

Perry v. Schwarzenegger (MOBILE)
Trial-Day 12 (Blankenhorn cross-redirect)
Lawdragon.com

1/27/2010

Volume 12
Pages 2835 - 2952

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

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

2837

APPEARANCES (CONTINUED):

For Defendant MENNEMEIER, GLASSMAN & STROUD
Gov. Schwarzenegger: 980 9th Street, Suite 1700
Sacramento, California 95814-2736
BY: ANDREW WALTER STROUD, ESQUIRE
KELCIE M. GOSLING, ESQUIRE

For Defendant STATE ATTORNEY GENERAL'S OFFICE
Edmund G. Brown Jr.: 455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004
BY: TAMAR PACHTER DEPUTY ATTORNEY GENERAL

For Defendant- COOPER & KIRK
Intervenor: 1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
BY: CHARLES J. COOPER, ESQUIRE
DAVID H. THOMPSON, ESQUIRE
HOWARD C. NIELSON, JR., ESQUIRE
NICOLE MOSS, ESQUIRE
PETER PATTERSON, ESQUIRE
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
BY: BRIAN W. RAUM, SENIOR COUNSEL
JAMES A. CAMPBELL, ESQUIRE
JORDAN LORENCE, ESQUIRE
DALE SCHOWENGERDT, ESQUIRE
ALLIANCE DEFENSE FUND
101 Parkshore Drive, Suite 100
Folsom, California 95630
BY: TIMOTHY D. CHANDLER, ESQUIRE
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, D.C. 90001
BY: AUSTIN NIMOCKS, SENIOR LEGAL COUNSEL
ADVOCATES FOR FAITH AND FREEDOM

For Proposed Intervenor Imperial County, et al.: 24910 Las Brisas Road, Suite 110
Murrieta, California 92562
BY: ROBERT H. TYLER, ESQUIRE

- - - -



2836

APPEARANCES:

For Plaintiffs: GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
BY: THEODORE B. OLSON, ESQUIRE
MATTHEW D. MCGILL, ESQUIRE
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
BY: THEODORE J. BOUTROUS, JR., ESQUIRE
CHRISTOPHER D. DUSSEAUT, ESQUIRE
SCOTT MALZAHN, ESQUIRE
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, California 94105-2933
BY: ETHAN D. DETTMER, JR., ESQUIRE
ENRIQUE A. MONAGAS, ESQUIRE
SARAH E. PIEPMEIER, ESQUIRE
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
BY: DAVID BOIES, ESQUIRE
ROSANNE C. BAXTER, ESQUIRE
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
BY: JOSHUA I. SCHILLER, ESQUIRE
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, California 94612
BY: JEREMY MICHAEL GOLDMAN, ESQUIRE
STEVEN C. HOLTZMAN, ESQUIRE
BEKO REBLITZ-RICHARDSON, ESQUIRE
CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY
One Drive Carlton B. Goodlett Place
San Francisco, California 94102-4682
BY: DENNIS J. HERRERA, CITY ATTORNEY
THERESE STEWART, DEPUTY CITY ATTORNEY
(APPEARANCES CONTINUED ON FOLLOWING PAGE)

For Plaintiff- Intervenor:

PROCEEDINGS 2838

1 PROCEEDINGS

2 JANUARY 27, 2010 8:33 a.m.

3

4 THE COURT: Very well, good morning, counsel.

5 (Counsel greet the Court.)

6 THE COURT: Good morning, Mr. Blankenhorn.

7 THE WITNESS: Good morning, sir.

8 THE COURT: Now, you understand that you're still

9 under oath?

10 THE WITNESS: Yes, sir.

11 THE COURT: The oath that you took yesterday

12 applies to this testimony as well; is that clear?

13 THE WITNESS: Yes, sir.

14 THE COURT: Proceed, Mr. Boies.

15 MR. BOIES: Thank you, your Honor.

16 We have a binder to hand out.

17 (Whereupon, binders were tendered

18 to the Court and the witness.)

19 DAVID BLANKENHORN,

20 called as a witness for the Defendants herein, having been

21 previously sworn, resumed the stand and testified further as

22 follows:

23 CROSS-EXAMINATION RESUMED

24 BY MR. BOIES

25 Q. Good morning, Mr. Blankenhorn.

2839

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"

2841

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

Lawdragon.com

2840

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

2842

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.

2843

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

2845

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.

Lawdragon.com

2844

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**

2846

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

2847	<p>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.</p>	2849
------	---	------

Lawdragon.com

2848	<p>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</p>	2850
------	--	------

2851

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

2853

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?

Lawdragon.com

2852

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

2854

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.

2855

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?

2856

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**

2857

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,

2858

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.**



2859

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?

2860

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**

2861

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?

2862

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,

2863

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

2864

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

2865

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.

2866

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**



2867

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

2868

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.

2869

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

2870

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.



2871

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

2873

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?

Lawdragon.com

2872

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

2874

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?

2875

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

2876

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?

2877

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

2878

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.

2879

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.**

2880

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**

2881

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**

2882

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?



2883

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.

2884

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

2885

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

2886

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?



2887

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

2889

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?

Lawdragon.com

2888

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

2890

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

2891

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.

2893

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?

Lawdragon.com

2892

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

2894

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.

2895

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

2897

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.

Lawdragon.com

2896

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

2898

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?

2899

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

2900

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.

2901

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

2902

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

Lawdragon.com

2903

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.**

2904

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

2905

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.**

2906

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



2907

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

2908

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

2909

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**

2910

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.

Lawdragon.com

2911

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

2913

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

Lawdragon.com

2912

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

2914

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?

2915

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.

2917

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

Lawdragon.com

2916

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

2918

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.

2919

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 --

2920

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

2921

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 Kertzner.
 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

2922

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



2923

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

2925

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

Lawdragon.com

2924

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.

2926

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

2927

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.

2929

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

Lawdragon.com

2928

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

2930

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.

2931

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

2933

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

Lawdragon.com

2932

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?

2934

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

2935

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?

2937

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

Lawdragon.com

2936

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.

2938

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.

PROCEEDINGS 2939

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.

PROCEEDINGS 2941

1 MR. BOUTROUS: Your Honor, we just received those
2 this morning so we would like, if possible, the opportunity
3 to review them and make submissions by the end of the week,
4 with our position or counterdesignations.
5 THE COURT: That would be fine.
6 MR. BOUTROUS: Thank you.
7 MR. THOMPSON: And the same goes for Dr. Robinson.
8 And we have no objection to their taking until the end of the
9 week on that, for their --
10 THE COURT: Dr.?
11 MR. THOMPSON: Robinson. There are some counters
12 for him.
13 THE COURT: All right.
14 MR. BOUTROUS: Thank you.
15 THE COURT: I, too, have some housekeeping that I
16 want to do. But perhaps --
17 MR. THOMPSON: I have one more item, Your Honor.
18 THE COURT: All right.
19 MR. THOMPSON: And then, finally, Your Honor, we
20 did note, as the Court is aware, that our motions to compel
21 are outstanding. And we're not in a position to formally
22 rest our case until those are resolved.
23 If we were to receive documents from the No On 8
24 campaign, then we might want leave to submit those documents
25 and/or call witnesses pertaining to those subject matters.

Lawdragon.com

PROCEEDINGS 2940

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.

PROCEEDINGS 2942

1 But other than that, we have no further witnesses
2 and no further documents.
3 THE COURT: Very well. We have either this morning
4 or last evening issued an order calling for a response from
5 the third parties that you have subpoenaed, the three
6 organizations, and have also given the plaintiffs an
7 opportunity to chime in, if they wish to do so. They may or
8 may not wish to do so.
9 But we've set a briefing schedule on that. And so
10 we should receive those by --
11 THE LAW CLERK: Friday.
12 THE COURT: -- Friday.
13 MR. THOMPSON: Thank you, Your Honor.
14 THE COURT: So I think that will be taken care of.
15 And housekeeping from the plaintiffs?
16 MR. BOUTROUS: Yes, Your Honor. Thank you. And
17 they are truly housekeeping.
18 The first issue, the Plaintiffs' Exhibit 2332A,
19 which was a list of materials considered by Mr. Blankenhorn,
20 was not moved into evidence. We would like to move that into
21 evidence so it's in the record before the Court.
22 THE COURT: 2332A?
23 MR. BOUTROUS: That's correct.
24 THE COURT: Hearing no objection.
25 MR. COOPER: No objection, Your Honor.

PROCEEDINGS 2943

1 THE COURT: Very well.
 2 (Plaintiffs' Exhibit 2332A received in evidence.)
 3 MR. BOUTROUS: Thank you, Your Honor.
 4 Another exhibit issue, during Mr. Boies's
 5 examination of Mr. Blankenhorn he referred to Plaintiffs'
 6 Exhibit 744, which was the book, The Future of Marriage, by
 7 Mr. Blankenhorn.
 8 THE COURT: Yes.
 9 MR. BOUTROUS: Defendants' Exhibit 956 is the book.
 10 It's in evidence. We could either move ours in, too, or I
 11 could clarify for the record that when Mr. Boies was
 12 referring to Plaintiffs' Exhibit 744, he was referring to the
 13 book which is Defendants' Exhibit 956, which is in evidence.
 14 THE COURT: Very well. We'll simply note in the
 15 record that those two books are the same book by different
 16 exhibit numbers.
 17 MR. BOUTROUS: Thank you, Your Honor.
 18 As the Court will recall, we had moved into
 19 evidence a couple of -- two documents from the Library of
 20 Congress. And we did not have the official copies. We
 21 represented to the Court that they were in the Library of
 22 Congress.
 23 We now have official copies, so I would simply like
 24 to substitute in the official copies. Plaintiffs' Exhibit
 25 2581, which was the IRS letter from 1974; and then

PROCEEDINGS 2945

1 to reflect that.
 2 THE COURT: All right. Anything further from any
 3 party? How about the attorney general?
 4 MS. PACTER: No, Your Honor. We have nothing.
 5 THE COURT: Or any of the other defendants?
 6 All right. We have some loose ends for the Court
 7 to take care of, one of which has been mentioned. And that
 8 is the motion to compel compliance with the No On 8 subpoenas
 9 that the defendants are seeking. And that should be taken
 10 care of shortly.
 11 We have, as yet, unresolved the motion to withdraw
 12 by Dr. Tam. And I think that's fully briefed. And so it
 13 simply remains to be ruled upon by the Court.
 14 Similarly, I believe the motion to intervene by
 15 Imperial County has been fully briefed. And that remains to
 16 be ruled on by the Court.
 17 We have 137 documents that the plaintiffs lodged
 18 with the Court, that have not been submitted on the record.
 19 Do you recall those, Mr. Boutrous? I believe those
 20 came from the production.
 21 MR. BOUTROUS: Your Honor, I believe that they were
 22 documents that were under seal, but let me -- if I could just
 23 investigate and report back, right now.
 24 THE COURT: Well, we have the documents.
 25 (Laughter)

Lawdragon.com

PROCEEDINGS 2944

1 plaintiffs' Exhibit 2566, which was the letter to the
 2 Mattachine Society.
 3 And I will provide copies to the Court and to
 4 opposing counsel.
 5 THE COURT: Very well.
 6 MR. BOUTROUS: Thank you.
 7 And then, finally, we have a number of documents
 8 that we just received from the -- where we disputed issues in
 9 the privilege log. And we would like to reserve the right to
 10 review those and supplement the record, where appropriate and
 11 as appropriate, once we have had a chance to review them.
 12 THE COURT: Very well. That will be fine.
 13 MR. BOUTROUS: Thank you, Your Honor.
 14 I think that's it from my list.
 15 THE COURT: I was going to ask the plaintiffs, and
 16 now that the defendants have essentially rested, whether you
 17 intend to call any rebuttal witnesses.
 18 MR. BOUTROUS: We do not, Your Honor.
 19 THE COURT: Mr. Thompson.
 20 MR. THOMPSON: Your Honor, I do apologize. I
 21 forgot one last housekeeping.
 22 Fatherless America has been admitted twice under
 23 the wrong number. It's -- we labeled it DIX103, but it's
 24 actually 108. So we just wanted the record to be clear that
 25 Fatherless America is 108, and the record should be corrected

PROCEEDINGS 2946

1 (Law clerk hands documents to Mr. Boutrous.)
 2 MR. BOUTROUS: May I investigate these?
 3 (Laughter)
 4 THE COURT: Things do run downhill, don't they?
 5 (Laughter)
 6 MR. BOUTROUS: Yes, Your Honor. We have dealt with
 7 these issues through the exhibits we have put into evidence,
 8 so they can now remain with us, unless the Court would like
 9 them back.
 10 (Laughter)
 11 THE COURT: I think we have enough, Mr. Boutrous.
 12 (Laughter)
 13 All right. That's helpful.
 14 Amicus briefs. Do the parties have a position on
 15 amicus briefs?
 16 My inclination -- I have some inclination with
 17 reference to that, but I would be happy to hear any
 18 suggestions that the parties wish to offer.
 19 MR. BOUTROUS: Your Honor, our position would be,
 20 to the extent the Court feels it would be useful, relatively
 21 brief amicus briefs filed -- I think the Court had indicated
 22 seven days after the close of evidence at one of our earlier
 23 hearings. We would welcome that, as long as the Court felt
 24 it was useful to the Court.
 25 THE COURT: Mr. Cooper.

PROCEEDINGS 2947

1 MR. COOPER: Your Honor, we don't have any kind of,
 2 you know, strident opposition to that, but it's difficult for
 3 me to imagine that the Court needs additional material to
 4 chew on as you consider the issues before you.
 5 But I do think that it would be important to have
 6 some meaningful opportunity after any amicus briefs were
 7 filed, for the parties then to put in their own -- their own
 8 papers, obviously, to the Court.
 9 THE COURT: Obviously, I quite agree.
 10 If it's agreeable to the parties, let me say that
 11 the Court will set a deadline of seven days from today, that
 12 will be next Wednesday, which I believe is February 3rd, for
 13 applications to file amicus briefs.
 14 And the Court will consider any such applications,
 15 and either grant or deny those as may be appropriate.
 16 And I will set a 15-page limitation on any amicus
 17 participation, and provide a period of time for the parties
 18 to file whatever response, if any, that they wish to make.
 19 I agree with Mr. Cooper that it's -- it's an
 20 abundant record, and I doubt amicus briefs can add too much.
 21 But one never knows. So I think we should at least leave the
 22 door open to amicus participation.
 23 And I believe that's it from my end. I assume
 24 there's nothing further from any of the parties?
 25 One other matter, Mr. Boutrous?

PROCEEDINGS 2949

1 time. When the time comes, I'll have the clerk call both
 2 sides and give you a range of dates so that you can work it
 3 out consistent with, I'm sure, your many other obligations.
 4 But I would, at this point, I think, only request
 5 references to the evidence that you've submitted in
 6 connection with your proposed findings and conclusions.
 7 How long do you think it will -- how long a time
 8 deadline would be reasonable for that submission?
 9 MR. BOUTROUS: 30 days would be fine with us, Your
 10 Honor. And I think that that would -- sounds like an
 11 excellent approach.
 12 THE COURT: Mr. Cooper?
 13 MR. COOPER: It seems to me that 30 days should
 14 be -- should be adequate, Your Honor, yes.
 15 THE COURT: Very well. That will be, then -- well,
 16 why don't we set February 26. That's -- that's just about 30
 17 days. All right. February 26. And, probably, by that time,
 18 I'll have a much better idea of what kind of schedule we
 19 should set for the closing argument.
 20 All right. Anything further?
 21 MR. BOUTROUS: Your Honor, on behalf of the
 22 plaintiffs, we just wanted to thank the Court's staff for
 23 making it so easy to try the case. And we very much
 24 appreciate everything everyone did during the trial.
 25 Thank you, Your Honor.

Lawdragon.com

PROCEEDINGS 2948

1 MR. BOUTROUS: In terms of post-trial filings.
 2 THE COURT: Yes. Here's what I'd like. I'd like
 3 to take some time to go over all of this material.
 4 I don't think, at this juncture, it would be
 5 helpful to have post-trial briefs. You may very well,
 6 however, wish to submit references to the evidence that have
 7 been submitted, with your proposed findings of fact and
 8 conclusions of law. Those you have already submitted.
 9 And I'm sure that you presented the evidence in the
 10 case with those proposed findings in mind, and the
 11 conclusions. And so it would be helpful if you could furnish
 12 those to the Court.
 13 I realize that you, too, have a lot of material to
 14 go through. So I'll be guided by your suggestion about how
 15 much time you'll need in order to do that.
 16 What I would like to do, after receiving those, and
 17 after concluding today's proceedings, is to consider that
 18 material and then set a date for closing argument.
 19 And what I will probably do, in connection with
 20 setting that date, is to perhaps key up some questions that
 21 have come to the fore as a result of the review of the
 22 evidence, and give you an opportunity to address that in
 23 closing argument and in any post-trial briefing that you wish
 24 to make on the law.
 25 But I'd rather leave that date open at the present

PROCEEDINGS 2950

1 THE COURT: Well, I want to extend my
 2 congratulations to the lawyers in the case for, obviously, a
 3 fascinating case. Extremely well-presented on both sides.
 4 Obviously, there are some old hands in the
 5 courtroom in this proceeding. But I have been particularly
 6 struck by the very fine work of many of the younger lawyers
 7 in the case, both here in the courtroom and, I'm sure, behind
 8 the scenes.
 9 (Laughter)
 10 It really -- the old hands should take great pride
 11 and pleasure in the younger colleagues that you've worked
 12 with. They have done a splendid job, and so you have much to
 13 be pleased with.
 14 And I would just like to take a moment to
 15 personally congratulate you and tell you what a good job
 16 you've all done.
 17 MR. COOPER: Thank you, Your Honor.
 18 MR. BOUTROUS: Thank you, Your Honor.
 19 MR. BOIES: Thank you, Your Honor.
 20 (At 12:00 noon, the proceedings were adjourned.)
 21
 22 - - -
 23
 24
 25

2951

1
2 I N D E X
3
4

DEFENDANTS' WITNESSES	PAGE	VOL.
5 BLANKENHORN, DAVID		
6 Cross-Examination Resumed by Mr. Boies	2838	12
7 Redirect Examination by Mr. Cooper	2933	12
8		
9 - - - -		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3 CERTIFICATE OF REPORTERS
4 We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
5 Official Reporters for the United States Court, Northern
6 District of California, hereby certify that the foregoing
7 proceedings in C 09-2292 VRW, Kristin M. Perry, et al. vs.
8 Arnold Schwarzenegger, in his official capacity as Governor
9 of California, et al., were reported by us, certified
10 shorthand reporters, and were thereafter transcribed under
11 our direction into typewriting; that the foregoing is a full,
12 complete and true record of said proceedings at the time of
13 filing.
14
15 /s/ Katherine Powell Sullivan
16
17 Katherine Powell Sullivan, CSR #5812, RPR, CRR
18 U.S. Court Reporter
19
20 /s/ Debra L. Pas
21 Debra L. Pas, CSR #11916, RMR CRR
22 U.S. Court Reporter
23
24 Wednesday, January 27, 2010
25

Lawdragon.com

2952

1
2 I N D E X
3
4

PLAINTIFFS' EXHIBITS	IDEN	VOL.	EVID	VOL.
4 749	2931	12		
5 1372	2931	12		
6 2096	2931	12		
7 2258	2931	12		
8 2259	2931	12		
9 2332A	2943	12		
10 2341	2931	12		
11 2403	2931	12		
12 2866	2931	12		
13 2876	2931	12		
14 2877	2931	12		
15 2878	2931	12		
16 2879	2912	12		
17 2879	2931	12		
18 2898	2931	12		
19 2899	2931	12		
20 2936	2931	12		
21				
22				
23				
24				
25				

DEFENDANTS' EXHIBITS	IDEN	VOL.	EVID	VOL.
15 2	2927	12		
16 1109	2931	12		
17 2717	2939	12		
18 2719	2940	12		
19 2720	2938	12		
20				
21				
22				
23				
24				
25				