 2880. Thank you.

25

1 **BY MR. BOIES:**

2 **Q.** 2880.

3 **A.** I'm sorry. I just --

4 **Q.** It should be in numerical order.

5 **A.** Oh, here it is.

6 Yes, sir, I have it.

7 **Q.** And you recognize that?

8 **A.** Yes, sir.

9 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
10 Exhibit 2880?

11 **MR. COOPER:** No objection, your Honor.

12 **THE COURT:** Very well. 2880 is in.

13 (Plaintiffs' Exhibit 2880 received in evidence.)

14 **BY MR. BOIES:**

15 **Q.** And when your Institute For American Values does its
16 analyses, it treats adoptive parents and biological parents
17 together, correct?

18 **A.** I did not do the research for this particular study, but
19 it is -- I would not at all be surprised if for the purposes of
20 this report we followed what is a common practice among
21 scholars in the field and lumped those two categories together
22 for the purposes of this study.

23 If you want to compare outcomes for children who are
24 adopted to outcomes to children in other family forms, you
25 really have to do a study on that specific issue, and that is

1 not what this was.

2 But the answer to your question is, I wouldn't be at
3 all surprised if we did not follow the customary -- a very
4 common custom among researchers who, for a number of reasons,
5 including practical, very practical ones, often tend to include
6 in the -- they clump them together in the way that you've said.

7 **Q.** Let me be sure I understand what you are saying.

8 Ordinarily researchers include adoptive parents in
9 the same category as biological parents; is that what you said?

10 **A.** No, sir.

11 **Q.** Okay. Let me try it again.

12 In the research that you are familiar with, do
13 researchers ordinarily include both biological parents and
14 adoptive parents in the same category?

15 **A.** It depends on the question they are seeking to answer.
16 The -- it depends on what they are studying.

17 **Q.** Well --

18 **A.** I'm sorry. That's really the determinative factor.

19 **Q.** Let me jump right to the bottom line, okay, sir?

20 **A.** Good.

21 **Q.** Are you aware of any studies -- and let's just talk about
22 gay and lesbian couples. Let's just jump right to the bottom
23 line.

24 Are you aware of any studies showing that children
25 raised from birth by a gay or lesbian couple have worse

1 outcomes than children raised from birth by two biological
2 parents?

3 **A.** No, sir.

4 **Q.** Okay.

5 **A.** Would it be okay for me to say additional --

6 **Q.** It would not be okay for you to volunteer anything. I
7 heard your -- the speech that ended, and I'm really trying to
8 move along; okay, sir? You will have a chance to make speeches
9 when your counsel is asking you questions.

10 **A.** Okay.

11 **Q.** Let me follow up on a question that your counsel did ask,
12 which was about domestic partnerships, and I want to be sure I
13 have your testimony.

14 You thought a lot about domestic partnerships in
15 recent years, correct?

16 **A.** My testimony was that I had not thought very much at all
17 about them and had given really no serious consideration to
18 them until I was kind of publicly challenged to do so in 2007
19 in an exchange with Jonathan Rauch and that, as you -- I'm sure
20 you heard me say this whole thing. That's what happened.

21 **Q.** Does that mean that the answer is that since 2007, you
22 have given a lot of thought to it?

23 **A.** Yes, sir.

24 **Q.** Okay. And is it your view that domestic partnerships
25 contribute to the deinstitutionalization of marriage?

1 And I would like you to begin with a "yes," "no," or
2 "I don't know."

3 **A.** Mr. Boies, I know the answer to your question.

4 **Q.** Well, then --

5 **A.** But I cannot answer it if the only choices you are going
6 to give me are the choices between the words "yes" and "no."

7 **Q.** No, it wasn't only between "yes" or "no."

8 **A.** Well, you gave me three. You gave me, "I don't know,"
9 "yes" or "no."

10 I do know, but I cannot give you an accurate answer
11 to the question if the only words I'm allowed to choose from
12 are "yes" and "no."

13 **Q.** Listen to the question, okay?

14 **A.** I have heard of word of it.

15 **Q.** Okay. What is the question?

16 **A.** You asked me if I had a view on this subject. You asked
17 me if -- you were asking me to state my opinion on this.

18 **Q.** Well, what I asked you was whether it was your view that
19 domestic partnerships contributed to the deinstitutionalization
20 of marriage?

21 **A.** My answer to your question is that I believe that they
22 could do so.

23 And an additional part of my answer is I believe that
24 that risk is --

25 **Q.** I didn't ask you whether the risk was worth it or not.

1 A. Then I won't tell you.

2 Q. I asked you whether you had a view --

3 A. I do.

4 Q. (Continuing) -- as to whether domestic partnerships
5 increased the deinstitutionalization of marriage, and you said
6 they could.

7 That's what you told me, right?

8 A. I said I thought it was possible or likely that they
9 would.

10 Q. Okay. Now, "possible" and "likely" are two different
11 standards.

12 A. Well, maybe we could rewind the tape and find out what I
13 actually said. I think I maybe used the word that it was
14 "possible," but I can't recall the exact word that I used a
15 moment ago.

16 Q. Well, let's try to get what your view is, regardless of
17 what you said before.

18 In your view, do domestic partnerships increase the
19 deinstitutionalization of marriage?

20 A. I believe that it's possible that they could do so.

21 Q. Okay. Now, when you say it's possible, obviously,
22 anything is possible. Do you believe that it is likely that
23 they do so?

24 A. I believe that those domestic partnerships --

25 Q. Sir, I have got to ask you, I mean, this is going to move

1 along a lot faster if you at least begin with a "yes," "no," or
2 "I don't know."

3 **A.** I cannot do that on this, because the -- there are
4 different domestic partnerships. I have to be able to say what
5 kind of domestic partnerships we are talking about.

6 **THE COURT:** Mr. Blankenhorn, counsel is entitled to
7 an answer to his question.

8 **THE WITNESS:** May I ask a --

9 **THE COURT:** That's how this process works. There is
10 a question and then there's an answer. The answer has to
11 respond to the question.

12 **THE WITNESS:** Does he mean domestic partnerships that
13 are open to opposite sex couples or not?

14 **BY MR. BOIES:**

15 **Q.** Let me take them one at a time, okay. And I may take it
16 one in three times.

17 First, do you believe that domestic partnerships that
18 are open to opposite-sex couples increase the
19 deinstitutionalization of marriage?

20 **A.** I believe that they would be likely to do so.

21 **Q.** Okay. Do you believe that domestic partnerships that are
22 not open to opposite-sex couples will increase the
23 deinstitutionalization of marriage?

24 **A.** I believe they would be dramatically less likely to do so.

25 **Q.** Nevertheless, I want to know whether you think they would

1 be likely to do so or not. Even though they may be less
2 likely, would they nevertheless be less likely to do so?

3 **A.** I don't know.

4 **Q.** Do you believe that domestic partnerships that are open to
5 different-sex couples only when one of the participants is over
6 62, which happens to be the law in California as I understand
7 it, increases the deinstitutionalization of marriage?

8 **A.** My answer is the same as I just said. I believe they
9 would be significantly less likely to do so.

10 **Q.** Now, you believe that gays and lesbians today are raising
11 children, correct?

12 **A.** Of course, yes.

13 **Q.** And, in fact, hundreds of thousands of children are being
14 raised by gay and lesbian couples, correct?

15 **A.** I don't know how many.

16 **Q.** Did you ever try to find out?

17 **A.** I did.

18 **Q.** And were you able to make an approximation?

19 **A.** I was -- yes, sir, I was.

20 **Q.** What was that approximation?

21 **A.** I can't recall.

22 **Q.** Can you recall approximately?

23 **A.** No, sir.

24 **Q.** Okay. And you recognize that in some cases the gays and
25 lesbians are raising a child that is the biological child of

1 one of the parents and in some cases they are raising adopted
2 children, correct?

3 **A.** Those would be two -- two of -- of course, they would
4 be -- those would be examples of -- those would be examples of
5 children in gay and lesbian homes, yes.

6 **Q.** And you believe that permitting gay and lesbian couples to
7 marry would significantly advantage the gays and lesbians
8 themselves and the children that they are raising, correct,
9 sir?

10 **A.** When you say "advantage," do you mean improve the
11 well-being of?

12 **Q.** Yes.

13 **A.** My answer to your question is that I believe that adopting
14 same-sex marriage would be likely to improve the well-being of
15 gay and lesbian households and their children.

16 **Q.** Now, in binder number one, we have a copy of your book,
17 *Future of Marriage*. I think that is Defendant's Exhibit 956.

18 **A.** I do not have a copy with me here, if you are addressing
19 your question to me.

20 **Q.** No, I think --

21 **THE COURT:** It's in the binder, I believe,
22 Mr. Blankenhorn.

23 **BY MR. BOIES:**

24 **Q.** It's in the binder. The binder we handed up to you. In
25 other words, the --

1 A. The binder you handed me?

2 Q. Yes. The binder that your counsel handed you only had the
3 cover page.

4 A. Yes.

5 Q. We have handed you a binder that, unless we have screwed
6 it up in some way, ought to have the entire book in it.

7 A. Okay. Well, if you tell me the number, I will track it
8 down.

9 Q. 956, Defendants' 956.

10 This is an excerpt. It's not the entire book, but it
11 is more pages than just the top page.

12 A. Got it.

13 Q. Okay.

14 A. A pretty short excerpt.

15 Q. Well, it is -- it's not the whole book, but it's longer
16 than just the cover page.

17 Would you turn to page two of the book?

18 A. Yes, sir.

19 Q. And the last two sentences. And for context you may want
20 to read earlier in the paragraph. You will see that your
21 writing there on the issue of same-sex marriage is this
22 profound principle of equal dignity, the heart of the matter?

23 "After all, part of the reason why the
24 principle is so revolutionary is that it can
25 grow and deepen over time. Groups that had

1 long been considered effectively outside its
2 moral reach, African-Americans, women, people
3 of certain colors or languages or religions,
4 can over time and often as a result of great
5 struggle, enter into its protective sphere."

6 And then you get to the two sentences that I want to
7 particularly direct your attention to. You say:

8 "I believe that today the principle of equal
9 human dignity must apply to gay and lesbian
10 persons."

11 Do you see that?

12 **A.** Yes, sir.

13 **Q.** And the "I" there is you, correct?

14 **A.** That's correct.

15 **Q.** And you say:

16 "In that sense insofar as we are a nation
17 founded on this principle, we would be more,
18 emphasize more, American on the day we
19 permitted same-sex marriage than we were on
20 the day before."

21 And you wrote those words, did you not, sir?

22 **A.** I wrote those words.

23 **Q.** And you believed them then, correct?

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

25 **Q.** And you believe them now, correct?

1 **A.** That's correct.

2 **Q.** Now, let me direct your attention to some of the scholars
3 that you say you relied on.

4 And Mr. Cooper took you through a number of
5 publications by a number of scholars and you indicated that you
6 had relied on what they had written; do you recall that?

7 **A.** I do recall.

8 **Q.** Now, were any of the scholars that you and Mr. Cooper
9 identified scholars who have asserted that permitting same-sex
10 marriage would cause a reduction in heterosexual marriage?

11 (Brief pause.)

12 **Q.** If you don't understand the question, I will try to make
13 it clear.

14 **A.** No, I do understand it. And I'm -- may I say it back to
15 you and see if I have got it?

16 I think you are asking me, did any of the scholars
17 that I have cited, do they believe that adopting same-sex
18 marriage would lower the marriage rate among heterosexuals?

19 **Q.** Almost. And I -- I just want to clarify one thing.

20 You said "believe" and I said "asserted." And I'm
21 not asking you to try to probe their minds. I'm simply asking
22 what they have said and written.

23 Do you understand the difference, what I'm saying?

24 **A.** Yes.

25 **Q.** And what I'm asking you is, whether any of the scholars

1 that you have relied on have asserted that permitting same-sex
2 marriage would result in a lower rate of heterosexual marriage?

3 **A.** I -- I think the safest answer would, for me, to say I
4 don't know.

5 But if you'll also permit me, I think -- I believe
6 the answer is yes, some of them have.

7 **Q.** In that case what I will now do is ask you which ones?

8 **A.** Well, I thought you might. That's why I was kind of
9 careful in walking into it, but...

10 **Q.** It comes from those discussions.

11 **A.** Yes, yes.

12 (Laughter.)

13 **A.** Professor Norval Glenn in his article called the
14 *Struggle For Same-Sex Marriage* I have not reread that article
15 in some time, but I know he is a long-time -- I have read many
16 things of his and he is a -- I know him and I believe that he
17 has voiced reservations about same-sex marriage along the lines
18 of this statement that I read from, in the article; that is,
19 that he is saying that if --

20 **Q.** Sir?

21 **A.** Yes.

22 **Q.** I -- I need to have you focus relatively precisely, if I
23 can, on my question.

24 You did read a -- or Mr. Cooper read to you a portion
25 from Mr. Glenn's article where he was talking about the

1 deinstitutionalization of marriage, and I do remember that,
2 okay?

3 My question is different, okay? My question is
4 whether Mr. Glenn or any scholar that you relied on has
5 asserted that permitting same-sex marriage will result in a
6 lower rate of heterosexual marriage?

7 **A.** The problem here -- I'm not trying to be evasive, but you
8 must let me just say my answer, which is that if they are
9 arguing --

10 **Q.** No, no, sir. I don't have to do this. All that's going
11 to happen is you're going to say something, then I'm going to
12 have to follow up. Okay?

13 What I'm trying to do is -- this is a very simple
14 question, all right?

15 **A.** It is not simple to me.

16 **Q.** All right. Well, let me try to make it simple.

17 **A.** If you are using.

18 **Q.** Let me try to make it simple.

19 **A.** (Continuing) -- the exact form of the words --

20 **Q.** If you are trying to --

21 **THE COURT:** Let's not argue with one another. Let's
22 just have a question and an answer.

23 (Laughter.)

24 **BY MR. BOIES:**

25 **Q.** Let me try to make the question as simple as I can.

1 Have any of the scholars that you have said you
2 relied on said in words or in substance, okay, this permitting
3 same-sex marriage will cause a reduction in heterosexual
4 marriage?

5 That's "yes," "no," or "I don't know."

6 **A.** I know the answer. I cannot answer you accurately if the
7 only words I'm allowed to choose from is "yes" or "no." I can
8 give you my answer very briefly in one sentence.

9 **THE COURT:** If you know the answer, why don't you
10 share it with us?

11 **THE WITNESS:** I would be happy to, but he is only
12 permitting me to give "yes" and "no," and I cannot do that and
13 be accurate.

14 **THE COURT:** He is giving you three choices, "yes,"
15 "no," "I don't know."

16 **THE WITNESS:** But I do know. I do know the answer.

17 **THE COURT:** Then is it "yes" or is it "no"?

18 **THE WITNESS:** Your Honor, I can answer the question,
19 but I cannot give an accurate answer if the only two choices I
20 have are "yes" and "no."

21 I -- if you give me a sentence, I can answer it. One
22 sentence is all I'm asking for.

23 **THE COURT:** All right. Let's take a sentence. One
24 sentence.

25 **A.** Can you ask me the question again, please.

1 **BY MR. BOIES:**

2 **Q.** Yes, yes.

3 Have any of the scholars who you say you relied on
4 asserted, written, that they believe that permitting same-sex
5 marriage will result in a reduction in the heterosexual
6 marriage rate?

7 **A.** My answer is that I believe that some of the scholars I
8 have cited have asserted that permitting same-sex marriage
9 would contribute to the deinstitutionalization of marriage, one
10 of the answer -- one of the manifestations of which would be a
11 lower marriage rate among heterosexuals.

12 But I do not have sure knowledge that in the exact
13 form of words you are asking me for they have made the direct
14 assertion that permitting same-sex marriage would directly
15 lower the marriage rate among heterosexuals.

16 **BY MR. BOIES:**

17 **Q.** Mr. Blankenthorn?

18 **A.** Horn.

19 **Q.** Mr. Blankenhorn.

20 **A.** That wasn't so long.

21 **Q.** Questions and answers.

22 **THE COURT:** If I were to take that as an "I don't
23 know" would that be fair?

24 **THE WITNESS:** With respect, your Honor, I would
25 disagree with you.

1 I know exactly my answer to this question, and I have
2 just stated it. And I would be happy to restate it.

3 **THE COURT:** The record is clear on what you said.

4 **BY MR. BOIES:**

5 **Q.** And let me try to see if I can clarify what you meant.

6 You have said that some of the scholars have said
7 that permitting same-sex marriage would lead to the
8 deinstitutionalization of marriage.

9 You have then said that the deinstitutionalization of
10 marriage would lead or might lead to reduced heterosexual
11 marriage rates. You said that, right?

12 **A.** Yes, sir.

13 **Q.** Okay. Now, what I am asking you is whether the linkage
14 that says deinstitutionalization of marriage leads to lower
15 heterosexual marriage rates is something that the scholars said
16 or is that something that you are saying?

17 **A.** Scholars.

18 **Q.** Okay. Now, what scholars have said that the
19 deinstitutionalization of marriage will lead to lower
20 heterosexual divorce rate? What scholars?

21 **A.** I think you mean to say marriage rates.

22 **Q.** Marriage rates.

23 **A.** Would you like me to name one?

24 **Q.** I would like you to name every one that you know.

25 **A.** Okay, I will.

1 It's going to take me a moment to compose my memory
2 here, but let's start with --

3 **Q.** Let's be sure that we know the question.

4 The question is: Which of the scholars that you have
5 said to Mr. Cooper that you rely on are scholars who have
6 written, one, that permitting same-sex marriage leads to the
7 deinstitutionalization of marriage; and, two, that that
8 deinstitutionalization of marriage leads to a lower rate of
9 heterosexual marriage?

10 Do you have the question clear?

11 **A.** I thought you were asking me to name scholars on whom I
12 relied to form my opinions.

13 I did not know that you were asking me to restrict it
14 to the few that you were enumerated in the colloquy with Mr.
15 Cooper. I thought you were asking me, am I aware of scholars
16 who make this claim.

17 If you are asking me to choose among the few scholars
18 that were involved in the earlier colloquy, my answer would be
19 that, to the best of my knowledge, Professor Glenn has argued
20 that permitting same-sex marriage would lead -- would likely
21 lead to the further deinstitutionalization of marriage. I'm
22 not saying he used those exact form of words, but I'm saying
23 the substance of his arguments, written arguments have been
24 such.

25 And I'm saying that in addition to that, Professor

1 Glenn has argued that the deinstitutionalization of marriage
2 has a manifestation of lower participation rates of
3 heterosexuals in marriage.

4 I'm saying that Professor Norval Glenn is one such
5 person among the very small number that were cited in this --
6 that's the universe you are limiting me to. I'm saying that,
7 to the best of my knowledge, the answer to your question is
8 Professor Norval Glenn.

9 Q. And --

10 A. I'll also add that he is one of the most distinguished
11 family scholars in the nation.

12 Q. Anybody other than Professor Glenn among the scholars that
13 you told Mr. Cooper that you were relying on? Anybody else?

14 A. In forming my views on this subject, I --

15 Q. Mr. Blankenhorn. Mr. Blankenhorn.

16 A. My views are not restricted to the few that are on this
17 list.

18 MR. BOIES: Your Honor, could I please?

19 A. If you want to know who I rely on --

20 BY MR. BOIES:

21 Q. This is a simple question.

22 A. I'm happy to tell you.

23 MR. BOIES: He identified several scholars that he
24 said to Mr. Cooper that he relied on.

25 A. These were illustrative only.

1 **BY MR. BOIES:**

2 **Q.** I will accept that it's your testimony that these were
3 illustrative only.

4 **A.** I have others that you would be pleased to know their
5 pedigree, and I would be happy to give them to you.

6 **THE COURT:** I think Mr. Boies is asking for their
7 names.

8 **A.** Professor David Popenoe from Rutgers University would be
9 another one.

10 **BY MR. BOIES:**

11 **Q.** Okay. Now, this is somebody who has written that the --
12 permitting same-sex marriage leads to deinstitutionalization of
13 marriage and that that, in turn, leads to lower heterosexual
14 marriage rates, correct?

15 **A.** Well, my -- my only hesitation in answering yes is that I
16 have not refreshed myself on his exact writings and whether the
17 form of words are close enough to satisfy your concerns.

18 But it's my belief, based on an extensive
19 acquaintance with his books and writings in recent years, that
20 those represent the substance of his beliefs. And I -- I can't
21 sit here right now without reference to his works to prove it
22 in exact word formulation.

23 So I want to issue that caveat, but I believe if he
24 were here right now, sitting here, and you asked him, I believe
25 he would say, Yes, those are my beliefs.

1 Q. Okay. Now, Mr. Blankenhorn, I want to try to make as
2 clear to you as I possibly can that my questions here are
3 asking about what these people have written, not what you think
4 they would say if we brought them in to testify; not what you
5 think is in their heart or mind based on your conversations
6 with them; but what they have actually written.

7 Do you understand the difference?

8 A. Of course, I do.

9 Q. Okay. So focusing on that -- and I'm afraid I'm going to
10 mispronounce David's last name. Could you give that to me
11 again?

12 A. Popenoe.

13 Q. Popenoe. It is your testimony that Mr. Popenoe, Professor
14 Popenoe may or may not have actually written something in which
15 he said:

16 A, permitting same-sex marriage leads to the
17 deinstitutionalization of marriage;

18 And, B, the deinstitutionalization of marriage leads
19 to a lower rate of heterosexual marriages.

20 Correct?

21 A. I know that he did -- has written -- I'm trying to answer
22 your question. You know, it's an important issue and I'm
23 trying to give you a short but clear answer.

24 Q. But if you answered the questions that I'm actually posing
25 --

1 **A.** I am doing so to the very best of my ability. I came all
2 the way here from New York to answer your questions absolutely
3 to the best of my ability.

4 And my answer is that I believe that Professor -- I
5 know certainly that he has written that the
6 deinstitutionalization of marriage would lead to -- would
7 likely lead to lower rates of marriage among heterosexuals.

8 I believe, but I am not certain, that he has written
9 that same-sex marriage would likely contribute to
10 deinstitutionalization.

11 **Q.** Okay. While we were talking, I was trying to read through
12 Norval Glenn's article which you have here.

13 And while I haven't maybe read it as carefully as I
14 would like, I don't see anything in here in which he talks
15 about heterosexual marriage rates.

16 Do you recall anything in here about heterosexual
17 marriage rates?

18 **A.** I was relying for that statement on a paper that he wrote
19 several years ago that I was involved in. That's why I can
20 remember it, where he was a co-author of a paper that talked
21 extensively about deinstitutionalization and he -- and in that
22 paper, of which he was a co-author, it specifically talked
23 about lowering marriage rates as a likely consequence.

24 **Q.** And was that paper that you just referred to one of the
25 documents that you relied on in your expert report?

1 **A.** I -- I don't recall now whether it was --

2 **Q.** Why don't you look?

3 **A.** Okay. Maybe I misunderstood something, but it never
4 occurred to me that everything I would say regarding my views
5 had to be represented in the list of documents. I have been
6 studying this topic for more than 20 years, and I certainly am
7 relying on many, many more things other than the few things in
8 this report.

9 **MR. BOIES:** Your Honor --

10 **THE COURT:** The question is whether or not this is
11 reflected in your expert report.

12 **THE WITNESS:** Let's -- let's -- well, it's reflected
13 in the sense that this was a thing that influenced my thinking,
14 but let's answer the question of whether it is listed and --

15 **BY MR. BOIES:**

16 **Q.** You listed the things that you considered and relied on,
17 correct? That's what you were asked to do, right?

18 **A.** Maybe I made a mistake, but it certainly never occurred to
19 me that all of the views that I expressed had to be traceable
20 to one of those documents at the end of this report. If that
21 -- if I had understood that that was the requirement, there
22 would have been many, many scores more documents cited. They
23 would have gone back for 20 years of the work and study and
24 reflection that I have done on this issue.

25 **Q.** Mr. Blankenthorn -- Mr. Blankenhorn.

1 A. Horn.

2 Q. Mr. Blankenhorn, I apologize.

3 A. Let's find out if it's listed. That would solve the whole
4 problem.

5 Q. That would, although even regardless of whether it's
6 listed or, not I do want to follow up on some things you just
7 said.

8 (Brief pause.)

9 A. No, sir. It is not listed.

10 Q. Now, at the end of your expert report you prepared an
11 index of materials considered, correct?

12 A. I believe that's the list I was just looking over to see
13 if I could find Norval Glenn's article.

14 Q. And it wasn't there, correct?

15 A. No, sir. I did not find it, upon reading it quickly.

16 Q. I don't find it either.

17 There is a Norval Glenn article, but it's a different
18 article, correct?

19 A. Well, that's correct. It's a different article.

20 Q. Now, maybe the easiest way for me to approach this is to
21 go through the materials that you went through with Mr. Cooper,
22 and I will try to go through them as quickly as I can.

23 Turn to tab three. This would be the --

24 Q. In your book, yes, sir, in your book.

25 A. Got it.

1 Q. And this is an excerpt from a book by Suzanne G. Frayser,
2 correct?

3 A. Yes, sir.

4 Q. Now, does Dr. Frayser assert that permitting same-sex
5 marriage will cause a reduction in heterosexual marriage rates?

6 A. I do not know of her having made such an assertion.

7 Q. Okay. Does Professor Frayser assert that permitting
8 same-sex marriage will result in an increase in heterosexual
9 divorce rates?

10 A. In the interest of moving along, I think I can say that I
11 do not know of any statement about same-sex marriage that
12 Suzanne Frayser has made.

13 I don't know of any comment that she has made on that
14 topic.

15 Q. Okay. Let's go to the next expert that you told Mr.
16 Cooper you relied on, tab number four. Professor Quale, the
17 book *The History of Marriage Systems*.

18 Does Professor Quale assert anywhere here that
19 permitting same-sex marriage will cause a reduction in
20 heterosexual marriage rates?

21 A. My answer is the same. I'm not aware of Professor Quale
22 having in this book made any comments, one way or the other,
23 about -- this was 1988 and it would have been highly unlikely
24 for her, or anyone, to be writing about it.

25 But the answer is no. I do not know of anything she

1 has said in this book or elsewhere on the subject of same-sex
2 marriage. I'm not aware of anything.

3 **Q.** Did Professor Quale assert that deinstitutionalization of
4 marriage, however it was caused, would result in a reduction in
5 heterosexual marriage rates?

6 **A.** No, sir. Nor was I relying upon her to talk about
7 deinstitutionalization. She is under the section under what is
8 marriage, not about what is same-sex marriage and not is what
9 is the theory of deinstitutionalization.

10 If you want to talk about sources for my views on
11 deinstitutionalization, I can save you some time and take you
12 right to them.

13 But, no, she does not in this book discuss same-sex
14 marriage and, to the best of my knowledge, she doesn't say --
15 use the term "deinstitutionalization." She is a historian and
16 deinstitutionalization is a term that comes from sociology.

17 **Q.** So maybe we can move this along.

18 Neither Professor Frayser nor Professor Quale nor
19 Professor Kingsley Davis nor the Committee of the Royal
20 Anthropological Institute of Great Britain and Ireland, nor
21 Professor van Den Berghe, nor Professor Malinowski, none of
22 them talk about -- insofar as you were relying on them talk
23 about same-sex marriage or talk about the
24 deinstitutionalization of marriage, correct?

25 **A.** That would not be correct.

1 Q. Okay. It didn't work to speed it up.

2 A. May I --

3 Q. It was a compound question, but I thought --

4 A. Mr. Boies --

5 Q. Let me do it my way.

6 A. I was trying to save us some time.

7 Q. I was, too. But first Professor Frayser. Professor

8 Frayser does not deal with deinstitutionalization of marriage,

9 does not deal with same-sex marriage at all, correct?

10 A. Nor was I relying upon her for any of my views on those
11 subjects. The answer is no, she doesn't.

12 **THE COURT:** Or the answer is yes, she doesn't.

13 (Laughter.)

14 **THE WITNESS:** Yes, she does not.

15 **BY MR. BOIES:**

16 Q. And Professor Quale, does --

17 A. Same.

18 Q. Does Professor Quale deal at all with

19 deinstitutionalization of marriage or with same-sex marriage?

20 A. Not to my knowledge, no, sir.

21 Q. Okay. Professor Kingsley Davis, does Professor Davis deal
22 at all with same-sex marriage or the deinstitutionalization of
23 marriage?

24 A. Yes, sir. Based on my memory, I am confident -- well, I

25 would say that based on my memory of his writings, that he does

1 speak either with specific use of the word
2 deinstitutionalization, because he is a sociologist, or making
3 the same argument.

4 So my best understanding is that he does speak about
5 that issue in his work.

6 **Q.** Okay. Now, you see if you begin with a "yes," "no," or "I
7 don't know" answer --

8 **A.** Well, now we are back to the same old problem.

9 **Q.** Well, but you got to the "yes" at the end of that long
10 speech, and what I'm trying to do --

11 **A.** It wasn't a very long speech.

12 **Q.** Well, let's not argue about that or we will be here too
13 long, okay?

14 **A.** Okay.

15 **Q.** What I'm trying to do is I'm just trying to -- I get to
16 ask the questions. You get to answer them.

17 **A.** That's what they tell me.

18 **Q.** And I get to choose what questions I ask. And my
19 questions are designed to be precise questions so that I get a
20 "yes" or "no" answer, or you can say "I don't know."

21 **A.** No, sir. I -- often the questions are not amenable to
22 those three choices. I often know the answer that I wish to
23 give. I can give it briefly, but I cannot give the answer
24 sometimes if the only words I'm allowed to choose from are
25 "yes" or "no."

1 Q. Well, but when I ask a question like does Mr. Kingsley
2 Davis -- does Professor Kingsley Davis address the issue of
3 deinstitutionalization or the issue of same-sex marriage, you
4 can answer that question "yes" or "no", can you not, sir?

5 A. That is not the question you just asked, but the -- if you
6 would ask it that way, the answer is yes.

7 Q. Okay. Good. Now, does he do so in the article that you
8 say you relied on?

9 A. I don't know. Hah, see, I did it.

10 (Laughter.)

11 Q. Good for you. Yes. And if I could give you a gold star,
12 I would.

13 A. But that's when the answer really was "I don't know."

14 Q. Now, does he do so in any material that you indicated that
15 you had considered in your expert report?

16 A. Well, see, now we are back to the problem of what's in the
17 expert report. I have read a lot of stuff by him and I believe
18 that he does talk about it, but I am -- let's go back and look
19 at the list.

20 I can tell you that I have relied upon his work in
21 forming my views --

22 Q. Why don't you just answer the question.

23 A. I will have to read the list in order to tell you
24 whether any other article is --

25 Q. Please do so and when you finish, let me know.

1 **A.** (Continuing) -- is listed here.

2 I will.

3 (Brief pause.)

4 **A.** My quick reading shows me that there are no other cites to
5 Davis, other than the one we are discussing.

6 **Q.** Okay. Now, if you turn to tab six, the *Notes and Queries*
7 *on Anthropology*, by the Committee of the Royal Anthropological
8 Institute of Great Britain and Ireland?

9 **A.** Yes, sir.

10 **Q.** And does this publication address, as you recall, either
11 the issue of same-sex marriage or the issue of the
12 deinstitutionalization of marriage?

13 **A.** I know for a fact that it does not discuss the issue of
14 same-sex marriage with -- using that term same-sex marriage.
15 It does not -- it does not.

16 But it is my belief that it does in -- specifically
17 or in substance discuss the process of deinstitutionalization.

18 **Q.** Can you find where it does so?

19 **A.** Well, I only have a few pages here. If you could give me
20 the book, I could -- I believe I could find it for you.

21 **Q.** Let me get that. Let me get that while we are going on to
22 other questions.

23 And the next question is at tab seven. Professor van
24 den Berge was another expert that you said you relied on,
25 correct?

1 **A.** I relied on these views about the definition of marriage,
2 not about deinstitutionalization of same-sex marriage. I have
3 tried to make this clear.

4 **Q.** That's actually what I'm trying to make clear, also. And,
5 in fact, one of the things I'm trying to make clear is that
6 these people that you spent your time on direct examination
7 testifying that you relied on don't talk about in these
8 materials same-sex marriage or the deinstitutionalization of
9 marriage. I'm trying to make that point.

10 **A.** And I'm agreeing with you, by and large, and telling you
11 that their area of study is marriage.

12 **Q.** It's the by and large part --

13 **A.** We have already found Kingsley Davis talking about
14 deinstitutionalization and a couple of these others.

15 **Q.** Wait a minute. Where did we find Kingsley Davis talking
16 about that?

17 **A.** I think wasn't my testimony before that I thought Kingsley
18 Davis in his work was -- does discuss the process of
19 deinstitutionalization?

20 **Q.** Yes. You said you thought that was so, but it wasn't in
21 the materials that were in your book and it wasn't in --

22 **A.** Well, if we are back to that --

23 **Q.** Let me finish, at least.

24 And it wasn't in the materials that were listed in
25 your report, correct, sir?

1 A. The only article by --

2 Q. That is a "yes" or "no" answer, sir.

3 A. If you are asking me was --

4 MR. BOIES: Your Honor, can I get a "yes" or "no"
5 answer to this question?

6 THE COURT: Do you have the question in mind?

7 THE WITNESS: No, sir. I don't, your Honor.

8 THE COURT: Then perhaps you could restate it.

9 MR. BOIES: Okay, okay.

10 BY MR. BOIES:

11 Q. To the extent that Professor Davis addressed the issue of
12 deinstitutionalization of marriage, he did so outside of the
13 publication that was in your book and outside of anything that
14 is listed in your expert report, correct?

15 A. No, sir. I believe that it is certainly true that it's
16 outside anything listed in this report. I can't --

17 Q. It's also outside the publication from Professor Davis
18 that is in your book?

19 A. I can't recall the ways in which I did or didn't use
20 Professor Davis's work in my book.

21 Q. Not in your book. I apologize. I think I created this
22 confusion.

23 You are thinking about your book being -- one of your
24 books, like *The Future of Marriage*, right?

25 A. Yes, sir.

1 Q. I apologize. I was meaning to refer to the binder that
2 you used with your counsel.

3 A. Then the answer is yes. It is not -- your statement is
4 correct.

5 Q. Okay. Now, Professor Malinowski, would it be accurate to
6 say that in the publication that is in the binder that you were
7 using with your counsel that you said that you relied on, that
8 Professor Malinowski does not deal either with same-sex
9 marriage or with the deinstitutionalization of marriage?

10 A. That would not be correct.

11 Q. That would not be correct, okay.

12 Does Professor Malinowski in this book deal with
13 same-sex marriage?

14 A. No, sir.

15 Q. Okay.

16 A. Not -- no, sir.

17 Q. Does he deal with the subject of the
18 deinstitutionalization of marriage?

19 A. I don't think he uses the word, but I'm pretty confident
20 that -- well, I know in his writings as a whole he talks about
21 the process of deinstitutionalization.

22 Q. When you say "his writings as a whole," you mean writings
23 other than what's here in your binder?

24 A. Yes, sir.

25 Q. Okay. Now, you may not have understood the question, but

1 the question was: In the materials that you told your counsel
2 that you relied on and that are in your binder, in those
3 materials does Professor Malinowski deal at all with the
4 subject of the deinstitutionalization of marriage?

5 **A.** I don't know.

6 **Q.** Okay. Tab 10. Professor Lévi-Strauss.

7 **A.** I think I can save time by saying that he does not talk
8 about same-sex marriage, and I don't know whether in this
9 particular writing he deals with the process of the
10 deinstitutionalization of marriage.

11 **Q.** Okay. That does speed it along.

12 Do you have any materials that you have listed as
13 materials considered or relied on in your expert report from
14 Professor Lévi-Strauss other than this publication?

15 **A.** I'm quite confident that I have not included anything
16 other than this one cited article.

17 I've read his work extensively, and they have been
18 very important influences on my views, but the only thing
19 listed here is this one piece.

20 **Q.** Okay. Now, tab 11. The Law Commission of Canada. This
21 does deal with same-sex marriage, correct?

22 **A.** It does, yes. Not only, but it does deal with it.

23 **Q.** Not only, not only.

24 Does the Law Commission of Canada assert in the
25 materials that you have here before you, that you say you

1 relied on, that same-sex marriage may result in a reduction in
2 heterosexual marriage rates?

3 **A.** I don't know.

4 **Q.** Does the Law Commission of Canada in the materials that
5 you have in front of you, that you say you relied on, assert
6 that permitting same-sex marriage may cause an increase in
7 heterosexual divorce rates?

8 **A.** My strong suspicion is that they did not, because they are
9 endorsing same-sex marriage and they are endorsing what I would
10 view to be the radical deinstitutionalization of marriage in
11 general.

12 So it would be my supposition, without having reread
13 the entire document recently, that it would be my very strong
14 speculation that they made no such statement in this document.

15 **Q.** And did the Law Commission of Canada in the materials that
16 you have in front of you, and that you say you relied on,
17 assert that permitting same-sex marriage might lead to a trend
18 towards polygamy?

19 That is "yes," "no" or "I don't know."

20 **A.** I believe that they endorse, at least indirectly --

21 **MR. BOIES:** Your Honor, your Honor this really is a
22 question that can be answered "yes," "no" or "I don't know."

23 **A.** It just depends if you want to know what I think about it.

24 (Laughter.)

25 **THE COURT:** Well, that's the next question, perhaps,

1 and a question that Mr. Cooper can pursue.

2 But Mr. Boies is entitled --

3 **A.** Okay. I don't know I don't know whether they --

4 **BY MR. BOIES:**

5 **Q.** Okay.

6 **A.** -- whether they said that same-sex marriage would lead or
7 could lead to polygamy.

8 **Q.** Okay. And, again, did the Law Commission of Canada and
9 the materials that you have in front of you, that you say you
10 relied on, assert that permitting same-sex marriage might cause
11 an increase in children raised outside of marriage?

12 Again, "yes," "no," or "I don't know."

13 **A.** They are strongly advocating for the trend. So I don't
14 think that --

15 **MR. BOIES:** Your Honor, your Honor, he keeps doing
16 this.

17 **THE COURT:** I wonder in view of the hour whether a
18 good night's sleep might be helpful.

19 (Laughter.)

20 **MR. BOIES:** Thank you.

21 **THE COURT:** Might that not be helpful in moving us
22 along?

23 **MR. BOIES:** I think it might. I hope it will.

24 **THE COURT:** All right. Now, is there a realistic
25 possibility that we could conclude the presentation of evidence

1 sometime in the morning, sometime before noon?

2 **MR. BOIES:** Let me confer with counsel.

3 (Discussion held off the record
4 amongst counsel.)

5 **MR. BOIES:** Your Honor, I think this is the last
6 witness. There may be some short documentary evidence to come
7 in, but I think that there is a -- there is a hope. And I will
8 try to sharpen my questions, and perhaps the witness can think
9 about sharpening his answers; and if we work together, we may
10 be able to get it done.

11 **THE COURT:** Very well. Let me ask Mr. Cooper. Are
12 you planning to present Mr. Schubert as a witness?

13 **MR. COOPER:** No, your Honor, not if we can work
14 this -- these document issues out, which we think we can.

15 **THE COURT:** Very well. So then we should be able to
16 conclude the presentation of evidence with Mr. Blankenhorn and
17 then any documentary evidence that you had want to put in; is
18 that what I understand Mr. Boies to be saying?

19 **MR. BOIES:** Yes, yes.

20 **THE COURT:** Well, I'll look forward to it and that
21 should enable us to conclude sometime before noon, is that
22 correct?

23 **MR. BOIES:** Yes. I think yes, your Honor.

24 **THE COURT:** Do you agree, Mr. Cooper?

25 **MR. COOPER:** I do agree with that, yes. Starting at

1 8:30 again tomorrow morning, your Honor?

2 **THE COURT:** Absolutely.

3 **MR. COOPER:** Okay.

4 **THE COURT:** All right. Have a pleasant evening.

5 **MR. BOIES:** Thank you, your Honor.

6 (Whereupon at 4:35 p.m. further proceedings
7 in the above-entitled cause was adjourned
8 until Wednesday, January 27, 2010 at 8:30 a.m.)

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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

Tuesday, January 26, 2010

Volume 12

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

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

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

) San Francisco, California
Defendants.) Wednesday
) January 27, 2010

TRANSCRIPT OF PROCEEDINGS

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Debra L. Pas, CRR, CSR 11916
Official Reporters - U.S. District Court

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- - - -

P R O C E E D I N G S

JANUARY 27, 2010

8:33 a.m.

THE COURT: Very well, good morning, counsel.

(Counsel greet the Court.)

THE COURT: Good morning, Mr. Blankenhorn.

THE WITNESS: Good morning, sir.

THE COURT: Now, you understand that you're still
under oath?

THE WITNESS: Yes, sir.

THE COURT: The oath that you took yesterday
applies to this testimony as well; is that clear?

THE WITNESS: Yes, sir.

THE COURT: Proceed, Mr. Boies.

MR. BOIES: Thank you, your Honor.

We have a binder to hand out.

(Whereupon, binders were tendered
to the Court and the witness.)

DAVID BLANKENHORN,

called as a witness for the Defendants herein, having been
previously sworn, resumed the stand and testified further as
follows:

CROSS-EXAMINATION RESUMED

BY MR. BOIES

Q. Good morning, Mr. Blankenhorn.

1 **A.** Good morning, sir.

2 **Q.** I'm going to try this morning to start with some things
3 that perhaps we can agree on.

4 You agree that marriage is an important public
5 good, as you use that term, correct?

6 **A.** Yes, sir.

7 **Q.** And could you explain for the record what you mean by a
8 "public good"?

9 **A.** I mean that it serves important public purposes, and
10 marriage makes a distinctive contribution to society.

11 **Q.** And you believe that marriage is something that benefits
12 both the participants in the marriage, the couple that are
13 married, as well as any children that the couple may raise,
14 correct?

15 **A.** Yes, sir.

16 **Q.** And you believe that legalizing gay and lesbian marriage
17 would benefit gay and lesbian couples as well as any children
18 they raise, correct?

19 **A.** I believe it would be likely to do so.

20 **Q.** Well, you believe it would be almost certain to do so,
21 correct, sir?

22 **A.** I do believe it is almost certainly true that gay and
23 lesbian couples and their children would benefit by having
24 gay marriage.

25 **Q.** Now, you have said that, "If adopting same-sex marriage"

1 -- and I'm going to refer here to your book *The Future of*
2 *Marriage*. And you have got that at tab 13 of the binder that
3 I handed out, and I'm going to be looking at page 20.

4 You can read along with me, if you would like. Tab
5 13 of the binder, page 20.

6 **A.** Yes, sir.

7 **Q.** And at the top of the page you write:

8 "If adopting same-sex marriage was likely
9 to be part of a larger societal shift leading
10 to better marriages, less divorce and less
11 unwed childbearing or, more modestly, if it
12 seemed likely that adopting same-sex marriage
13 would not significantly undermine efforts to
14 renew our wider marriage culture, I am
15 confident that most marriage advocates would
16 favor its adoption. I know I would. But if
17 adopting same-sex marriage is likely to
18 impede that larger goal, I would be against
19 it."

20 And that's what you believe, correct, sir?

21 **A.** Yes, sir.

22 **Q.** And in saying that if adopting same-sex marriage would
23 impede that goal, you would be against it, what you are
24 saying is that you believe that the rights of gays and
25 lesbians should take second place to the needs of an existing

1 social institution, correct?

2 **A.** Well, maybe you could point me to the sentence.

3 **Q.** Sure. It's actually the very next sentence. You say:

4 "Those who disagree with me can charge
5 that I am proposing a moral metric in which,
6 regardless of the ultimate policy decision on
7 same-sex marriage, the rights of gays and
8 lesbians take second place to the needs of an
9 existing social institution."

10 Do you see that?

11 **A.** Yes, sir.

12 **Q.** And you say that the charge would be accurate, correct?

13 **A.** Yes, sir.

14 **Q.** And is it fair --

15 **A.** I was trying to say that from the point -- the answer to
16 your question is yes. I just only might point out that I did
17 say that -- I was saying I understood and accepted the
18 validity of the argument of those who disagreed with me.

19 **Q.** Yes, I appreciate that, sir.

20 Is it fair to summarize, to say that your choice
21 would be to choose marriage as a public good over the rights
22 and needs of gay and lesbian adults and those same-sex
23 couples who are raising children?

24 **A.** Well, again, I would like you -- I'm not trying to be
25 difficult, but I would just like to see the sentence that you

1 are referring to.

2 **Q.** Sure. The very bottom of the page, the last sentence.

3 You write:

4 "To the degree that I must choose, with
5 some anguish I will choose children's
6 collective rights and needs. I will choose
7 marriage as a public good over the rights and
8 needs of gay and lesbian adults and those
9 same-sex couples who are raising children."

10 Do you see that?

11 **A.** Yes, sir.

12 Mr. Boies, the whole purpose of my book was to
13 argue --

14 **Q.** I'm really not asking for the whole purpose of your
15 book, and --

16 **A.** I would just like to say that the sentences you're --
17 it's an important point.

18 The sentences that you are citing are an argument
19 about what I call goods in conflict. I'm one of those
20 persons who do not believe that this issue is a case of good
21 versus bad. I believe and have gone to great lengths to say
22 that I believe that there are valid arguments on both sides
23 of the issue, and my book is an attempt to explore that.

24 And these sentences you are selecting are examples
25 of me exploring that, what I'm calling goods in conflict.

1 Q. And I thought you --

2 A. It just helps to know what I'm trying to argue here.

3 Q. And I thought you would be agreeable to what I'm
4 pointing out to you. I just --

5 A. I am agreeable. I'm just providing a context so that
6 people can understand, and you can understand, why these
7 sentences are stated as they are.

8 **THE COURT:** All right. Let's have a question and
9 an answer.

10 **BY MR. BOIES**

11 Q. In fact, in your book, *The Future of Marriage*, you list
12 approximately 20 possible benefits of allowing gay and
13 lesbian marriage, correct?

14 A. Yes, sir. Those benefits that I listed in the book were
15 a result of a collaborative discussion that I led and they
16 involved advocates of both sides of the position. And we
17 tried to come up with -- over time we tried to come up with a
18 list of the likely or possible benefits of gay marriage, the
19 likely or possible disadvantages. And so I enumerated those
20 in that chapter of my book.

21 Q. Okay. Now, if you turn to page 203 of your book, again
22 behind tab 13, it is the page with the heading "Goods In
23 Conflict," and then the subheading "Positive Consequences."

24 A. Yes, sir.

25 Q. Now, what I'm going to do is I'm going to ask you just

1 which of these you agree with, if any, because as I
2 understand it, this was sort of a group thought experiment
3 that was going on.

4 **A.** Yes, sir.

5 **Q.** And you put down on a white board a lot of ideas that
6 people had, both for and against gay marriage, correct?

7 **A.** Yes, sir.

8 **Q.** Okay. And you did not necessarily agree with any
9 particular idea; you just wrote it down if it was brought up
10 by somebody, correct?

11 **A.** Well, there was a process, but the substance of what
12 you're saying is correct.

13 **Q.** Okay. So what I want to know -- because you are the
14 witness here, I want to know which, if any, of these positive
15 consequences of gay and lesbian marriage you agree with?

16 **A.** Yes, sir. And I only wish to say that with each of them
17 the issue that we discussed was likely; not definite, but
18 likely.

19 **Q.** Likely?

20 **A.** Yes, sir.

21 **Q.** So --

22 **A.** Because these are all speculative in the sense that they
23 are an attempt to predict something that will happen in the
24 future.

25 It's an important point. And so the issue is

1 likely --

2 **Q.** Mr. Blankenhorn. Mr. Blankenhorn, you may have
3 important points to make.

4 **A.** I think I do actually.

5 **Q.** I know you do. I know you do. But this is not a
6 debate.

7 **A.** No, sir. I'm trying to have you understand --

8 **Q.** I'm trying to ask you a question.

9 **A.** -- the nature of what I wrote in the book.

10 **Q.** I'm trying to ask you a question, sir.

11 **A.** I'm doing my very best to answer your question.

12 **THE COURT:** All right. Let's not interrupt one
13 another.

14 **MR. BOIES:** Your Honor, could I ask that the
15 witness be instructed to listen to the question, answer my
16 question and not make a statement that is not responsive to
17 the question, even if he believes it's important.

18 **THE WITNESS:** I don't need such instruction.
19 That's what -- my intention is to do exactly that.

20 **THE COURT:** Mr. Blankenhorn, one of the
21 instructions that the Court gives to the jury when an expert
22 witness testifies is to consider the witness's background,
23 training and experience; the testimony that the witness
24 gives; the reasons that the witness gives for the opinions
25 that he expresses; and all of the other evidence in the case.

1 And all of that other evidence, of course, includes
2 the demeanor of the witnesses. And the demeanor of the
3 witnesses is sometimes gauged, importantly, by the
4 responsiveness of the witness to the questions that he's
5 asked.

6 So with that in mind, because I'm sure you would
7 not want your demeanor on the stand to be a negative factor
8 in your testimony, I would urge you to pay close attention to
9 Mr. Boies's questions and to answer them directly,
10 succinctly. Then to the extent additional elaboration should
11 be brought out, your very able counsel, I'm sure, Mr. Cooper,
12 will be able to do that.

13 So bear that in mind.

14 **THE WITNESS:** Yes, sir, I will.

15 **THE COURT:** All right. Fine.

16 **BY MR. BOIES**

17 **Q.** So, Mr. Blankenhorn, could you just go down this list of
18 possible positive consequences and tell me which, if any, you
19 personally agree with?

20 And just tell me by number, because these are all
21 numbered, and I think it will go faster if you simply tell me
22 which of the numbers here, if any, you personally agree with.

23 **A.** You want me to read each one silently to myself and then
24 tell you "One, yes." Is that what you want me to do?

25 **Q.** What I -- read it silently to yourself and then just

1 tell me which of these you agree with. Give me the numbers
2 of the items that you agree with.

3 **A.** For each of the 23?

4 **Q.** Yes.

5 (Brief pause.)

6 **A.** Number one, yes.

7 Number two, yes.

8 Number three, yes.

9 Number four, yes.

10 Number five, yes.

11 Number six, yes.

12 Number seven, yes.

13 Number eight, no.

14 Number nine, no.

15 Number 10, yes.

16 Number 11, yes.

17 Number 12, I don't know.

18 Number 13, no.

19 Number 14, no.

20 Number 15, yes.

21 Number 16, I don't know.

22 Number 17, no.

23 Number 18, yes.

24 Number 19, yes.

25 Number 20, I don't know.

1 Number 21, I don't know.

2 Number 22, yes.

3 Number 23, I don't know.

4 **Q.** Okay. Thank you.

5 Now, I would like to publish this list and go
6 through it, and both identify those that you agree with and
7 then ask you some questions about some of the ones that you
8 said you disagreed with.

9 **MR. BOIES:** Can I publish this up on the board?

10 (Document displayed)

11 **MR. BOIES:** Can you make it a little more readable
12 by making some of the ones we are going to deal with first
13 larger?

14 **BY MR. BOIES**

15 **Q.** The first point that you agreed with was that:

16 "Same-sex marriage would meet the stated
17 needs and desires of lesbian and gay couples
18 who want to marry. In so doing, it would
19 improve the happiness and well-being of gay
20 and lesbian individuals, couples and family
21 members."

22 **A.** I said "many," "many gay and lesbian individuals,
23 couples and family members."

24 **Q.** I misread that. Let me just read it to be clear:

25 "Same-sex marriage would meet the stated

1 needs and desires of lesbian and gay couples
2 who want to marry. In so doing, it would
3 improve the happiness and well-being of many
4 gay and lesbian individuals, couples, and
5 family members."

6 The second positive consequence that you agreed
7 with was:

8 "Gay marriage would extend a wide range
9 of the natural and practical benefits of
10 marriage to many lesbian and gay couples and
11 their children."

12 The third positive consequence that you agreed with
13 was:

14 "Extending the right to marry to same-sex
15 couples would probably mean that a higher
16 proportion of gays and lesbians would choose
17 to enter into committed relationships."

18 The fourth positive consequence that you agreed
19 with was that:

20 "Same-sex marriage would likely
21 contribute to more stability and to
22 longer-lasting relationships for committed
23 same-sex couples."

24 The fifth positive consequence that you agreed with
25 was that:

1 "Same-sex marriage might lead to less
2 sexual promiscuity among lesbians and
3 (perhaps especially) gay men."

4 The sixth positive consequence that you agreed with
5 was that:

6 "Same-sex marriage would signify greater
7 social acceptance of homosexual love and the
8 worth and validity of same-sex intimate
9 relationships."

10 The seventh positive consequence which you agreed
11 with was that:

12 "Gay marriage would be a victory for the
13 worthy ideas of tolerance and inclusion. It
14 would likely decrease the number of those in
15 society who tend to be viewed warily as
16 "other" and increase the number who are
17 accepted as part of "us." In that respect,
18 gay marriage would be a victory for, and
19 another key expansion of, the American idea."

20 And I have read those correctly, have I not, sir?

21 **A.** Yes, sir.

22 **Q.** And then items eight and nine you disagreed with,
23 correct?

24 **A.** Yes, sir.

25 **Q.** And then item 10 you agreed to, and that reads:

1 "Gay marriage might contribute over time
2 to a decline in anti-gay prejudice as well
3 as, more specifically, a reduction in
4 anti-gay hate crimes."

5 And the 11th positive consequence and, again, one
6 that you agreed with, was that -- number 11 reads:

7 "Because marriage is a wealth-creating
8 institution, extending marriage rights to
9 same-sex couples would probably increase
10 wealth accumulation and lead to higher
11 standards for" --

12 **A.** "Living standards."

13 **Q.** (As read)

14 "...higher living standards for these
15 couples, as well as help reduce welfare costs
16 (by promoting family economic self
17 sufficiency) and decrease economic
18 inequality."

19 And did I read those correctly with your help?

20 **A.** Yes, sir.

21 **Q.** Number 12 you said you didn't know.

22 Numbers 13 and 14 you disagreed with, correct?

23 **A.** Yes, sir.

24 **Q.** Number 15, which you agreed with, reads:

25 "Extending marriage rights to same-sex

1 couples would probably reduce the proportion
2 of homosexuals who marry persons of the
3 opposite sex and, thus, would likely reduce
4 instances of marital unhappiness and
5 divorce."

6 And did I read that correctly?

7 **A.** Yes, sir.

8 **Q.** And number 16, which you said you didn't know, and
9 number 17, which you disagreed with, correct?

10 **A.** Yes, sir.

11 **Q.** And then number 18, which you agreed with reads:

12 "By increasing the number of married
13 couples who might be interested in adoption
14 and foster care, same-sex marriage might well
15 lead to fewer children growing up in state
16 institutions and more growing up in loving
17 adoptive and foster families."

18 And number 19, which you also agreed with reads:

19 "Adopting same-sex marriage would likely
20 be accompanied by a wide-ranging and
21 potentially valuable national discussion of
22 marriage's benefits, status and future."

23 And did I read those items correctly?

24 **A.** Yes, sir.

25 **Q.** And am I correct that items 20 and 21 you don't know

1 whether you agree with or not?

2 **A.** Yes, sir.

3 **Q.** And then number 22 is one that you do agree with, which
4 is that:

5 "Gay marriage would probably expand the
6 possibility and likelihood of new scholarly
7 research on a variety of topics related to
8 marriage and parenting."

9 Correct?

10 **A.** I'm absolutely certain of that one.

11 **Q.** And then number 23, you don't know, correct?

12 **A.** Correct.

13 **Q.** Now, I would like to ask you to go back to number 14,
14 which you said you disagreed with, and I want to ask you
15 about certain parts of that and see whether there is any part
16 of that that you agree with.

17 There is a reference here to "marriage lite
18 schemes," such as civil unions and domestic partnerships; do
19 you see that?

20 **A.** Yes, sir.

21 **Q.** And there is a statement here that:

22 "Those marriage lite schemes can
23 harmfully blur distinctions between marriage
24 and non-marriage."

25 Do you see that?

1 A. Yes, sir.

2 Q. Do you believe that that part of the statement is true?

3 (Brief pause.)

4 A. The part that you have read so far?

5 Q. Yes, just this part.

6 A. No, sir. I do not believe that -- I do not believe that
7 it's true.

8 Q. Okay.

9 A. Saying, again, that this is what's likely.

10 Q. Yes, I know. I understand, and that's what I'm saying.

11 My question was whether you believed it was likely
12 that marriage lite schemes that you refer to here, or what is
13 written here as marriage lite schemes, such as civil unions
14 and domestic partnerships, whether it's likely that those can
15 harmfully blur the distinctions between marriage and
16 non-marriage?

17 A. Well, now, you have just read one part of it, because I
18 do believe that it is a -- it is a concern of mine that -- it
19 is one concern that needs to be taken into account; that
20 domestic partnership and civil unions, because they are in
21 some respects comparable to marriage, it is a concern that
22 they could blur this distinction. It is a concern.

23 I was basing my thought on the fact that you had
24 read me a much longer portion of it.

25 Q. Let me see if I understand what you are saying.

1 You are saying that marriage lite schemes, such as
2 civil unions and domestic partnerships, are a concern to you
3 because those schemes might well or could harmfully blur the
4 distinctions between marriage and non-marriage; is that what
5 you are saying?

6 **A.** Yes, sir.

7 **Q.** Okay. Now, I would like to ask you to turn to the
8 document that is in the pocket of the -- beginning pocket of
9 your binder, right at the very beginning. It is Plaintiffs'
10 Exhibit 2332-A.

11 **A.** I'm sorry. I'm -- I'm having a hard time.

12 **MR. BOIES:** May I approach, your Honor?

13 **THE COURT:** Yes, you may.

14 (Whereupon, document was tendered
15 to the witness.)

16 **BY MR. BOIES**

17 **Q.** This is a copy of the "Index of Materials," the list of
18 materials that in your expert report you said that you had
19 considered and relied on.

20 Do you recognize it as such?

21 **A.** It's titled "Index of Materials Considered."

22 **Q.** And did you understand that as part of your expert
23 report, you were supposed to list the materials that you
24 considered and relied on in preparing your expert report; do
25 you understand that?

1 **A.** No, sir. As I explained yesterday, we had a --

2 **Q.** You don't have to explain it.

3 **A.** -- we had a back-and-forth about this.

4 **Q.** You don't have to explain it.

5 **A.** It's just that you asked me the question.

6 **Q.** I understand.

7 **THE COURT:** Perhaps if you showed the witness the
8 expert report, it might be of some help.

9 **BY MR. BOIES**

10 **Q.** The expert report is in the witness binder that you have
11 that Mr. Cooper gave you.

12 **THE COURT:** PX-743, I believe.

13 **BY MR. BOIES**

14 **Q.** And do you see that what we have marked as Plaintiffs'
15 Exhibit 2332-A is a copy of what you attached to your expert
16 report?

17 **A.** Yes, sir. That's -- yes, sir.

18 **Q.** Okay. Now, I would like you to go down this list --
19 this is a list of materials -- and I would like you to tell
20 me which of these materials, it is your testimony, assert
21 that permitting gay marriage will adversely affect
22 heterosexual marriage?

23 **A.** I will be happy to do my best. I don't think I can give
24 you a precise answer because I don't have the ability now to,
25 you know, reread each of these documents, but I will do my

1 best to give you a judgment, if that's what you want me to
2 do.

3 **Q.** Yes. It's your best testimony and, obviously, people
4 can later go look it up.

5 **A.** Could you say, again, what it is you are asking me if
6 these materials contain?

7 **Q.** Whether the materials contain a statement that -- or an
8 assertion that permitting gay and lesbian marriage will
9 adversely affect heterosexual marriage.

10 (Brief pause.)

11 **Q.** And, again, perhaps the easiest way is for you simply to
12 tell me the numbers that relate to materials that you believe
13 fit what I'm asking.

14 (Brief pause.)

15 **A.** Well, with the provisos that I can't speak with
16 absolutely confidence about this, and with the proviso that
17 the overwhelming majority of these materials were actually
18 written before the gay marriage debate even came up on the
19 national stage and were cited not about the subject you are
20 asking me about, I will answer your question by saying, 2, 3,
21 10, 13, 24, 27, and that's all.

22 **Q.** All right. Let me go through each of those.

23 Let me begin with certain declarations that you
24 have identified.

25 Number 10 is a declaration of Allan C. Carlson,

1 correct?

2 **A.** Yes.

3 **Q.** Who is Allan C. Carlson?

4 **A.** Well, he's a writer and researcher and he has written
5 some books on marriage and he -- I don't know. I think the
6 group he heads is a private conservative think tank in
7 Illinois. I think it's called the Howard Center. He is --
8 his doctorate is in history.

9 **Q.** So he is not an anthropologist, or a psychologist, or a
10 sociologist; is that correct, sir?

11 **A.** No, sir. He's a historian.

12 **Q.** And then the other declaration that you identified was
13 the declaration of Maggie Gallagher, correct; number 24?

14 **A.** Well, that was one of them, yes, sir.

15 **Q.** And who is Maggie Gallagher?

16 **A.** She is one of the leading opponents of gay marriage in
17 the public debate today. She is a writer and, I guess you
18 might say an organizer, writer and organizer, whose principal
19 focus has been marriage and whose principal focus in the past
20 four or five years has been to lead a campaign and to make
21 public arguments in opposition to gay marriage.

22 **Q.** Do you consider her a scholar, as you have used those
23 words?

24 **A.** I do, yes. As I am using the term, I believe that she
25 is a serious -- an intellectually serious person, yes.

1 Q. And an intellectually serious person is what you have
2 meant when you have referred to scholars in your testimony?

3 A. No. If you want to quarrel over the terms --

4 Q. I'm not quarreling. I'm just asking what you meant.

5 A. So what's your question?

6 Q. You have used a number of times in your testimony, both
7 your direct testimony and occasionally your cross, the term
8 "scholar" to refer to people that you have relied on; do you
9 recall that?

10 A. Yes. I do not -- I did not mean -- if you think I mean
11 that I believe that the definition of scholar is someone who
12 is intellectually serious, then I misspoke. So we can --

13 Q. And when you use the term "scholar," what are you
14 referring to?

15 A. Well, let's see. I hadn't thought recently to try to
16 form a kind of dictionary definition, but I guess my
17 understanding of a scholar would be someone who is able and
18 equipped to engage seriously with intellectual competence
19 with one or more bodies of evidence and to make rigorous
20 analyses and arguments about one or more bodies of evidence.

21 And I believe that the ideals of good scholarship
22 are to be -- to have integrity; that is, to try to seek the
23 truth of the matter.

24 Q. And do you believe that one of the attributes of good
25 scholarship is objectivity?

1 **A.** Objectivity in the sense of trying to see things whole
2 and trying to understand and engage seriously with opposing
3 points of view and treat those opposing points of view
4 respectfully. In that sense yes, there is an ideal in
5 scholarship that would be -- that you might call those
6 cluster of terms or that -- those aspirations, you might call
7 those objectivity, yes.

8 See, Maggie Gallagher has a dual role. She is a
9 journalist and writer, but she is also an activist and
10 partisan in this public debate. I have tried to make that
11 clear.

12 **Q.** Has she published any peer-reviewed articles?

13 **A.** Yes.

14 **Q.** Which ones?

15 **A.** Well, I don't have her C.V. in front of me right now,
16 Mr. Boies. I mean, I happen to know that she has published
17 several articles in peer-reviewed law journals, but I'm not
18 able to recall the specifics of her 20-year publication
19 history right now.

20 **Q.** Can you recall any peer-reviewed article by Maggie
21 Gallagher that you have relied on?

22 **A.** That I have relied on?

23 **Q.** Yes.

24 **A.** Well, I have read a number of them over the years. I
25 mean, if that's what you mean, I have read them. And they

1 have helped, along with thousands of other articles and
2 books, to shape my over all views on things.

3 **Q.** What was the most recent peer-reviewed article by Maggie
4 Gallagher that you have relied on; that you think is reliable
5 as objective scholarship with integrity?

6 **A.** You are putting words in my mouth.

7 **Q.** Well, let me not put words in your mouth. Let me simply
8 ask a question.

9 Has Maggie Gallagher written any peer-reviewed
10 article that you believe is characterized by the ideals of
11 integrity and objectivity that you have described that you
12 have relied on?

13 **A.** That I have relied on for my testimony here today?

14 **Q.** Let's answer that question first. That wasn't really my
15 question, but let's put that question and get an answer to
16 that.

17 **A.** There are no such articles that I have specifically
18 relied on for my testimony here today, or my preparation for
19 my testimony here today.

20 **Q.** Okay. Another one of the items that you identified --
21 and by my count you identified a total of six items.

22 Another one of the items that you identified was
23 Norval Glenn, "The Struggle For Same-Sex Marriage" and that
24 was one of the articles that Mr. Cooper raised with you, am I
25 correct?

1 **A.** Yes, sir.

2 **Q.** And would you turn to that in Mr. Cooper's book?

3 **A.** Can someone tell me the tab?

4 **Q.** I believe that it is tab 18.

5 **A.** Okay.

6 **Q.** Okay. Now, you said that Mr. Glenn asserted that
7 permitting gay and lesbian marriage would adversely affect
8 heterosexual marriage, correct?

9 **A.** Well, I believe I was answering a question of yours, and
10 I believe the way you asked me was to -- based on reviewing
11 this list called "Index of Materials Considered," if I could
12 identify for you any documents in that list that I thought
13 the view of the author was that adopting same-sex marriage
14 would weaken the institution of marriage.

15 **Q.** Okay. I'm glad we clarified that.

16 Now, I want to go back to the list. And the six
17 items that you have identified are items which you say -- and
18 I want to get your words exactly.

19 You thought this was materials where the view of
20 the author was that adopting same-sex marriage would weaken
21 the institution of marriage. That's what you answered,
22 right?

23 **A.** That's what I just said, yes, sir.

24 **Q.** Now, I want to ask a somewhat different question with
25 respect to these items that you have identified; and that is,

1 which of these six did this material that's here, that's
2 listed here, contain an assertion that permitting gay and
3 lesbian marriage would harm heterosexual marriage?

4 Do you understand the difference between the two?
5 If not, I will explain it.

6 **A.** I'm afraid I don't.

7 **Q.** Okay. You were doing two things. One, you were giving
8 me what you thought the author believed?

9 **A.** Yes, sir.

10 **Q.** And I'm asking you not what the author believes in your
11 view, but what the author said.

12 Second --

13 **A.** Said not in some book or article that exists in the
14 world, but says specifically in the words that you have
15 stipulated in this narrow list of materials cited?

16 **Q.** Yes, sir.

17 **A.** Okay.

18 **Q.** And that's the --

19 **A.** It's a very narrow question, but I'm happy to try to do
20 my best to answer it.

21 **Q.** Yes. And so what I'm asking you is which, if any of
22 these materials themselves, not some other material --

23 **A.** Written material, a book, peer-reviewed article, so
24 forth; only these materials?

25 **Q.** Only these materials that you have listed. Which of

1 these materials contain assertions that permitting gay and
2 lesbian marriage will harm heterosexual marriage or the
3 institution of heterosexual marriage, if any?

4 **A.** Does it have to say it in that exact form of words that
5 you have offered?

6 **Q.** No. In words or in substance, so that a reasonable
7 reader could read it and say this writer in this publication
8 is asserting that gay and lesbian marriage will weaken
9 heterosexual marriage.

10 **A.** Be likely to weaken heterosexual marriage.

11 **Q.** I beg your pardon.

12 **A.** The issue is always likely, Mr. Boies. It's not --
13 there is no such thing as certainty about predicting a future
14 event. The concept is always what is likely in their
15 judgment to occur.

16 **Q.** I accept that, Mr. Blankenhorn.

17 **A.** Blankenhorn.

18 Well, I don't really -- with the proviso that I
19 can't speak with confidence about this unless I were to
20 reread each of these documents word for word right now, but
21 my best effort to answer your question right now would be
22 that the list I have given you would be the same list.

23 **Q.** So that each of the six that you have identified, you
24 believe these materials themselves assert in words or in
25 substance that permitting gay and lesbian marriage will harm

1 heterosexual marriage, is that correct?

2 **A.** I believe that a reason- -- as you put it, a reasonable
3 reader, reading these materials, would conclude that this
4 author has stated or suggested that adopting gay marriage
5 would be likely to weaken marriage as a social institution.

6 **Q.** Now, in that answer you said "stated or suggested." Do
7 you use those terms interchangeably, synonymously or do you
8 mean something different by them?

9 **A.** I mean something different by them.

10 **Q.** What do you mean?

11 **A.** Would it be okay if I gave you an example, or would you
12 rather me state it abstractly?

13 **Q.** I would rather you state it in concept.

14 **A.** "Stated" would be an unequivocal assertion that is
15 similar to the wording that you have offered in your -- you
16 know, an unmistakable, no possible way to doubt the declared
17 intent of the sentence or the paragraph.

18 A "suggestion" would be a way of making an
19 argument, stating it so that a reasonable reader would
20 understand clearly based on the written words that the author
21 has a serious concern or a serious worry or is stating his or
22 her belief that it would be likely that adopting gay marriage
23 would weaken marriage as a social institution.

24 **Q.** Now, with respect to the six items that you have
25 identified, let me ask the question separately.

1 **A.** I was afraid that might be where we were going.

2 **Q.** I'm getting predictable.

3 Which of these in your testimony does the author,
4 in this material, state -- using "state" the way you have
5 described it -- that permitting gay and lesbian marriage
6 would harm heterosexual marriage?

7 **A.** Well, I think you would probably have to take Cherlin
8 off the list, number 13, because while he argues that gay
9 marriage is contributing to the deinstitutionalization of
10 marriage, that's his statement. He does not specifically in
11 words that you're calling for him to do make the statement
12 that you are calling for him to make. So I think we would
13 probably have to take him off that very narrow list.

14 So let's keep going.

15 Well, you might have to take Norval Glenn, number
16 27, off the list, but although because he does say that
17 adopting gay marriage would be likely to result in the
18 deinstitutionalization of marriage, he does not have the form
19 of words that are in the unequivocal statement that you are
20 asking for. So let's take him off the list.

21 On number three, Agacinski. I have read a lot of
22 her work and I know that she is an opponent of same-sex
23 marriage, and I know in great detail the reasons why she is
24 an opponent, and I know that she believes that it would be a
25 result of the deinstitutionalization of marriage. And it's

1 been an important body of work for me, her work as a
2 philosopher and as a scholar, but I cannot speak with
3 certainty about the exact form of words in this one book
4 listed here called *Parity of Sexes*, so let's take her off the
5 list as well.

6 **Q.** And you do understand that it's not the exact form of
7 words. It is the unmistakable -- what you referred to as an
8 unmistakable --

9 **A.** It is an extremely narrow and rigid category that you
10 are erecting here and which is your perfect right to do. So
11 let's take her off the list.

12 **Q.** I just want to be sure that we are taking her off the
13 list because you can't say --

14 **A.** An opponent of same-sex marriage, but let's take her off
15 the list.

16 **Q.** I want to be clear that the reason we are taking her off
17 the list is because you cannot say that in this particular
18 material that's cited here, that she unmistakably
19 communicates that permitting gay and lesbian marriage would
20 harm heterosexual marriage?

21 **A.** My answer is that I know with absolutely certainty that
22 she opposes gay marriage for the reason that would contribute
23 to the deinstitutionalization of marriage.

24 My concluding part of my answer is that I do not
25 know with absolutely certainty that those sentences appear in

1 the text called *Parity of the Sexes*, and so for that reason I
2 think we should remove her from the list.

3 **Q.** And you do understand, sir, that all I am doing is
4 asking you about the materials you listed; you understand
5 that, don't you?

6 **A.** Of course I do.

7 **Q.** Okay. Now, is there anybody else you would take off the
8 list?

9 **A.** I don't think so.

10 **Q.** Okay. Now, let me follow up something that you said
11 about Norval Glenn, just because we have got his article in
12 front of us, and that's Defendant's Exhibit 60.

13 You said he did state that permitting gay and
14 lesbian marriage was likely to result in the
15 deinstitutionalization of marriage. Did I understand you
16 correctly?

17 **A.** Well, if where you're going with this is to ask me to
18 show you in his article the word "deinstitutionalization," to
19 the best of my knowledge, the word -- I don't know whether
20 the word is there or not. I don't think it is.

21 But my testimony to you is that in substance that
22 is what he is saying.

23 **Q.** Well, let me ask you to look at some of what he actually
24 said and see whether you define it as being in substance what
25 you say.

1 And first let me just ask you a general point. As
2 you understand what Mr. Glenn is doing in this article, is he
3 trying to decide or trying to assert whether gay marriage is
4 or is not a good idea, or is he trying to talk about his
5 concerns about the debate about same-sex marriage?

6 **A.** My memory of the article is that it's the latter.

7 **Q.** Okay. So what he is really concerned about here is he
8 is concerned that the debate about same-sex marriage is
9 harming or could potentially harm the institution of
10 marriage, is that correct?

11 **A.** As you have said and as I have agreed, the -- I have not
12 read this article in several years. The reason it's cited in
13 the List of Materials Considered is because I excerpted a
14 specific paragraph from it in my report.

15 But my memory of the article is as you have stated,
16 is that it is more a discussion -- this is in keeping with a
17 lot of his scholarship. This is in more of a discussion of
18 an analysis of the debate, rather than an advocacy or a
19 polemical argument in favor of one side or the other.

20 **Q.** And, for example, one of the things he believes is that
21 legalizing same-sex marriage would have a small effect, at
22 most, on the percentage of fatherless children, correct, sir?

23 **A.** I don't recall where he says that. Could you point that
24 paragraph out?

25 **Q.** Sure. If you turn to page 28? And the second column, I

1 think it seventh line down, do you see where he says,

2 Legitimate -- legitimate --

3 **A.** I see where you are. I would like to read the sentence,
4 if I may.

5 **Q.** Making it legal.

6 "Making legal same-sex marriage would
7 have a small effect, at most, on the
8 percentage of fatherless children."

9 Do you see that?

10 **A.** I'm just reading --

11 **Q.** I understand, but do you see what I just read?

12 **A.** I do see it, yes, sir.

13 **Q.** Take at much time as you want to review the context and
14 when you have finished, let me know.

15 (Brief pause.)

16 **A.** I now understand that in this paragraph --

17 **Q.** Sir, sir, I'm not asking you -- when I say please let me
18 know, I'm not saying please let me know what you think the
19 context is. I'm just saying please let me know when you
20 finish reviewing the context because I have some questions.

21 **A.** I have finished.

22 **Q.** Now, do you agree that legalizing same-sex marriage
23 would have a small effect, at most, on the percentage of
24 fatherless children? Do you agree with that?

25 **A.** No, sir, I do not.

1 Q. Did you know prior to the time that I showed you this,
2 that that was an assertion that Professor Glenn made?

3 A. Of course I did, because I read the article.

4 Q. Okay.

5 A. Wouldn't it help to know what he is trying to say here?

6 Q. What I'm trying to do is focus on the words that --

7 A. So am I. His words.

8 Q. Not your interpretation or not what you think is
9 important.

10 A. Well, could we just read the paragraph?

11 Q. You will have an opportunity to read the whole
12 paragraph --

13 A. So we don't want to know what he is actually saying.
14 Okay.

15 Q. Well, one of the things he said immediately after that,
16 to complete the sentence, the entire sentence says:

17 "Legitimizing of same-sex marriage would
18 have a small effect, at most, on the
19 percentage of fatherless children and there
20 is no precedent for prohibiting a family
21 arrangement because it creates less than
22 ideal conditions for children."

23 A. It's not the point I was trying to make. I won't make
24 it. It's okay.

25 Q. That's the complete sentence, correct? That is the

1 complete sentence?

2 **A.** Yes, sir, that is the complete sentence.

3 **Q.** Okay. Now, do you agree that there is no precedent for
4 prohibiting a family arrangement because it creates less than
5 ideal conditions for children?

6 **A.** By "prohibiting," do you mean making it illegal? Do I
7 believe that there is a family form that has been made
8 illegal because it is less than ideal for children?

9 **Q.** When Professor Glenn writes:

10 "Legalizing same-sex marriage would have
11 a small effect, at most, on the percentage of
12 fatherless children and there is no precedent
13 for prohibiting a family arrangement because
14 it creates less than ideal conditions for
15 children."

16 Do you agree that with, with what he says here;
17 there is no precedent for prohibiting a family arrangement
18 because it creates less than ideal conditions for children?

19 **A.** Well, when I think about prohibition of the family form
20 of polygamy, I believe that one of the important reasons why
21 we have historically -- if you go back to the records, I
22 believe -- I'm not an expert in this area. This is not
23 something I have studied in detail. I don't know how
24 relevant it is to our conversation, but it is certainly a
25 family form that is present in the world, in societies, and

1 it is prohibited here in the United States.

2 And I believe, based on my imperfect study, that
3 one of the reasons that it is prohibited is that it is
4 considered less than ideal for children. And I believe the
5 historical record, the discussion of that, I'm fairly
6 confident would confirm that.

7 I think there are probably other examples of family
8 forms as well, but I would have to give that some thought.

9 **Q.** Speaking of polygamy, since you raised it, and I
10 understand that you say you're not an expert on it.

11 But are you aware of what reasons were stated for
12 prohibiting polygamy in the United States?

13 **A.** Well, I believe I just -- in answer to your previous
14 question, I just stated that it is not a field of expertise
15 of mine.

16 **Q.** Are you aware of any of the reasons that were stated for
17 prohibiting polygamy in the United States?

18 **A.** In the sense of having studied it and believing myself
19 to be competent to speak with expert knowledge on this
20 subject, the answer is no.

21 **Q.** Okay. Incidentally, you have testified about your three
22 rules of the game for marriage?

23 **A.** I don't think I used those terms today or yesterday.

24 **Q.** Well, you certainly said that that was the basis of a
25 lot of your views, have you not, sir?

1 **A.** Well, I think I would rather tell you in my words what
2 my views are than have you try to put them in my mouth.

3 **Q.** Well, sir, we are going to actually go to your words in
4 your deposition, but have you described the rules of the game
5 for marriage?

6 **A.** My understanding is that the phrase "rules of the game,"
7 I think I might have used it in my book and my report.

8 I'm not trying to make a quarrel over this, but I
9 think it was actually quoting -- I think I put it in quotes
10 and I think it was from Professor North. I think I was
11 citing an article from Professor North.

12 I'm not confident of that, but I think it's true.
13 I mean, if it's important to you to pin down this wording, I
14 would be happy to take a moment and try to make sure -- try
15 to give you complete clarity on that question.

16 **Q.** Well, I would like -- I would like to get --

17 **A.** See, I think the economist --

18 **Q.** We will get to your testimony. That is, first --

19 **A.** You make it sound like kind of a jocular thing, and I
20 think I was quoting -- what I meant was --

21 **Q.** I wasn't meaning to say jocular, sir. I really wasn't.
22 I was just trying to use the --

23 **A.** I'm going for clarity here.

24 **Q.** All right. You have said that the main rules of the
25 game when it comes to marriage are three, correct?

1 **A.** Let's try to find -- I just want to pin this down. If
2 you give me a moment, I would like to see if I'm right about
3 how I used the term.

4 **THE COURT:** There is a question pending,
5 Mr. Blankenhorn.

6 **THE WITNESS:** I'm trying to answer the question
7 about did I use the term "rules of the game."

8 **A.** That's the question I'm -- and I will stop my inquiry if
9 you wish me to. Do you wish me to?

10 **BY MR. BOIES**

11 **Q.** I wish you to answer the question.

12 **A.** You've asked me if I have used this term, rules of the
13 game, and I'm trying to answer it. And I'll stop my inquiry
14 if you wish me to.

15 **Q.** Sir, the question was: You have said that the main
16 rules of the game when it comes to marriage are three,
17 correct?

18 (Brief pause.)

19 **A.** Yes, I was correct. The -- the phrase "rules of the
20 game" comes from a Nobel Prize winning economist, who wrote a
21 paper that actually won him a Nobel Prize about the role of
22 institutions in society. That's the -- that's where that
23 phrase comes from, and that's why I put it in quotes, and
24 that's why it's footnoted.

25 **Q.** Sir, let me ask you the question. I'm not asking you

1 where it came from. I will. I'm not asking you whether you
2 put it in quotes or not.

3 What I'm asking you is whether it is your view --
4 whether it is your view that the main rules of the game when
5 it comes to marriage are three. Is that your view,
6 regardless of how you have come to it?

7 **A.** I believe marriage has three fundamental foundational
8 structures, and there has been times in my writings that I
9 have referred to them as rules.

10 **Q.** And when you refer to your writings where you have
11 referred to them as rules, would you include the report that
12 you submitted in this litigation?

13 **A.** Yes, sir.

14 **Q.** Okay. And you have said that your source of these three
15 rules are principally the body of scholarship on the
16 anthropology of human marriage, correct?

17 **A.** It's what I believe. I don't -- I will just -- would it
18 be okay to say that is what I believe? You said I have
19 stated it. I don't recall being asked that question by you
20 so far, but it is what I believe.

21 **Q.** Okay. And the scholars that you rely on for your belief
22 are who?

23 **A.** Would you like a comprehensive list?

24 **Q.** I would like the most important scholars that you rely
25 on, or the scholars that you rely on the most?

1 **A.** Okay. Well, if you give me a moment to compose my
2 thoughts on that, I will give you a brief list of principal
3 scholars. I'm going to take a moment to just make a note to
4 myself here as I try to collect my thoughts on that question.

5 (Brief pause.)

6 **A.** Would it be against the -- would it be against procedure
7 for me to consult a copy of my book to see the index?

8 **Q.** Let me ask you to do it this way. Putting on the record
9 that you haven't consulted your book or your index, and
10 putting on the record that you don't have a photographic
11 memory and you don't remember everything that's in there --

12 **A.** I think there would probably be 50 or 60 names on the
13 list.

14 **Q.** What I'm asking you is, as you sit here now as a
15 testifying expert, what are the scholars that you think most
16 important in your mind?

17 **A.** Okay. Well, that's a different question. I would say
18 that the --

19 **Q.** The most important scholars. Just to be clear, that you
20 rely on for your --

21 **A.** I understand.

22 **Q.** (Continuing) -- for your three rules?

23 **A.** I hear you.

24 **Q.** Okay.

25 **A.** The scholars that have influenced me most deeply on this

1 have been Bronislaw Malinowski and Meyer Fortes.

2 **Q.** Okay. Now, the three rules, why don't you state what
3 the three rules are?

4 **A.** Well, may I just say -- I will, but may I say, you call
5 them rules and you've quoted this Nobel Prize winning
6 economist --

7 **Q.** No, no, no, no, no. I did not quote the Nobel Prize
8 winning economist, sir.

9 **A.** That's where the phrase "rules of the game" that you
10 attributed to me came from. You said -- you have referred to
11 rules of the game, and I'm trying to point out that that
12 phrase comes from a Nobel Prize winning economist --

13 **Q.** Sir --

14 **A.** -- who's studying the role of institutions.

15 **Q.** Sir. Sir, I asked you whether it was your view, your
16 view, that the main rules of the game when it came to
17 marriage were three; do you recall me asking you that
18 question?

19 **A.** We have had a pretty extended colloquy, so I certainly
20 recall the question.

21 **Q.** Okay. And you answered that that was your view.

22 And I specifically said I'm not asking about what
23 any economist is saying, whether he won the Nobel Prize or
24 not. I'm not asking what anybody else is saying. I'm just
25 asking for your views.

1 And your view is that when it comes to marriage,
2 there are three main rules of the game.

3 And let me say I'm not suggesting that that's --
4 you said before that rules of the game was taking it too
5 lightly or something like that?

6 **A.** Yes, sir. That was exactly my suggestion.

7 **Q.** I don't mean it in that sense, okay?

8 Rules of the game can be a serious principle, okay.
9 I will accept that. I don't want to -- I don't want you to
10 get --

11 **A.** Then I will not belabor it one more moment.

12 **Q.** Okay, okay. And we could even use a different
13 phraseology, if that makes you more comfortable?

14 **A.** Absolutely understood. We can proceed. That's
15 absolutely the only point I was trying to make.

16 **Q.** And I accept that point, okay.

17 Now, what are the three main rules that you believe
18 define marriage?

19 **A.** Well, the first is what you might call the rule of
20 opposites. That was the man -- what is the customary
21 man/woman basis of marriage.

22 **Q.** And second?

23 **A.** Two, that is, marriage is two people.

24 **Q.** Okay. And the third?

25 **A.** It's a sexual relationship.

1 Q. Okay. Now, let me ask you about those three rules that
2 you used to define marriage.

3 First, with respect to the rule of opposite --

4 A. By the way, I want to just clarify. I'm not saying that
5 those three rules constitute a definition of marriage. What
6 I'm referring -- that was the term you just used in your
7 question or your statement.

8 What I'm saying is that those are the three
9 essential foundations of the marital institution or the three
10 essential structures of the marital institution, and that's
11 where we get into this concept of rules. So that's what I'm
12 trying to say.

13 Q. Okay. The three essential structures of the institution
14 of marriage, is that an acceptable terminology?

15 A. Yes, sir.

16 Q. Okay. Now, the first of these three essential
17 structures of the institution of marriage is the rule of
18 opposites, correct?

19 A. Yes, sir.

20 Q. Now, are you aware of marriages in other societies that
21 have not been limited to people of the opposite sex?

22 A. Well, I'm certainly aware that assertions have been made
23 in the popular and occasionally in the scholarly literature
24 that such cases exist. And I have not in-depth studied every
25 single example of such an assertion, but I have troubled

1 myself to try to familiarize myself to the best of my ability
2 with quite a number of such assertions, and I have views
3 about them, both collectively and individually, and I will
4 share them with you, if you wish.

5 **Q.** Let me just begin first by asking you whether, in your
6 view, there are any examples in history of marriages that do
7 not comply with your first essential structure of the
8 institution of marriage; that is, the rule of opposites?

9 **A.** Well, of course, we would have to recognize that in
10 Massachusetts now there are such marriages.

11 **Q.** Massachusetts and Iowa and Spain and Sweden and the
12 Netherlands and Canada.

13 **A.** I'm aware. I'm aware. I'm just trying to be clear. So
14 that I'm not -- sure, I understand that in the localities
15 that have in recent months and years adopted same-sex
16 marriage and that's the controversy and the set of
17 disagreements that bring us here today. I'm perfectly aware
18 of the context.

19 **Q.** Let me ask you a more pointed question.

20 Are you aware of any instances of marriage in any
21 society prior to the last 50 years that was inconsistent with
22 your first essential structure of the institution of
23 marriage; that is, the rule of opposites?

24 **A.** There are two or three or four what I would call hard
25 cases in the literature. And as I said, we could discuss

1 them, if you wish.

2 I would say that as a -- if you will allow me to
3 make the proviso that I'm aware that there are probably two
4 or three hard cases that require very specific understandings
5 of the context, I will say that -- generally speaking of
6 marriage as a global phenomenon, I would say that there are
7 either no or almost no exceptions to this principle that
8 marriage is between a man and a woman.

9 So my answer, just to be very precise, is that I
10 know that the scholars have some debates, about two or three
11 small instances in the field of anthropology.

12 So my answer to you, to be on the safe side for
13 me -- for me to be on the safe side, is to say that there are
14 no or almost no exceptions to this structural feature of
15 marriage.

16 **Q.** Now, you say in that answer "no or almost no." And as
17 you --

18 **A.** I'm trying to account for the two or three hard cases.

19 **Q.** And as you probably expect, that's what I'm going to ask
20 you about.

21 **A.** I thought you might.

22 **Q.** Now, my question is not whether there is a debate, but
23 whether you, as an expert, have an opinion as to whether or
24 not in societies, prior to the last 50 years, there have been
25 marriages that are inconsistent with your rule of opposites?

1 **A.** I mean, I say that that form of the question is quite a
2 different question because the issue here is -- that the
3 scholars have concerned themselves with is, are there
4 examples of marriage in societies that in some ways resemble,
5 are precursors, are -- prefigure the concept of same-sex
6 marriage? That's is a very different question. Those are
7 two very different questions.

8 So I wish you would clarify which of them you wish
9 me to answer.

10 **Q.** The question I want you to answer is whether in your
11 view there are any instances in societies, prior to the last
12 50 years, of marriages that are inconsistent with your rule
13 of opposites?

14 **A.** Okay. So it's the former. I will not seek to answer
15 the question, is there any marriages that could be considered
16 same-sex marriages.

17 (Laughter.)

18 **A.** It's not -- it's actually not a laughing matter to me,
19 Mr. Boies, because I'll tell you, this is a very important
20 topic and your -- it's two different questions. And you can
21 take your pick, I will answer either one.

22 **THE COURT:** Mr. Blankenhorn, Mr. Boies is not
23 laughing at you. He's amused at the back-and-forth, as I
24 think many of us who are observing this are.

25 Try again, Mr. Boies.

1 **BY MR. BOIES**

2 **Q.** I had tried to take my pick, Mr. Blankenhorn. That's
3 what I was trying to do when I asked you the question.

4 **A.** Okay. Let's go.

5 **Q.** My question is whether in your view in societies, prior
6 to the last 50 years, there are marriages that have been
7 inconsistent with your rule of opposites?

8 **A.** Okay. If you will just give me maybe 10 seconds to
9 compose my thoughts on this.

10 (Brief pause.)

11 **A.** My answer is that I can think of one instance of -- in a
12 human group that has been studied where some scholars believe
13 and others disagree, but it is a hard case and there are
14 arguments on both sides; but there has been one case where
15 there is some dispute or some scholarly argumentation over
16 whether or not there is an exception to this rule.

17 So I think there's been one that I think -- I'm not
18 saying that no other person has asserted something about some
19 other phenomenon, but there is one that I think is a
20 particularly significant one to me personally, and I have --
21 so I would say my view is that I know of one instance in a
22 society in which there may have been -- according to some
23 scholars, there may have been an exception to this rule.

24 **Q.** And what is that one instance?

25 **A.** There is a society in Africa -- it no longer happens

1 this way, but there was a period of time when the men of the
2 group lived in -- mostly in military barracks. They were a
3 warrior group and they had an institution whereby adult men
4 would have a sexual relationship with a young boy. And this
5 was, this -- the anthropologists would sometimes translate
6 the word -- they would sometimes translate the word as
7 marrying. The man would give gifts to the boy's parents and
8 they would -- they had a sexual relationship and the boy was
9 to address the man with a great term of respect and to serve
10 him his meals and to be kind of a servant for him, as well as
11 a sexual partner.

12 And then when the boy would outgrow that initiatory
13 period, that initiatory -- was no longer a part of that
14 homosexual relationship, he would often go on to marry, to
15 marry a woman with a conventional marriage ceremony, but
16 there was a part of this experience that was a ritualized --
17 it was surrounded by custom. It was recognized in law. And
18 there was a period of time in a highly kind of a warrior
19 society the males were -- as I say, they lived in kind of
20 military barracks and they would have a marriage-like
21 relationship with a -- with a male child. And this was not
22 viewed as deviant or -- wrong or shameful in any way and it
23 was an accepted part. The kinship groups accepted this and
24 thought it was just a normal part of life.

25 And so this -- Evans-Pritchard, the anthropologist

1 who wrote of this, he -- in translation, of course, he called
2 it "man-boy marriage." And so he used the term "marriage" in
3 his scholarship. And he said, "I use it advisedly," he said.
4 "I use it advisedly." This was a ceremonial thing and so
5 forth.

6 And Gilbert Herdt, a very prominent anthropologist,
7 has written a book called *Ritualized Homosexuality in Human*
8 *Societies*, and he talks of this.

9 And there are, perhaps, some other examples where
10 you have initiation periods of time in the life of young boys
11 where they have a homosexual relationship with an adult man
12 and it's a phase of life, but sometimes this is -- this has a
13 marriage-like feeling to it in terms of language, custom and
14 law. It tends to be a transitory period of life and usually
15 the man goes on then at a later point to marry a woman.

16 But this is an example that -- the principal
17 example that I think constitutes a hard case if we are
18 looking for -- if we scour all of human history and all of --
19 across all time, we could -- if we are searching out for an
20 exception, I think that's probably the most robust
21 ethnographic evidence, would be this one.

22 **Q.** And you said this occurred in Africa?

23 **A.** Yes, sir.

24 **Q.** Are you aware of that occurring in other cultures? Just
25 to pick one at random, ancient Greece?

1 **A.** That was not marriage. That was a different thing.

2 What I'm talking about here is something that
3 scholars actually have -- they sometimes -- it's a subject of
4 debate, but they sometimes think of this as a marriage-like
5 relationship.

6 There are other -- there are, to answer your
7 question, the prominent anthropologist Raymond Kelly has
8 examined a society, a very small society, that lives in Papua
9 New Guinea. They have a similar arrangement, whereby the
10 boys of the group for a period of time during their boyhood
11 have sexual relations with males. And they believe that --
12 they believe this -- these people believe that sexual
13 activity with -- a boy having sexual activity with a man
14 contributes to his vitality, his virility, his manliness.
15 They consider it an important part of the development of his
16 potential as a member of the tribe.

17 And this is an example that Raymond Kelly -- these
18 people -- this tribe is the Etoro people. And he has written
19 a masterful book called *Etoro Social Structure* that examines
20 this in considerable detail, although Kelly makes it clear
21 that this is not marriage. He does not say that this is a
22 marriage relationship. He understands it as part of Etoro's
23 social structure that has some kind of a mimicking quality
24 for a period of time, but he views it as essentially an
25 initiation right for the boys of the tribe that is of

1 somewhat short duration, usually two or three years. And he
2 is, I think, actually the finest scholar that is working in
3 this field.

4 Q. Now, what I want to focus on is marriage. In, as you
5 say, scouring all of human history to find examples, did you
6 happen to come across Professor Young, who was an expert for
7 the defense in this case?

8 A. Are you asking me if I know her?

9 Q. Yes.

10 A. I do know her.

11 Q. And did you read her testimony in this case?

12 A. No, sir, I did not.

13 Q. Have you ever talked to her about examples of marriage
14 in prior societies that were inconsistent with your rule of
15 opposites?

16 A. No, sir.

17 Q. You do believe that she is an expert in the field, do
18 you not?

19 A. The truth is that I know her personally, but I have -- I
20 am not familiar with her writings. And I would accept her
21 expert status based on her -- the very things that you
22 pointed out that I didn't have yesterday. She is affiliated
23 with a university. She teaches courses and so forth. So
24 that's really all I know about her status as an expert.

25 Q. Now, let me go on to your second rule, your second

1 essential structure of the institution of marriage, which was
2 the rule of two people.

3 **A.** Yes, sir.

4 **Q.** Now, you are obviously aware of a lot of examples of
5 marriages that are inconsistent with that rule, correct?

6 **A.** No, sir.

7 **Q.** You are not? What percentage of marriages over the last
8 300 years have been limited to two people in your judgment?

9 **A.** The way that I and many other scholars have looked at
10 this, the answer would be that almost every single marriage
11 has been limited to two people.

12 If I may just cut to the chase, I believe that
13 perhaps...

14 (Brief pause.)

15 **A.** I'm sorry. I thought you wanted me to pause for a
16 moment.

17 **Q.** No.

18 **A.** If you wish, Mr. Boies, I can just cut to the chase and
19 perhaps you are talking about the polygamy and polyandry.
20 Was that -- do you wish me to speak to the question of
21 whether that violates the rule of two?

22 **Q.** First of all, you recognize that over the last 300 years
23 there have been more polygamous marriages than there have
24 been marriages that have been limited to two people; would
25 you agree with that?

1 **A.** I don't know, but -- my strong suspicion would be that
2 that is erroneous, but I do not know.

3 **Q.** How many -- how many societies --

4 **A.** In fact, I would be extremely surprised if that were a
5 true statement.

6 If I may --

7 **Q.** Let me ask you some questions about that.

8 What societies are you aware of that prior to the
9 last hundred years had polygamy as a regular course?

10 **A.** The best scholarly estimate I have seen on that is
11 83 percent.

12 **Q.** Eighty-three percent of the countries?

13 **A.** Eighty-three percent of societies.

14 **Q.** Eighty-three percent of societies had polygamy as a
15 regular course?

16 **A.** No, sir.

17 **Q.** My question is --

18 **A.** I'm trying to be precise here.

19 **Q.** My question is: Prior to the last hundred years --

20 **A.** If you wish, we could just say in human history, because
21 the scholarship I'm citing that says 83 percent, he's just
22 trying to --

23 **Q.** Eighty-three percent of what? What is the numerator?
24 What's the --

25 **A.** Societies, societies. Eighty-three percent of societies

1 permit polygamy.

2 **Q.** Okay. Eighty-three percent of societies permit
3 polygamy?

4 **A.** That's a very different issue than how many marriages
5 are polygamous.

6 **Q.** I do understand that. Because in a society that permits
7 polygamy, you may still have marriages that only involve two
8 people, correct?

9 **A.** You may still have the overwhelming majority of
10 marriages -- and, in fact, that is the case -- that involve
11 two people.

12 **Q.** That's what I'm asking you, okay? And let's take the
13 most populous places, India and China.

14 Is it your judgment that the majority of marriages
15 in those two places prior to the last hundred years have been
16 limited to just two people as opposed to polygamous
17 marriages?

18 (Brief pause.)

19 **Q.** Do you understand the question?

20 **A.** Completely. And I'm struggling to help you understand
21 my answer which is -- my answer to your question is yes.

22 I think I could just save us some time if I would
23 be allowed to say another sentence or two.

24 **Q.** Go ahead. But try to keep it brief.

25 **A.** I will. I promise you.

1 Even in instances of a man engaging in polygamous
2 marriage, each marriage is separate. He -- one man marries
3 one woman. That's the way it works.

4 The scholars then have pointed out that in certain
5 societies, many societies, men of wealth and power then go on
6 to marry additional women. They do not marry as a group. It
7 is not a group marriage. It permits certain men that have
8 access to power to marry more than one woman. Each marriage
9 is a separate marriage of one man and one woman.

10 **Q.** Let me be sure I understand what you are saying.

11 First, just as a background question, are you aware
12 of instances in which a man has actually married multiple
13 women at the same time?

14 **A.** Well, that would be -- the term that would be used is
15 poly- -- I mean, sorry, polyamory, a group.

16 To the best of my knowledge, that is -- I know it
17 is virtually non-present in human experience and, to the best
18 of my knowledge -- I could be mistaken on this because
19 history is long and there have been many people who have
20 lived on this earth, but I do not think there are examples of
21 group marriages in the human experience.

22 **Q.** And by group marriages -- I just want to be clear -- I'm
23 saying where a man marries multiple women at the same time.
24 You are not aware of any instances like that?

25 **A.** At the same moment? They all stand together, one man

1 and a bunch of women and they say, "You are all married now"?

2 **Q.** Two or more women.

3 **A.** I am -- since you are asking me, perhaps you found an
4 example. I am certainly not aware of one.

5 **Q.** Okay. Now, let me turn to what you are aware of, and
6 that is where a man marries more than one woman at different
7 points in time, so-called polygamy, or some situations you
8 are also aware of where a woman may marry more than one man,
9 correct?

10 **A.** Well, what that is called is --

11 **Q.** I'm not asking what it's called.

12 **A.** -- polyandry.

13 There's is an important clarification here because
14 in almost all known examples of polyandry, it's the woman who
15 marries sequentially two brothers, two people who are
16 brothers to one another. And there are cases where, because
17 the sex ratio is so skewed, that as a survival adaptation for
18 these very rare subgroups, it is permitted for a woman to
19 marry two males who are brothers to one another sequentially.

20 **Q.** Is it your testimony that the only instances that you
21 are aware of women marrying more than one man sequentially,
22 so that after marrying the second one she was married to two
23 people --

24 **A.** The brothers.

25 **Q.** -- is where they were brothers? Is that your testimony?

1 **A.** It's my testimony that --

2 **Q.** I'm just asking whether that's your testimony, sir.

3 **A.** I'm trying to answer your question. This is a
4 subject --

5 **Q.** This is a "yes" or "no" question.

6 **A.** If you are going to -- we are back to where we were
7 yesterday. If you are going to make me choose between those
8 two words, then I'm going to just say --

9 **Q.** Between what two words?

10 **A.** It's not a "yes" or "no" question. I'm answering the --
11 in the time we are arguing about this, I could have given you
12 my answer. My answer is that --

13 **Q.** Which question are you answering?

14 **A.** The best scholarship --

15 **Q.** Wait a minute. What question are you answering right
16 now?

17 **A.** It seemed to me that you said, Is it your testimony that
18 there are no examples of polyandrous marriages, other than
19 the woman marrying the two brothers. And I was seeking to
20 answer that question succinctly.

21 **Q.** Now, that question is actually the question I was asking
22 you.

23 **A.** Yes, sir.

24 **Q.** Now, can you answer that question "yes" or "no"? If you
25 can't, I'm going to move on because it's not that important.

1 **A.** Okay. Then let's move on because it does not permit a
2 "yes" or "no" answer.

3 **Q.** But I want -- but I want to know whether you are
4 prepared to answer "yes" or "no"?

5 **A.** I would give a lot if I could have 15 seconds to answer
6 the question.

7 **Q.** Go.

8 **A.** The best scholarship available shows that almost all
9 examples of polyandrous marriages involve a woman marrying
10 the two brothers. There are very rare exceptions to that,
11 that have been documented by the ethnographic literature.

12 In addition, polyandry as a human phenomenon is
13 extraordinarily rare in the human record. How did I do?

14 **Q.** That was good.

15 **A.** That was okay?

16 **Q.** That was okay.

17 **A.** Good.

18 **Q.** Now -- and the reason I didn't want to spend much time
19 on it is because I agree that's unusual.

20 Polygamy, however, as you say, was present in
21 83 percent of the societies. And in those cases --

22 **A.** A very minority -- as a minority family form.

23 **Q.** I'm going to ask you about that. And I might as well do
24 that now.

25 What percentages of marriages prior to the last

1 hundred years, were polygamous? That is, what percentage of
2 the people were in polygamous marriages as opposed to
3 marriages between just two people?

4 **A.** You know, I'm a little embarrassed to tell you, I don't
5 know.

6 **Q.** But approximately?

7 **A.** I honestly don't know. I know that my -- well, I'll
8 stop there. I don't know.

9 **Q.** Okay. Now, I want to pursue whether polygamous
10 marriages are consistent with your so-called rule of two.

11 As I understand it --

12 **A.** We are now down to so-called?

13 **Q.** Well, your rule of two. It just seems to me that --
14 well, never mind. I'll put it in the form of a question.

15 If you have a man who has five wives at the same
16 time --

17 **A.** He doesn't marry them at the same time.

18 **Q.** But he has them at the same time.

19 **A.** After he has married the fifth, he has five.

20 **Q.** Right.

21 **A.** After he has married one, he has one.

22 **Q.** After he's married two --

23 (Simultaneous colloquy.)

24 **A.** has two. That's how it works.

25 **Q.** And after he has married his fifth wife, assuming they

1 all continue to live and there has been no divorce, he has
2 five wives, right?

3 **A.** Yes, sir.

4 **Q.** Now, it's your testimony that that man with five wives
5 is consistent -- that marriage is consistent with what you
6 say is your rule of two; is that correct? That is a yes or
7 no answer.

8 **A.** Based on the findings of the anthropologists who've
9 actually studied this, yes, the answer to your question is
10 yes.

11 **Q.** And when you say based on the scholars that have studied
12 this, that's because you're simply repeating the things that
13 these scholars say?

14 **A.** Yes.

15 **Q.** You're just a transmitter of the findings of these
16 scholars, correct?

17 **A.** Well, you're putting words in my mouth now.

18 **Q.** No, sir.

19 **A.** Yes, sir.

20 **Q.** Well, let's look at your words in your deposition, page
21 300. Do you have your deposition up there?

22 **A.** I don't believe I do.

23 **Q.** It's in the first book, the first book Mr. Cooper gave.

24 **MR. COOPER:** I beg your pardon.

25 **THE COURT:** It's in the plaintiffs' binder.

1 **THE WITNESS:** I might be able to save us time by
2 saying that the substance of your comment is correct. I was
3 simply trying to report the view of some scholars.

4 It's the transmitter thing. I just was trying to
5 suggest that I was basing my arguments on -- on scholarship.
6 I'm not even saying there aren't scholars that have a
7 different point of view. I'm saying there are scholars,
8 respected scholars, who have made this argument based on
9 ethnographic research. And I've read them. And that's the
10 basis for my assertion. That's all.

11 **BY MR. BOIES:**

12 **Q.** I understand. I'm really just addressing whether I was
13 putting words in your mouth. And if you look at page 300,
14 lines 7 through 12. And you can read any other portion of
15 this that you want. But you have said that you are basing
16 your analysis on the work of highly-regarded scholars. And
17 then you say --

18 **A.** Oh, a gotcha moment. I used the word "I'm a transmitter
19 of findings of eminent scholars." Gotcha. Okay.

20 **Q.** That's not a gotcha. I'm just trying to --

21 **A.** I said "transmitter" seven months ago in a deposition.

22 **Q.** And what you meant there was that what you were doing
23 was, you weren't making these conclusions on your own. You
24 were simply repeating what these scholars had said. Is that
25 correct?

1 **A.** If I may say it in my own words?

2 **Q.** Well --

3 (Simultaneous colloquy.)

4 **A.** I was basing --

5 **Q.** Let me look at your own words on page 300, at lines 7 to
6 12:

7 "I'm simply repeating things that they
8 say. I can assure you, I'm not making any of
9 this up on my own. These are not my own
10 conclusions. I'm -- I'm a transmitter here
11 of findings of these eminent scholars."

12 Did you give that testimony at your deposition?

13 **A.** That's what I said at the deposition.

14 **Q.** Okay. Now, I want to be sure that I've got an answer to
15 my question. And if you did answer it, I apologize, sir.

16 But is it your judgment that a man who is married
17 at the same time, that is, he has married multiple wives
18 along the way --

19 **A.** Sequentially.

20 **Q.** Sequentially -- and he is now married to five women --

21 **A.** Each with a separate ceremony and a separate "I do."

22 **Q.** Yes. Is it your view that that man who has married one
23 wife, and then another wife, and then another wife, and then
24 another wife, and then another wife, and now has five wives,
25 and they are all his wives at the same time, that that

1 marriage is consistent with your rule of two?

2 And that is a yes or no question.

3 **A.** I concur with Bronislaw Malinowski, and others, who say
4 that that is consistent with the two rule of marriage.

5 **Q.** Okay. Now, let me go on to your third essential
6 structure of the institution of marriage. And that is sex.

7 **A.** That's a good subject.

8 **Q.** It is. And I don't want to fall into the trap of making
9 sex boring.

10 (Laughter)

11 **A.** Maybe together we can do that.

12 (Laughter)

13 No insinuation.

14 (Laughter)

15 **Q.** My question was going to be, and is now, whether you are
16 aware of instances in which marriage -- marriages are in --
17 they are inconsistent with your rule of sex?

18 **A.** I'm sorry. You were saying the couple is married and
19 they do not have sexual intercourse, am I aware of such
20 marriages?

21 **Q.** That actually wasn't my question, but why don't you
22 answer that question. That's really easy, right? The answer
23 to that is yes, correct?

24 **A.** I -- I was going to answer no. But maybe I'm
25 misunderstanding the nature of your question.

1 Q. All right. You --

2 A. The presumption, the presumption of sex is one of the
3 foundational elements of marriage. And failure to consummate
4 the marriage through sexual intercourse, in the overwhelming
5 majority in societies, in both law and custom, is grounds for
6 divorce.

7 Q. Let me -- let me --

8 A. That's why we have terms like the "marriage bed,"
9 "culminating the marriage." That's what happens. The couple
10 gets married and then they have sexual intercourse.

11 Q. So it's your testimony that you're not aware of any
12 married couples who don't have sex?

13 A. Well, here we go. Going to make it boring again.

14 There are some married couples in the world today
15 who have never had sexual intercourse? Oh, my gosh, well, I
16 suppose, just thinking hypothetically, I'm trying to think.

17 Q. If you're not aware of them, I'm not asking you to
18 hypothesize.

19 A. There could be an example, say, of an incarcerated man
20 who marries while he's incarceration. It could be true that
21 the system he's in is one of the minority of systems that
22 does not produce -- allow for conjugal visits, and he will
23 not be able to consummate the sexual relationship with his
24 wife until he is released from prison.

25 And during the time that he is in prison and

1 married, and unable to have a conjugal visit, I guess it's
2 possible or likely that that man will not have had sexual
3 intercourse with his wife, by virtue of incarceration. And
4 he will have to wait until after he is released or he will
5 have to wait until the period of a conjugal visit. That
6 would be an example.

7 Or you might have examples of a husband and wife
8 who simply don't like sex; they don't want to have sex; it's
9 not of interest to them, or they don't hold it as a valuable
10 component of anything in life. And so they may wish to get
11 married for other reasons having nothing to do with sex. And
12 so they may just be one of these couples -- I've never met
13 one. I'm not aware of it being, at all, a pattern in humans.
14 In fact, I believe the pattern is entirely in the opposite
15 direction. But, hypothetically, could there be such a case?
16 I suppose there could.

17 **Q.** Well, sir, you know perfectly well that these are not
18 sort of just hypothetical cases. Correct, sir?

19 **A.** No, sir.

20 **Q.** You don't? You don't? Like this example of the
21 incarcerated prisoner, you know perfectly well that that's a
22 real example from a real court case; don't you, sir?

23 **A.** No, sir, I do not.

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

25 **A.** Why would you try to put words in my mouth of that

1 nature?

2 **Q.** Well, because it is my understanding that you have
3 previously recognized that -- this very specific example of
4 where the United States Supreme Court held that you could not
5 deprive somebody of the right to marry merely because they
6 were incarcerated and could not have sex.

7 And I thought that you had talked about that. And
8 if you tell me that that's not so, and I can't find --

9 **A.** To the best of my ability -- I mean, to the best of my
10 recollection, I'm telling you that that is not so.

11 **Q.** So you are not aware of that case, at all?

12 **A.** No, sir. Not -- no.

13 **Q.** Okay.

14 **A.** I'm not saying that in the course of a lifetime somebody
15 has never said anything to me about it. I just have no
16 recollection of it.

17 **Q.** Okay. So other -- and I don't want you to hypothesize.

18 Other than hypothetical examples --

19 **A.** I have talked about issues of -- I have thought about
20 and in conversation with others talked about the issue of
21 prisoners who marry. I have talked about that.

22 But I am not aware -- I'm not a student of -- I
23 don't know what year the court case -- I'm not even aware --

24 **Q.** Okay.

25 **A.** -- this thing that you're talking about.

1 Q. All right. Let me approach it this way.

2 I'm not asking you to hypothesize. I'm just asking
3 you whether you are aware of any examples of marriages that
4 are inconsistent with your rule of sex. If you are not aware
5 of them, I don't want you to hypothesize or try to think up
6 what might exist.

7 Just, are you aware of any examples or not?

8 A. No, sir.

9 Q. Okay. Let me --

10 A. May I clarify? You're asking me am I aware of an
11 individual marriage case, an individual married couple that
12 has not consummated their marriage through sexual
13 intercourse? Is that -- is that your question?

14 Q. No. My -- my question was whether you were aware of any
15 examples of marriages that were inconsistent with your rule
16 of sex?

17 A. Rule of sex --

18 Q. Now -- now --

19 A. I was just asking if you were asking me of an individual
20 couple, did I know of an individual couple who had not
21 consummated their marriage through sexual intercourse.

22 Q. Let me approach it this way, okay.

23 A. I'm not aware of such a couple.

24 Q. Let me approach it this way, because this has gone on
25 long enough where I have found the deposition that I thought

1 existed.

2 Would you turn to page 258 of your deposition. And
3 beginning at line 13:

4 "But in any society, if a man and woman
5 want to marry and not have sex at all, and
6 neither one seek divorce, they're free to do
7 that, right?

8 **"ANSWER:** Well, you know, the law on
9 this has changed in recent decades. And now,
10 in recent years, there has been a growing
11 permission on the part of courts to accept
12 married couples who cannot have sexual
13 intercourse. For example, when one spouse is
14 in prison."

15 Do you see that, sir?

16 **A.** That's exactly what I told you in my answer.

17 **Q.** This doesn't say it's hypothetical, does it, sir?

18 You're not talking hypothetical --

19 **A.** I did not use -- I don't think I used the word
20 "hypothetical" in my answer. I said in cases where a
21 prisoner is unable to consummate his marriage, he would have
22 to depend upon getting out of prison to do so, or conjugal
23 visits. I think that's what I said.

24 And you said, oh, no, there's a specific court
25 case. And I said, I'm not aware of a specific court case.

1 Which I'm not.

2 I do know that the courts allow, I believe, as a
3 matter of being a generally-informed person, that courts
4 allow -- many courts -- I don't know. Every court? I don't
5 know. Many courts allow prisoners to marry.

6 And it's a topic of interest to me as a person
7 interested in marriage. And I have the level of knowledge as
8 adumbrated in this definition. Which is not a deep one, but
9 I know that prisoners are allowed to marry. And I know that
10 in order to consummate the marriage, they would have to wait
11 until they get out of prison, or if they are in a system that
12 allows conjugal visits.

13 That's all I know. I'm not aware of specific court
14 cases that have or haven't done this. I know it's been a
15 tendency on the part of the courts, or at least some courts,
16 to -- to allow prisoners to marry.

17 It's not my area of expertise. I just -- that's my
18 level of knowledge.

19 **Q.** But it is clear, is it not, that the growing permission
20 on the part of courts to accept married couples who cannot
21 have sexual intercourse, for example, when one spouse is in
22 prison, is something that exists today. It's not a
23 hypothetical situation, correct, sir?

24 **A.** I don't think I ever said it's a hypothetical.

25 **Q.** I'm not asking whether you ever said it or not. I think

1 the record will show whatever it shows.

2 All I'm asking you now is --

3 **A.** If you're asking me if there are prisoners who can
4 marry, the answer, to my best knowledge, is yes.

5 **Q.** Even when they cannot have sexual intercourse, correct?

6 **A.** Until they get out of prison.

7 **Q.** Well, if they are in for life, they never get out of
8 prison, right?

9 **A.** Well, if they're in life and -- they're in prison for
10 life, and they're in a system that does not allow any
11 conjugal visits, I would have to consult experts to find out
12 if there is a human being in the country who is in such a
13 situation. He's in prison for life, he's married, and he is
14 not in a system in which any conjugal visitation is allowed.

15 And if there -- I don't know whether there is such
16 a person. But if there were, then it would be true that that
17 person would be a married person who cannot consummate his
18 marriage through sexual intercourse. That's my answer to
19 your question.

20 **Q.** And at your deposition on November 3, 2009, you say:

21 "The law on this has changed in recent
22 decades. And now, in recent years, there has
23 been a growing permission on the part of
24 courts to accept married couples who cannot
25 have sexual intercourse. For example, when

1 one spouse is in prison."

2 Correct, that's what you said on November 3, 2009,
3 correct? That is a --

4 **A.** Yes. Yes. I'm not looking at a transcript now. But,
5 yes, that's what I said.

6 **Q.** And it is your testimony that you have never looked at
7 any court cases that address whether or not prisoners can
8 marry, correct?

9 **A.** To the very best of my recollection and memory, I have
10 never consulted, by reading anything, a court document that
11 is related to the topic that we are discussing. I'm not
12 saying I never have. I have been reading things for a long
13 time. But, to the best of my knowledge, I have never read a
14 court document that is specifically focused on this topic.
15 And if I ever have, then I have forgotten it. But I don't
16 really, honestly, don't think I have.

17 I have had conversations with people who are
18 lawyers about the -- I don't even know at which level this
19 thing gets decided. But I know that there's a tendency to
20 allow more freedom, I believe -- I believe that there is a
21 tendency to allow prisoners more freedom than was heretofore
22 the case to marry. And that's about as far as I was trying
23 to go in my deposition statement.

24 **Q.** What I'm focusing on now, sir, is, in your study of
25 marriage, have you come across cases from the United States

1 Supreme Court that talk about marriage as a fundamental right
2 of all people?

3 Have you come across any cases that discuss that?
4 That is a yes or no question.

5 **A.** By "come across" do you mean have I read -- read
6 something that the courts have written?

7 **Q.** Let's start with that. Have you read any Supreme Court
8 opinions that discuss marriage as a fundamental right? Just
9 yes or no.

10 **A.** Well, I --

11 **Q.** Or "I don't remember."

12 **A.** To the best of my knowledge, the answer is no.

13 **Q.** Okay. Now, has any person summarized for you the
14 holdings of the United States Supreme Court in cases that
15 discuss the fundamental right to marry?

16 **A.** I believe the answer to that is yes, because if someone,
17 you or someone were to ask me is it my understanding that the
18 Supreme Court has stated -- at some point in time, at any
19 point in time, has used the term "fundamental right to marry"
20 and has articulated a fundamental right to marry, my answer
21 would be that I believe -- I believe that the Supreme Court
22 has stated such a right.

23 And it would be my -- I would not be surprised to
24 learn that were true. I would be happy to learn that it's
25 true. But I'm not basing it on sure knowledge of having read

1 any document.

2 **Q.** I'm not asking you whether you would be surprised by it.
3 I'm just trying to ask you whether you are aware of it and
4 whether you considered that in your work. That's all I was
5 trying to get at.

6 And having talked about it this far, does it
7 refresh your recollection that somebody has talked to you
8 about the United States Supreme Court holding that prisoners
9 had a fundamental right to marry, even if they were not able
10 to have sex?

11 Does that refresh your recollection that you have
12 either been told that or read that?

13 **A.** No, sir. I --

14 **Q.** Okay.

15 **A.** -- to the best of my knowledge, have never been told
16 that or ever read that.

17 **Q.** Okay.

18 **A.** To the best of my recollection.

19 **Q.** Okay. Let me turn to another subject.

20 And let me ask you to look at tab 8.

21 (Mr. Cooper confers with Mr. Boies.)

22 **MR. BOIES:** Absolutely. Absolutely.

23 **THE COURT:** All right. Can we resume at five
24 minutes of the hour?

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

1 **THE COURT:** All right.

2 (Recess taken from 10:40 to 10:58 a.m.)

3 **THE COURT:** Mr. Boies, you may continue.

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

5 **BY MR. BOIES:**

6 **Q.** Would you turn to tab 8 in the binder that we gave you
7 this morning.

8 **A.** Yes.

9 **Q.** This is Plaintiffs' Exhibit 2879. And it's titled, "The
10 Marriage Movement. A Statement of principles." And you're
11 familiar with this, are you not, sir?

12 **A.** Yes, sir.

13 **Q.** And this was put out by the Institute for American
14 Values; is that correct?

15 **A.** It was put out by three organizations; one of which was
16 the Institute for American Values.

17 **Q.** And did you review this before it was put out?

18 **A.** Yes, sir.

19 **Q.** And did you agree with it?

20 **A.** Well, if -- if I had -- if it had been my own writing, I
21 would have -- the words would not have been the same. But I
22 supported -- I supported the overall thrust of the document,
23 and felt that it was a valuable contribution to the public
24 discussion.

25 **Q.** And one of the things the document talks about is how

1 marriage is in crisis; is that correct?

2 **A.** I don't recall if it used the words "crisis," but it
3 wouldn't surprise me to find that it did.

4 **Q.** If you turn to page 5.

5 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
6 Exhibit 2879.

7 **MR. COOPER:** No objection, Your Honor.

8 **THE COURT:** Very well. 2879 is admitted.

9 (Plaintiffs' Exhibit 2879 received in evidence.)

10 **THE WITNESS:** Yes, okay, it does use the word
11 "crisis."

12 **BY MR. BOIES:**

13 **Q.** And it discusses why marriage has weakened, correct,
14 sir?

15 **A.** Yes, sir. I mean, I'm assuming it does. I -- I believe
16 it -- my recollection is that it does.

17 **Q.** Yes. And your recollection is correct.

18 And the reasons that are given why marriage is
19 weakened have nothing to do with homosexuality or same-sex
20 marriage, correct?

21 **A.** The reasons given in this document?

22 **Q.** Yes.

23 **A.** From the year 2000?

24 **Q.** Yes.

25 **A.** To the best of my recollection, we did not include

1 anything about homosexuality or the then not very
2 significant -- not very -- you know, very nascent gay
3 marriage legal cases. I'm not confident of this but, to the
4 best of my knowledge, this document does not make any
5 extensive or perhaps even no references to those topics.

6 Q. Okay.

7 A. That's based on my memory.

8 Q. Okay. Now, let me ask you to turn to page 8. And
9 there's a heading that says, "What is Marriage? Six
10 Dimensions." And it says, "Marriage Has At Least Six
11 Important Dimensions."

12 Do you see that?

13 A. Yes, sir.

14 Q. And do you agree with that?

15 A. Marriage has at least six important dimensions?

16 Q. Yes.

17 A. Oh, my goodness. I think I would have to take a moment
18 to review what this group of scholars wrote.

19 I was a signatory of this document, and so I read
20 it and thought it was a valuable and positive contribution.
21 But if you want me to -- I'm not quite sure if you -- if you
22 want me to, on a word-by-word basis, say I agree with every
23 single sentence in the following few paragraphs, I'm afraid
24 you're going to have to give me a moment to read them and
25 refresh my memory of what the actual wording of each one of

1 them is.

2 **Q.** My present question -- if you have to read it, read it.

3 But my present question was simply whether you, as a

4 signatory to this document, agree that marriage has at least

5 six important dimensions?

6 **A.** What I will say is that I agree that this is a -- for

7 the purposes of this document, for what this document was

8 trying to do, I believe that this is a useful way of

9 describing marriage's dimensions.

10 **Q.** The first of these six important dimensions is that

11 "Marriage is a legal contract." Do you see that?

12 **A.** Yes, sir.

13 **Q.** And taking the current subject of gay and heterosexual

14 marriage, whether you have a heterosexual couple or a gay or

15 lesbian couple, the dimension of marriage as a legal contract

16 would be the same, correct?

17 **A.** Yes, sir.

18 **Q.** And the second dimension --

19 **A.** You're saying that gay -- you're saying that same-sex

20 marriage would be a legal contract like opposite-sex

21 marriage?

22 **Q.** Yes.

23 **A.** Yes, sir. Yes, sir.

24 **Q.** And the second important dimension that's listed here

25 is, "Marriage is a financial partnership." Do you see that?

1 A. That would be the same, as well.

2 Q. And that would be the same for heterosexual couples and
3 homosexual couples, correct?

4 A. Yes, sir.

5 Q. And the next important dimension of marriage that's
6 listed here is, "Marriage is a sacred promise." And that,
7 again, would be the same for gay and lesbian couples as for
8 heterosexual couples, correct?

9 A. As would be the same in "sexual union" and "personal
10 bond."

11 Q. Which are the next two?

12 A. Yes, sir.

13 Q. "Marriage is a sexual union" was the fourth important
14 dimension. And "Marriage is a personal bond" was the fifth
15 important dimension. Correct?

16 A. Yes, sir.

17 Q. And the sixth important dimension is, "Marriage is a
18 family-making bond," correct?

19 A. Yes, sir.

20 Q. And, obviously, a heterosexual marriage can -- and by
21 "family-making bond," let me just ask, does this mean it's a
22 family-making bond even when there are only two people, or
23 does it mean that this is a way of establishing children?

24 A. I just -- I -- I'm afraid -- I'm sorry. Could you
25 repeat the question.

1 Q. Sure. Let me break it up this way. The sixth important
2 dimension is, "Marriage is a family-making bond."

3 Now, when two people are married, they become a
4 family, correct?

5 A. Yes, sir.

6 Q. And that is true for gay and lesbian couples on the one
7 hand, and --

8 A. Opposite.

9 Q. -- heterosexual couples on the other, right?

10 A. Yes, sir.

11 Q. And both gay and lesbian couples on the one hand and
12 opposite sex couples on the other can raise children within
13 that family bond, correct?

14 A. Can both opposite-sex couples and same-sex couples raise
15 children? Yes, sir.

16 Q. Okay. And in that connection, let me ask you --

17 A. The important word there is the verb "raise."

18 Q. Yes.

19 A. Yes.

20 Q. In that connection, let me ask you to turn to tab 9.
21 This is Plaintiffs' Exhibit 2898. It is an article in the
22 *Social Science Quarterly* by Laura Langbein and Mark Yost,
23 entitled "Same-Sex Marriage and Negative Externalities."

24 Do you see that?

25 A. I am looking at this article for the first time, I

1 believe, yes.

2 **Q.** So you have not seen this before?

3 **A.** To the best of my knowledge, I have not.

4 **Q.** Do you know either of these authors?

5 **A.** No, sir.

6 **Q.** So you're not familiar with either of these two authors
7 or their work?

8 **A.** I can't say that I've never read anything by them. But
9 sitting here right now, they are not -- those names are not
10 familiar to me.

11 **MR. BOIES:** Your Honor, we would ask you take
12 judicial notice of Plaintiffs' Exhibit 2898.

13 **THE COURT:** Very well.

14 **MR. COOPER:** Your Honor, we have no objection to
15 the request made by Mr. Boies. I would note, this is a
16 document we haven't seen until, I think, this morning. But
17 we have no objection to you taking judicial notice of it.

18 **THE COURT:** Fine.

19 **BY MR. BOIES:**

20 **Q.** Now, on the first page there is a summary, and there are
21 headings: "Objectives," "Methods," "Results," and
22 "Conclusions."

23 Do you see those headings?

24 **A.** Yes, sir.

25 **Q.** Now, after "Conclusions" the article states as the

1 conclusions:

2 "The argument that same-sex marriage
3 poses a negative externality on society
4 cannot be rationally held. Although many
5 might believe that this conclusion is so
6 obvious that it does not warrant testing,
7 many politicians use this argument as a
8 fact-based rationale to legitimize bans on
9 same-sex marriage."

10 Now, you have said that you don't recall having
11 seen this article before. But are you aware of scholars who
12 have asserted, in peer-reviewed articles, that the argument
13 that same-sex marriage poses a negative externality on
14 society cannot be rationally held?

15 **A.** Yes. And I'm also aware of many arguing that it's so
16 obvious that it need not warrant -- it need not be tested.

17 **Q.** So you're aware of --

18 **A.** In other words, it's a self-evident beginning
19 proposition for them. They think that it's so self-evident
20 that anybody who has an opposing point of view is not a
21 rational person.

22 **Q.** And --

23 **A.** Many articles say this.

24 **Q.** Many articles say this?

25 **A.** Yes, sir.

1 Q. Incidentally, you talked about how the issues that you
2 are addressing are issues that are addressed by sociologists,
3 anthropologists, and psychologists, and other scholars.

4 Have you looked at what associations of those
5 scholars have said about same-sex marriage?

6 A. Yes, sir. A number of them I have looked at, yes, sir.
7 I don't know that I've necessarily looked at every one, but
8 I've certainly seen a number of them.

9 Q. Do you know, for example -- I'm going to hand out
10 another binder.

11 A. Thank you.

12 Q. Do you know, for example, what position the American
13 Psychoanalytic Association takes with respect to same-sex
14 marriage?

15 A. My recollection is that their corporate kind of lobbying
16 body has endorsed it.

17 Q. When you say their lobbying body --

18 A. Or their -- the leaders of their association, let's put
19 it that way. The people that speak for them as -- as -- as a
20 professional scholarly association, their leaders.

21 Q. Let me ask you to look at tab 3 of this new binder that
22 I just handed you, where you have a publication of the
23 American Psychoanalytic Association. Do you see that?

24 A. I think my tab 3 says "Lesbian Mothers, Gay Fathers and
25 Their Children: A Review." Unless I'm --

1 Q. We must have a different -- you should have -- you
2 should have Plaintiffs' Exhibit 760 there.

3 A. Am I in the wrong book? It's a different book.

4 Q. The binder you were just given, the small binder you
5 were just given?

6 A. 3.

7 Q. Tab 3?

8 A. Here it is. He is.

9 Q. The American Psychoanalytic Association publication,
10 Plaintiffs' Exhibit 760 --

11 A. A position paper.

12 Q. Yes. And it says the American Psychoanalytic
13 Association, in 1977 [sic], endorsed the following marriage
14 resolution.

15 Do you see that?

16 A. Yes, sir.

17 Q. And it states:

18 "Because marriage is a basic human right
19 and an individual personal choice, RESOLVED,
20 the State should not interfere with
21 same-gender couples who choose to marry and
22 share fully and equally in the rights,
23 responsibilities, and commitment of civil
24 marriage."

25 Were you aware that in 1997, the American

1 Psychoanalytic Association had adopted that resolution?

2 **A.** Yes, sir, I believe I have -- I believe I have read this
3 one, or read excerpts from this position statement.

4 As I mentioned, there are many such statements.

5 And I'm -- I might be able to save us time by saying, I
6 perfectly understand that many scholarly associations, the
7 leadership groups, as a policy matter have endorsed same-sex
8 marriage.

9 **Q.** Now, you say "as a policy matter."

10 Let me ask you to look at page 4 of this exhibit,
11 where a number of references are listed. And are you aware
12 of these references? Have you read these materials?

13 **A.** Well, I've read a number of them.

14 **Q.** Okay.

15 **A.** Let me see if I've read every single one.

16 No, sir, I have not read all of them.

17 **Q.** Why don't you just identify the ones you've not read.

18 **A.** Bradford. Chan. DiPlacido. Falkner. Green, I don't
19 know. Greenan. King. Herek.

20 I've read Gilbert Herdt, but I can't recall if I've
21 read this article or not by Gilbert Herdt and his colleague
22 Kertzer.

23 House, I don't believe I've read. Kertzner.

24 Kiecolt-Glaser, I think I have read. I'm pretty sure I've
25 actually cited it somewhere, but I can't speak with certainty

1 on that.

2 Kim, no, I don't think. Although, I'm not sure.

3 Meyer, I don't think so. Morris, I don't think so.

4 Patterson, I think so, but I -- I've certainly read

5 Charlotte Patterson's work on this subject over the years.

6 She has written many articles. And I believe I've read this

7 one, but I'm not 100 percent confident that I have.

8 Peplau, I don't think so. And Williams, I don't

9 think so. Williams, I'm confident, I have not read.

10 **Q.** So you did read the Waite and Gallagher article?

11 **A.** It's a book.

12 **Q.** Book. And you think you've read the Patterson article.

13 You're pretty sure you read the Kiecolt-Glaser

14 article. And you read the two articles by Ama- -- is it --

15 **A.** Amato, Paul Amato.

16 **Q.** Amato. The two articles by Amato.

17 And the article -- or book, I guess it is, by

18 Blumstein and Schwartz. Is that correct?

19 **A.** That's my best -- that's the best answer I can give you

20 right now.

21 **Q.** Okay. Let me just, while I'm here, the American

22 Psychological Association has also adopted a resolution in

23 favor of gay marriage, correct, sir?

24 **A.** Yes, sir.

25 **Q.** And let me ask you to look at tab 4 in this binder. And

1 this is Exhibit 765.

2 Have you seen this document before?

3 **THE COURT:** I believe this is in evidence. Is it
4 not?

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

6 **THE WITNESS:** Mr. Boies, I'm fairly confident that
7 I read it when it came out, but I can't absolutely give you
8 a -- it's my best -- I certainly know of the endorsement.
9 And I have certainly read of the endorsement.

10 And I know that I've read excerpts. And I believe
11 I read the document in its entirety when it came out, but I
12 cannot say that with absolute certainty.

13 **BY MR. BOIES:**

14 **Q.** Now, on the third and fourth and fifth pages of the
15 document, the last three pages of the document, there are a
16 series of references. Do you see that?

17 **A.** Yes, sir.

18 **Q.** Now, this is -- this is a very long list. And by
19 glancing at it, can you tell me whether you have read most of
20 these or not read most of these?

21 **A.** By "most" do you mean more than 50 percent?

22 **Q.** Yes. I'm just trying to figure out, is it faster to ask
23 you those that you have read or those you have not read?
24 Which is the faster way to go through this?

25 **A.** Just give me one moment. I think that I have not read

1 at least 51 percent of these documents.

2 **Q.** Okay. Then why don't you just tell me the ones you have
3 read.

4 **A.** The Anthropological Association statement.

5 Again, I think -- well, that's a different
6 Blumstein and Schwartz. I don't know if I've read that or
7 not.

8 Most of these I have not read. Some of them are
9 duplicative of the other, the previous list that we were
10 going through.

11 **THE COURT:** Is the question --

12 **THE WITNESS:** Eskridge.

13 **THE COURT:** -- whether he has read or not read?

14 **MR. BOIES:** Read.

15 **THE COURT:** Read.

16 **MR. BOIES:** Which are the ones that has he read.

17 **THE WITNESS:** I see. Okay.

18 American Anthropological Association, Eskridge,
19 Goodridge. I think Johnson. I think -- I think those few
20 are it, on this list.

21 **BY MR. BOIES:**

22 **Q.** Okay. Okay. So that would -- and you said Eskridge.
23 Did you read both of the Eskridge articles that are here?

24 **A.** No, sir. Just the Equality Practice. That was his
25 book.

1 Q. So it would be --

2 A. I'm sorry. That -- I'm sorry. It was a -- a law review
3 article.

4 Q. So you would have -- you would have read --

5 A. I've also read his books, but that's a different --
6 what's listed here is "Equality Practice," as a law review
7 article.

8 Q. So you would have read four or perhaps five of the 40 or
9 41 references that are listed here, correct?

10 A. I think that's fair, yes, sir.

11 Q. Let me ask you to turn to tab 10 in the first binder
12 that I gave you this morning. Not the -- not the recent
13 little binder, but the first binder I gave you this morning.
14 Plaintiffs' Exhibit 2899.

15 A. I'm sorry --

16 MR. BOIES: May I approach, Your Honor?

17 THE COURT: Sure.

18 THE WITNESS: I'm just having a hard time finding
19 out the binder that I am to look in. One of these?

20 BY MR. BOIES:

21 Q. It's this binder here.

22 A. Okay. Goes up to 15.

23 Q. Tab 10 in that binder.

24 A. 10.

25 Q. This is Plaintiffs' Exhibit 2899. It's entitled "Will

1 Providing Marriage Rights to Same-Sex Couples Undermine
2 Heterosexual Marriage?"

3 Do you see that?

4 **A.** I do, yes, sir.

5 **Q.** Is this a document that you reviewed?

6 **A.** Uhm, it's not listed on my documents included, but it --
7 Badgett is someone whose articles I have read. I don't know
8 whether or not I have specifically reviewed this article.

9 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
10 Exhibit 2899.

11 **MR. COOPER:** No objection to the Court taking
12 judicial notice of it.

13 **THE COURT:** Very well.

14 **THE WITNESS:** She's a prominent proponent of
15 same-sex marriage, Ms. Badgett. So I've read -- I know I've
16 read a number of her things.

17 **BY MR. BOIES:**

18 **Q.** She is a well-regarded scholar, is she not?

19 **A.** I don't know. I don't know -- know -- know her -- I'm
20 perfectly happy to take your word for that. I am sure she
21 is.

22 **Q.** You don't know that one way or the other?

23 **A.** I'm just saying that I've read several of her articles,
24 in an attempt to acquaint myself with her work, and I
25 appreciate the integrity of those articles. I don't know

1 quite what else to say. She's obviously taking a very --
2 position quite opposite to my own, on most every possible
3 question. But I respect her as a thinker.

4 **THE COURT:** You have your answer.

5 **BY MR. BOIES:**

6 **Q.** Let me ask you to look at tab 11 in the same binder.

7 **A.** Yes, sir.

8 **Q.** This is Defendants' Exhibit 2. And I don't know whether
9 this is in evidence or not.

10 **A.** I think it's -- I think it's on my list, Mr. Boies. The
11 Amato article?

12 **Q.** Yes.

13 **MR. COOPER:** To whatever extent it is not, we have
14 no objection, Your Honor.

15 **THE COURT:** Is that a request to move it in?

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

17 **THE COURT:** All right.

18 (Defendants' Exhibit 2 received in evidence.)

19 **BY MR. BOIES:**

20 **Q.** And this is a -- an article in which Amato investigates
21 how children in households with both biological parents
22 differ from children in households with only one biological
23 parent, correct?

24 **A.** Well, I see that you've read that from a summary that
25 was written by someone else.

1 Q. Let me ask --

2 A. What I --

3 (Simultaneous colloquy.)

4 A. My understanding is that he is writing an article on the
5 impact of family formation change, on the cognitive, social,
6 and emotional well-being of the next generation.

7 Q. That's the title of the thing?

8 A. Yes, sir.

9 Q. But in terms of -- you've read this whole thing, of
10 course?

11 A. Yes, sir.

12 Q. And do you have a current recollection of it enough to
13 answer a question about what the overall methodology of this
14 article was?

15 A. Well, I believe he looked at some data from the Add
16 Health survey. And I believe he was trying to investigate
17 whether or not children who grow up in -- I believe he -- I
18 believe he, at several times in the article, refers to it as
19 "continuously married biological parents."

20 I believe he is trying to compare, using this body
21 of data in this particular article and other books and
22 articles -- he's looked at different bodies of data, but in
23 this particular article it's Add Health. And he's trying to
24 estimate outcome differences, comparing children who are
25 growing up in continuously married two biological parent

1 homes with children from other family structures. And he's
2 making certain conclusions about those inquiries.

3 And then he's making a policy recommendation, at
4 the end, that it would be much to the advantage --

5 **Q.** I'm not asking you to summarize or give a book report on
6 this. What I just want -- two quick questions that I ought
7 to be able to get answers to.

8 The first is: Is it your understanding that what
9 he compares are the outcome differences between children in
10 households with both biological parents as compared to
11 children in households with only one biological parent? Is
12 that your understanding or not?

13 **A.** Well, not really.

14 **Q.** Okay. Let me ask you to look at the second paragraph of
15 the document, okay. It says:

16 "Amato begins by investigating how
17 children in households with both biological
18 parents differ from children in households
19 with only one biological parent."

20 Do you see that?

21 **A.** Can you tell me where you're reading from?

22 **Q.** The very second paragraph of the document.

23 "Amato begins by investigating how
24 children in households with both biological
25 parents differ from children in households

1 with only one biological parent."

2 Do you see that?

3 **A.** I was reading from the --

4 **Q.** Do you see that?

5 **A.** Yes, sir, I see it.

6 **Q.** Okay. Now, is it your understanding that when Amato
7 uses the term "biological parent" in this article, he is
8 including adoptive parents to be the same as biological
9 parents?

10 **A.** Yes, sir.

11 **Q.** Okay. Now, with respect to the issue of biology, you
12 believe that it is more important that children grow up with
13 two parents than that they grow up with a single biological
14 parent, correct?

15 **A.** That -- that's not familiar to me as a statement that
16 I've made.

17 **Q.** Well, for example, have you stated that it is important
18 to encourage unmarried women who have children to give their
19 babies up for adoption by married couples?

20 **A.** In several publications with certain qualifications in
21 place, I have -- specifically with reference, in my mind, to
22 unmarried teenage girls, I have made such a recommendation.
23 To the best of my memory, I have made such a recommendation.
24 Or I may have been a part of a study that made such a
25 recommendation.

1 Q. All right.

2 MR. BOIES: May I have just a moment, Your Honor?

3 THE COURT: Very well.

4 MR. BOIES: Your Honor, we've agreed on a list of
5 documents to be admitted. And I would hand that up, if I
6 can.

7 THE COURT: Very well.

8 MR. COOPER: There's one document not on this list.
9 It's a declaration by Mr. Prentice. But it will be added to
10 the list. It was part of an arrangement.

11 THE COURT: Fair enough. Do you have an exhibit
12 number on the document to be added?

13 MR. BOUTROUS: Why don't we make that the next --
14 we'll put a --

15 THE COURT: Number it later.

16 MR. BOUTROUS: Okay. Thank you, Your Honor.

17 (Plaintiffs' Exhibits 749, 1372, 2096, 2258,
18 2259, 2866, 2876, 2877, 2878, 2879, 2898, 2899,
19 2936, 2341 and 2403 received in evidence.)

20 (Defendants' Exhibit 1109 received in evidence.)

21 MR. BOIES: Thank you.

22 BY MR. BOIES:

23 Q. All right. Mr. Blankenhorn, let me -- let me just ask
24 you, hopefully, just two more quick areas.

25 First, would you turn to tab 3 of this binder, the

1 binder that has 15 tabs to it.

2 **A.** I have it, yes, sir.

3 **Q.** And this is the review article that you referred to
4 previously, and published in *Developmental and Behavioral*
5 *Pediatrics*; is that correct?

6 **A.** I'm sorry. I'm really sorry, I must be --

7 **Q.** 3. Tab 3.

8 **A.** Sorry. "Lesbian Mothers, Gay Fathers, and Their
9 Children."

10 **Q.** Yes.

11 **A.** Yes, sir.

12 **Q.** Are you familiar with this document?

13 **A.** Uhm, I -- I don't believe so, sir.

14 **Q.** Okay. There's something that's headed the "Abstract."

15 And you know what an abstract is; do you not?

16 **A.** Of course.

17 **Q.** And the abstract says:

18 "There is a variety of families headed by
19 a lesbian or gay male parent or same-sex
20 couple. Findings from research suggest that
21 children with lesbian or gay parents are
22 comparable with children with heterosexual
23 parents on key psychosocial developmental
24 outcomes."

25 Do you see that?

1 A. Yes, sir.

2 Q. And even though you may not be aware of this article,
3 are you aware of other articles in peer-reviewed journals
4 that reach that conclusion?

5 A. Yes, sir, I am aware.

6 Q. Now, we've talked a lot about the institution of
7 marriage. You would agree that the institution of marriage
8 is constantly evolving, correct?

9 A. Yes, sir.

10 Q. And always changing, correct?

11 A. I wrote those words in my book.

12 Q. And no single universally accepted definition of
13 marriage, correct?

14 A. I wrote those words, too.

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

16 THE COURT: Redirect, Mr. Cooper.

17 MR. COOPER: Thank you, Your Honor. I can be quite
18 brief, I think.

19 REDIRECT EXAMINATION

20 BY MR. COOPER:

21 Q. Mr. Blankenhorn, is your -- is your book in front of you
22 the entire book, *Future of Marriage*?

23 A. Do you mean -- oh, no, sir. No, sir.

24 MR. COOPER: Could I hand the full book, because
25 there's a page I wanted to refer to that isn't in any of

1 these excerpts that are before him.

2 **THE COURT:** Sure.

3 **MR. COOPER:** Thank you.

4 **THE COURT:** This is Exhibit 9 -- DIX956. And I
5 believe this has already been admitted.

6 **MR. COOPER:** May I hand the book to the witness,
7 Your Honor?

8 **THE COURT:** Yes, indeed. I say, 956 is in?

9 **MR. BOUTROUS:** Yes, Your Honor.

10 **THE COURT:** All right.

11 **BY MR. COOPER:**

12 **Q.** Mr. Blankenhorn, do you recall yesterday, when Mr. Boies
13 read a passage from page 2 of your book, *The Future of*
14 *Marriage*, in which you say, among other things, that:

15 "I believe that today the principle equal
16 human dignity must apply to gay and lesbian
17 persons."

18 Do you recall that?

19 **A.** Yes.

20 **Q.** Would you look on page 3 of your book, the last two
21 paragraphs. I'd like to read those paragraphs into the
22 record:

23 "Many thinkers, perhaps most notably
24 Isaiah Berlin, the great 20th century
25 philosopher of liberalism, have pointed out

1 that many important choices we face do not
2 involve choosing between good and bad, but
3 between good and good.

4 "It is good to deter crime by punishing
5 criminals. It is also good to forgive. But
6 doing more punishing means doing less
7 forgiving because the two goods are to some
8 extent mutually exclusive.

9 "Berlin's concept of goods in conflict is
10 central to my understanding of society's need
11 to make choices regarding the definition of
12 marriage.

13 "One good is the equal dignity of all
14 persons. Another good is a mother and father
15 as a child's birthright. These goods are at
16 least partially in conflict. Resolving that
17 conflict, making a morally responsible choice
18 about the future of marriage that is faithful
19 to the essential purposes of the institution
20 while at least recognizing both of these
21 goods is a major aim of this book."

22 Earlier, I think, in your colloquy with Mr. Boies,
23 you mentioned a conflict of goods. Is this -- does this
24 essentially capture your -- your thought on that, or
25 summarize it?

1 A. Yes, sir.

2 Q. Turn to page 20 of the witness -- excuse me, the -- of
3 the document behind tab 13 of your witness binder from this
4 morning. And that is another excerpt. That is an excerpt of
5 your book.

6 A. This is from *Fatherless America*?

7 Q. No. This is from *The Future of Marriage*.

8 A. Oh, yes, I have it. I'm sorry.

9 Q. Do you recall this morning colloquy with Mr. Boies, in
10 which you made clear that to the degree you must choose
11 between the rights and interests of gays with respect to
12 same-sex marriage on the one hand, and the interests that you
13 have articulated previously that are served by customary
14 marriage, you would, with anguish, choose those interests
15 served by customary marriage; do you recall that?

16 A. Yes, sir.

17 Q. All right. I want you to refer now to page 20, the last
18 full paragraph of your -- of the page in your book *The Future*
19 *of Marriage*. And, again, I'd like to read that, as well.

20 "In the case of same-sex marriage, one
21 priority is the particular rights and needs
22 of same-sex couples, the right to equal
23 respect, the right to form loving, stable
24 partnerships and families, and the need for
25 greater social acceptance.

1 "Another priority is the collective
2 rights and needs of children. The right to
3 know and be loved by a mother and a father,
4 and the need for as many children as possible
5 to grow up under a strong shelter of
6 marriage, our society's most pro-child
7 institution.

8 "To the degree that these two priorities
9 can be in harmony, or at least exist together
10 in peace, I want to embrace them both."

11 Is that your view?

12 **A.** Yes, sir.

13 **Q.** Do you believe that they can be embraced in harmony?

14 **A.** Yes, sir.

15 **Q.** Do you believe that, for example, many of the items that
16 you identified this morning on the list of good public policy
17 outcomes that would flow from same-sex marriage can be
18 achieved through, for example, domestic partnerships?

19 **A.** I do. That's my understanding of the -- that's been my
20 own conclusion, in trying to wrestle with this concept of
21 goods in conflict.

22 And that's -- this is the conclusion that I have
23 come to, as I have tried to -- to reconcile these -- this
24 conflict, as best I can.

25 **Q.** And did you speak to that yesterday, in connection with

1 describing the process you had gone through which culminated,
2 I think, in the publication of an article in the *New York*
3 *Times* early last year?

4 **A.** Yes, sir. Endorsing the protection of marriage for its
5 distinctive purpose, but also establishing very strong
6 domestic partnership structures.

7 **MR. COOPER:** Your Honor, I have no further
8 questions.

9 I would like to submit into the record for judicial
10 review a copy of that *New York Times* article. I don't have
11 it in my hands right now. But I will get copies into my
12 hands and into the court's and into counsel's.

13 **MR. BOIES:** No objection, Your Honor.

14 **THE COURT:** Very well. That will be marked as DIX
15 next in order.

16 **MR. COOPER:** Here they are now.

17 **THE COURT:** You have able assistance.

18 **MR. COOPER:** Yes, indeed. Thank you.

19 **THE COURT:** All right.

20 (Defendants' Exhibit 2720 received in evidence.)

21 **MR. COOPER:** Thank you. And so I have no further
22 questions, Your Honor.

23 **THE COURT:** Very well. Then, thank you,
24 Mr. Blankenhorn. You may step down. Thank you for your
25 testimony.

1 (Witness excused.)

2 Any additional witnesses, Mr. Cooper?

3 **MR. COOPER:** I beg your pardon, any what?

4 **THE COURT:** Call your next witness.

5 **MR. COOPER:** Your Honor, we have no further
6 witnesses.

7 **THE COURT:** Very well. Now, I understood that you
8 had some documents that you wanted to add. Have we taken
9 care of that this morning?

10 **MR. COOPER:** I think we have resolved it. And my
11 colleague, Mr. Thompson, has been the lead for us on that,
12 and he can speak to that.

13 **MR. THOMPSON:** Your Honor, this will just take a
14 very brief moment, but there are a couple of items.

15 We have a proffer of documents. And the plaintiffs
16 have not objected to this list of documents. These are the
17 official campaign speech and materials of
18 ProtectMarriage.com. And we have a list of those documents.

19 In addition, there is one other document, DIX2717,
20 which the plaintiffs have not objected to. So with the
21 Court's permission, we would submit that list. That's DIX?

22 **MR. THOMPSON:** 2717.

23 **THE COURT:** Very well.

24 (Defendants' Exhibit 2717 received in evidence.)

25 **MR. BOUTROUS:** Thank you.

1 **MR. THOMPSON:** In addition, Your Honor, a moment
2 ago there was reference to the fact that we had an additional
3 document for which we didn't have a number. We now have the
4 document. We have a number. It's under seal, but may I pass
5 that to the clerk?

6 **THE COURT:** You may.

7 **MR. THOMPSON:** And it's DIX2719.

8 **THE COURT:** Fine. And that's being admitted
9 without objection, I gather?

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

11 **THE COURT:** Okay.

12 (Defendants' Exhibit 2719 received in evidence.)

13 **MR. THOMPSON:** In addition, Your Honor, just in the
14 nature of housekeeping, we have the counterdesignations of
15 Professor Young and Nathanson, the pink and the yellow.

16 **THE COURT:** Yes.

17 **MR. THOMPSON:** We understand the Court will resolve
18 that at the Court's convenience, but we just wanted to note
19 that we would still like the pink and the yellow in the
20 record.

21 And, in addition, we have made some
22 counterdesignations of Dr. Tam's deposition. We understand
23 that there may be objections to that, but we'd still like to
24 submit those, subject to whatever objections the plaintiffs
25 have.