

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

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

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

) San Francisco, California
Defendants.) Wednesday
) January 27, 2010

TRANSCRIPT OF PROCEEDINGS

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Official Reporters - U.S. District Court

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P R O C E E D I N G S

JANUARY 27, 2010

8:33 a.m.

THE COURT: Very well, good morning, counsel.

(Counsel greet the Court.)

THE COURT: Good morning, Mr. Blankenhorn.

THE WITNESS: Good morning, sir.

THE COURT: Now, you understand that you're still
under oath?

THE WITNESS: Yes, sir.

THE COURT: The oath that you took yesterday
applies to this testimony as well; is that clear?

THE WITNESS: Yes, sir.

THE COURT: Proceed, Mr. Boies.

MR. BOIES: Thank you, your Honor.

We have a binder to hand out.

(Whereupon, binders were tendered
to the Court and the witness.)

DAVID BLANKENHORN,

called as a witness for the Defendants herein, having been
previously sworn, resumed the stand and testified further as
follows:

CROSS-EXAMINATION RESUMED

BY MR. BOIES

Q. Good morning, Mr. Blankenhorn.

1 **A.** Good morning, sir.

2 **Q.** I'm going to try this morning to start with some things
3 that perhaps we can agree on.

4 You agree that marriage is an important public
5 good, as you use that term, correct?

6 **A.** Yes, sir.

7 **Q.** And could you explain for the record what you mean by a
8 "public good"?

9 **A.** I mean that it serves important public purposes, and
10 marriage makes a distinctive contribution to society.

11 **Q.** And you believe that marriage is something that benefits
12 both the participants in the marriage, the couple that are
13 married, as well as any children that the couple may raise,
14 correct?

15 **A.** Yes, sir.

16 **Q.** And you believe that legalizing gay and lesbian marriage
17 would benefit gay and lesbian couples as well as any children
18 they raise, correct?

19 **A.** I believe it would be likely to do so.

20 **Q.** Well, you believe it would be almost certain to do so,
21 correct, sir?

22 **A.** I do believe it is almost certainly true that gay and
23 lesbian couples and their children would benefit by having
24 gay marriage.

25 **Q.** Now, you have said that, "If adopting same-sex marriage"

1 -- and I'm going to refer here to your book *The Future of*
2 *Marriage*. And you have got that at tab 13 of the binder that
3 I handed out, and I'm going to be looking at page 20.

4 You can read along with me, if you would like. Tab
5 13 of the binder, page 20.

6 **A.** Yes, sir.

7 **Q.** And at the top of the page you write:

8 "If adopting same-sex marriage was likely
9 to be part of a larger societal shift leading
10 to better marriages, less divorce and less
11 unwed childbearing or, more modestly, if it
12 seemed likely that adopting same-sex marriage
13 would not significantly undermine efforts to
14 renew our wider marriage culture, I am
15 confident that most marriage advocates would
16 favor its adoption. I know I would. But if
17 adopting same-sex marriage is likely to
18 impede that larger goal, I would be against
19 it."

20 And that's what you believe, correct, sir?

21 **A.** Yes, sir.

22 **Q.** And in saying that if adopting same-sex marriage would
23 impede that goal, you would be against it, what you are
24 saying is that you believe that the rights of gays and
25 lesbians should take second place to the needs of an existing

1 social institution, correct?

2 **A.** Well, maybe you could point me to the sentence.

3 **Q.** Sure. It's actually the very next sentence. You say:

4 "Those who disagree with me can charge
5 that I am proposing a moral metric in which,
6 regardless of the ultimate policy decision on
7 same-sex marriage, the rights of gays and
8 lesbians take second place to the needs of an
9 existing social institution."

10 Do you see that?

11 **A.** Yes, sir.

12 **Q.** And you say that the charge would be accurate, correct?

13 **A.** Yes, sir.

14 **Q.** And is it fair --

15 **A.** I was trying to say that from the point -- the answer to
16 your question is yes. I just only might point out that I did
17 say that -- I was saying I understood and accepted the
18 validity of the argument of those who disagreed with me.

19 **Q.** Yes, I appreciate that, sir.

20 Is it fair to summarize, to say that your choice
21 would be to choose marriage as a public good over the rights
22 and needs of gay and lesbian adults and those same-sex
23 couples who are raising children?

24 **A.** Well, again, I would like you -- I'm not trying to be
25 difficult, but I would just like to see the sentence that you

1 are referring to.

2 **Q.** Sure. The very bottom of the page, the last sentence.

3 You write:

4 "To the degree that I must choose, with
5 some anguish I will choose children's
6 collective rights and needs. I will choose
7 marriage as a public good over the rights and
8 needs of gay and lesbian adults and those
9 same-sex couples who are raising children."

10 Do you see that?

11 **A.** Yes, sir.

12 Mr. Boies, the whole purpose of my book was to
13 argue --

14 **Q.** I'm really not asking for the whole purpose of your
15 book, and --

16 **A.** I would just like to say that the sentences you're --
17 it's an important point.

18 The sentences that you are citing are an argument
19 about what I call goods in conflict. I'm one of those
20 persons who do not believe that this issue is a case of good
21 versus bad. I believe and have gone to great lengths to say
22 that I believe that there are valid arguments on both sides
23 of the issue, and my book is an attempt to explore that.

24 And these sentences you are selecting are examples
25 of me exploring that, what I'm calling goods in conflict.

1 Q. And I thought you --

2 A. It just helps to know what I'm trying to argue here.

3 Q. And I thought you would be agreeable to what I'm
4 pointing out to you. I just --

5 A. I am agreeable. I'm just providing a context so that
6 people can understand, and you can understand, why these
7 sentences are stated as they are.

8 **THE COURT:** All right. Let's have a question and
9 an answer.

10 **BY MR. BOIES**

11 Q. In fact, in your book, *The Future of Marriage*, you list
12 approximately 20 possible benefits of allowing gay and
13 lesbian marriage, correct?

14 A. Yes, sir. Those benefits that I listed in the book were
15 a result of a collaborative discussion that I led and they
16 involved advocates of both sides of the position. And we
17 tried to come up with -- over time we tried to come up with a
18 list of the likely or possible benefits of gay marriage, the
19 likely or possible disadvantages. And so I enumerated those
20 in that chapter of my book.

21 Q. Okay. Now, if you turn to page 203 of your book, again
22 behind tab 13, it is the page with the heading "Goods In
23 Conflict," and then the subheading "Positive Consequences."

24 A. Yes, sir.

25 Q. Now, what I'm going to do is I'm going to ask you just

1 which of these you agree with, if any, because as I
2 understand it, this was sort of a group thought experiment
3 that was going on.

4 **A.** Yes, sir.

5 **Q.** And you put down on a white board a lot of ideas that
6 people had, both for and against gay marriage, correct?

7 **A.** Yes, sir.

8 **Q.** Okay. And you did not necessarily agree with any
9 particular idea; you just wrote it down if it was brought up
10 by somebody, correct?

11 **A.** Well, there was a process, but the substance of what
12 you're saying is correct.

13 **Q.** Okay. So what I want to know -- because you are the
14 witness here, I want to know which, if any, of these positive
15 consequences of gay and lesbian marriage you agree with?

16 **A.** Yes, sir. And I only wish to say that with each of them
17 the issue that we discussed was likely; not definite, but
18 likely.

19 **Q.** Likely?

20 **A.** Yes, sir.

21 **Q.** So --

22 **A.** Because these are all speculative in the sense that they
23 are an attempt to predict something that will happen in the
24 future.

25 It's an important point. And so the issue is

1 likely --

2 **Q.** Mr. Blankenhorn. Mr. Blankenhorn, you may have
3 important points to make.

4 **A.** I think I do actually.

5 **Q.** I know you do. I know you do. But this is not a
6 debate.

7 **A.** No, sir. I'm trying to have you understand --

8 **Q.** I'm trying to ask you a question.

9 **A.** -- the nature of what I wrote in the book.

10 **Q.** I'm trying to ask you a question, sir.

11 **A.** I'm doing my very best to answer your question.

12 **THE COURT:** All right. Let's not interrupt one
13 another.

14 **MR. BOIES:** Your Honor, could I ask that the
15 witness be instructed to listen to the question, answer my
16 question and not make a statement that is not responsive to
17 the question, even if he believes it's important.

18 **THE WITNESS:** I don't need such instruction.
19 That's what -- my intention is to do exactly that.

20 **THE COURT:** Mr. Blankenhorn, one of the
21 instructions that the Court gives to the jury when an expert
22 witness testifies is to consider the witness's background,
23 training and experience; the testimony that the witness
24 gives; the reasons that the witness gives for the opinions
25 that he expresses; and all of the other evidence in the case.

1 And all of that other evidence, of course, includes
2 the demeanor of the witnesses. And the demeanor of the
3 witnesses is sometimes gauged, importantly, by the
4 responsiveness of the witness to the questions that he's
5 asked.

6 So with that in mind, because I'm sure you would
7 not want your demeanor on the stand to be a negative factor
8 in your testimony, I would urge you to pay close attention to
9 Mr. Boies's questions and to answer them directly,
10 succinctly. Then to the extent additional elaboration should
11 be brought out, your very able counsel, I'm sure, Mr. Cooper,
12 will be able to do that.

13 So bear that in mind.

14 **THE WITNESS:** Yes, sir, I will.

15 **THE COURT:** All right. Fine.

16 **BY MR. BOIES**

17 **Q.** So, Mr. Blankenhorn, could you just go down this list of
18 possible positive consequences and tell me which, if any, you
19 personally agree with?

20 And just tell me by number, because these are all
21 numbered, and I think it will go faster if you simply tell me
22 which of the numbers here, if any, you personally agree with.

23 **A.** You want me to read each one silently to myself and then
24 tell you "One, yes." Is that what you want me to do?

25 **Q.** What I -- read it silently to yourself and then just

1 tell me which of these you agree with. Give me the numbers
2 of the items that you agree with.

3 **A.** For each of the 23?

4 **Q.** Yes.

5 (Brief pause.)

6 **A.** Number one, yes.

7 Number two, yes.

8 Number three, yes.

9 Number four, yes.

10 Number five, yes.

11 Number six, yes.

12 Number seven, yes.

13 Number eight, no.

14 Number nine, no.

15 Number 10, yes.

16 Number 11, yes.

17 Number 12, I don't know.

18 Number 13, no.

19 Number 14, no.

20 Number 15, yes.

21 Number 16, I don't know.

22 Number 17, no.

23 Number 18, yes.

24 Number 19, yes.

25 Number 20, I don't know.

1 Number 21, I don't know.

2 Number 22, yes.

3 Number 23, I don't know.

4 **Q.** Okay. Thank you.

5 Now, I would like to publish this list and go
6 through it, and both identify those that you agree with and
7 then ask you some questions about some of the ones that you
8 said you disagreed with.

9 **MR. BOIES:** Can I publish this up on the board?

10 (Document displayed)

11 **MR. BOIES:** Can you make it a little more readable
12 by making some of the ones we are going to deal with first
13 larger?

14 **BY MR. BOIES**

15 **Q.** The first point that you agreed with was that:

16 "Same-sex marriage would meet the stated
17 needs and desires of lesbian and gay couples
18 who want to marry. In so doing, it would
19 improve the happiness and well-being of gay
20 and lesbian individuals, couples and family
21 members."

22 **A.** I said "many," "many gay and lesbian individuals,
23 couples and family members."

24 **Q.** I misread that. Let me just read it to be clear:

25 "Same-sex marriage would meet the stated

1 needs and desires of lesbian and gay couples
2 who want to marry. In so doing, it would
3 improve the happiness and well-being of many
4 gay and lesbian individuals, couples, and
5 family members."

6 The second positive consequence that you agreed
7 with was:

8 "Gay marriage would extend a wide range
9 of the natural and practical benefits of
10 marriage to many lesbian and gay couples and
11 their children."

12 The third positive consequence that you agreed with
13 was:

14 "Extending the right to marry to same-sex
15 couples would probably mean that a higher
16 proportion of gays and lesbians would choose
17 to enter into committed relationships."

18 The fourth positive consequence that you agreed
19 with was that:

20 "Same-sex marriage would likely
21 contribute to more stability and to
22 longer-lasting relationships for committed
23 same-sex couples."

24 The fifth positive consequence that you agreed with
25 was that:

1 "Same-sex marriage might lead to less
2 sexual promiscuity among lesbians and
3 (perhaps especially) gay men."

4 The sixth positive consequence that you agreed with
5 was that:

6 "Same-sex marriage would signify greater
7 social acceptance of homosexual love and the
8 worth and validity of same-sex intimate
9 relationships."

10 The seventh positive consequence which you agreed
11 with was that:

12 "Gay marriage would be a victory for the
13 worthy ideas of tolerance and inclusion. It
14 would likely decrease the number of those in
15 society who tend to be viewed warily as
16 "other" and increase the number who are
17 accepted as part of "us." In that respect,
18 gay marriage would be a victory for, and
19 another key expansion of, the American idea."

20 And I have read those correctly, have I not, sir?

21 **A.** Yes, sir.

22 **Q.** And then items eight and nine you disagreed with,
23 correct?

24 **A.** Yes, sir.

25 **Q.** And then item 10 you agreed to, and that reads:

1 "Gay marriage might contribute over time
2 to a decline in anti-gay prejudice as well
3 as, more specifically, a reduction in
4 anti-gay hate crimes."

5 And the 11th positive consequence and, again, one
6 that you agreed with, was that -- number 11 reads:

7 "Because marriage is a wealth-creating
8 institution, extending marriage rights to
9 same-sex couples would probably increase
10 wealth accumulation and lead to higher
11 standards for" --

12 **A.** "Living standards."

13 **Q.** (As read)

14 "...higher living standards for these
15 couples, as well as help reduce welfare costs
16 (by promoting family economic self
17 sufficiency) and decrease economic
18 inequality."

19 And did I read those correctly with your help?

20 **A.** Yes, sir.

21 **Q.** Number 12 you said you didn't know.

22 Numbers 13 and 14 you disagreed with, correct?

23 **A.** Yes, sir.

24 **Q.** Number 15, which you agreed with, reads:

25 "Extending marriage rights to same-sex

1 couples would probably reduce the proportion
2 of homosexuals who marry persons of the
3 opposite sex and, thus, would likely reduce
4 instances of marital unhappiness and
5 divorce."

6 And did I read that correctly?

7 **A.** Yes, sir.

8 **Q.** And number 16, which you said you didn't know, and
9 number 17, which you disagreed with, correct?

10 **A.** Yes, sir.

11 **Q.** And then number 18, which you agreed with reads:

12 "By increasing the number of married
13 couples who might be interested in adoption
14 and foster care, same-sex marriage might well
15 lead to fewer children growing up in state
16 institutions and more growing up in loving
17 adoptive and foster families."

18 And number 19, which you also agreed with reads:

19 "Adopting same-sex marriage would likely
20 be accompanied by a wide-ranging and
21 potentially valuable national discussion of
22 marriage's benefits, status and future."

23 And did I read those items correctly?

24 **A.** Yes, sir.

25 **Q.** And am I correct that items 20 and 21 you don't know

1 whether you agree with or not?

2 **A.** Yes, sir.

3 **Q.** And then number 22 is one that you do agree with, which
4 is that:

5 "Gay marriage would probably expand the
6 possibility and likelihood of new scholarly
7 research on a variety of topics related to
8 marriage and parenting."

9 Correct?

10 **A.** I'm absolutely certain of that one.

11 **Q.** And then number 23, you don't know, correct?

12 **A.** Correct.

13 **Q.** Now, I would like to ask you to go back to number 14,
14 which you said you disagreed with, and I want to ask you
15 about certain parts of that and see whether there is any part
16 of that that you agree with.

17 There is a reference here to "marriage lite
18 schemes," such as civil unions and domestic partnerships; do
19 you see that?

20 **A.** Yes, sir.

21 **Q.** And there is a statement here that:

22 "Those marriage lite schemes can
23 harmfully blur distinctions between marriage
24 and non-marriage."

25 Do you see that?

1 A. Yes, sir.

2 Q. Do you believe that that part of the statement is true?

3 (Brief pause.)

4 A. The part that you have read so far?

5 Q. Yes, just this part.

6 A. No, sir. I do not believe that -- I do not believe that
7 it's true.

8 Q. Okay.

9 A. Saying, again, that this is what's likely.

10 Q. Yes, I know. I understand, and that's what I'm saying.

11 My question was whether you believed it was likely
12 that marriage lite schemes that you refer to here, or what is
13 written here as marriage lite schemes, such as civil unions
14 and domestic partnerships, whether it's likely that those can
15 harmfully blur the distinctions between marriage and
16 non-marriage?

17 A. Well, now, you have just read one part of it, because I
18 do believe that it is a -- it is a concern of mine that -- it
19 is one concern that needs to be taken into account; that
20 domestic partnership and civil unions, because they are in
21 some respects comparable to marriage, it is a concern that
22 they could blur this distinction. It is a concern.

23 I was basing my thought on the fact that you had
24 read me a much longer portion of it.

25 Q. Let me see if I understand what you are saying.

1 You are saying that marriage lite schemes, such as
2 civil unions and domestic partnerships, are a concern to you
3 because those schemes might well or could harmfully blur the
4 distinctions between marriage and non-marriage; is that what
5 you are saying?

6 **A.** Yes, sir.

7 **Q.** Okay. Now, I would like to ask you to turn to the
8 document that is in the pocket of the -- beginning pocket of
9 your binder, right at the very beginning. It is Plaintiffs'
10 Exhibit 2332-A.

11 **A.** I'm sorry. I'm -- I'm having a hard time.

12 **MR. BOIES:** May I approach, your Honor?

13 **THE COURT:** Yes, you may.

14 (Whereupon, document was tendered
15 to the witness.)

16 **BY MR. BOIES**

17 **Q.** This is a copy of the "Index of Materials," the list of
18 materials that in your expert report you said that you had
19 considered and relied on.

20 Do you recognize it as such?

21 **A.** It's titled "Index of Materials Considered."

22 **Q.** And did you understand that as part of your expert
23 report, you were supposed to list the materials that you
24 considered and relied on in preparing your expert report; do
25 you understand that?

1 A. No, sir. As I explained yesterday, we had a --

2 Q. You don't have to explain it.

3 A. -- we had a back-and-forth about this.

4 Q. You don't have to explain it.

5 A. It's just that you asked me the question.

6 Q. I understand.

7 THE COURT: Perhaps if you showed the witness the
8 expert report, it might be of some help.

9 BY MR. BOIES

10 Q. The expert report is in the witness binder that you have
11 that Mr. Cooper gave you.

12 THE COURT: PX-743, I believe.

13 BY MR. BOIES

14 Q. And do you see that what we have marked as Plaintiffs'
15 Exhibit 2332-A is a copy of what you attached to your expert
16 report?

17 A. Yes, sir. That's -- yes, sir.

18 Q. Okay. Now, I would like you to go down this list --
19 this is a list of materials -- and I would like you to tell
20 me which of these materials, it is your testimony, assert
21 that permitting gay marriage will adversely affect
22 heterosexual marriage?

23 A. I will be happy to do my best. I don't think I can give
24 you a precise answer because I don't have the ability now to,
25 you know, reread each of these documents, but I will do my

1 best to give you a judgment, if that's what you want me to
2 do.

3 **Q.** Yes. It's your best testimony and, obviously, people
4 can later go look it up.

5 **A.** Could you say, again, what it is you are asking me if
6 these materials contain?

7 **Q.** Whether the materials contain a statement that -- or an
8 assertion that permitting gay and lesbian marriage will
9 adversely affect heterosexual marriage.

10 (Brief pause.)

11 **Q.** And, again, perhaps the easiest way is for you simply to
12 tell me the numbers that relate to materials that you believe
13 fit what I'm asking.

14 (Brief pause.)

15 **A.** Well, with the provisos that I can't speak with
16 absolutely confidence about this, and with the proviso that
17 the overwhelming majority of these materials were actually
18 written before the gay marriage debate even came up on the
19 national stage and were cited not about the subject you are
20 asking me about, I will answer your question by saying, 2, 3,
21 10, 13, 24, 27, and that's all.

22 **Q.** All right. Let me go through each of those.

23 Let me begin with certain declarations that you
24 have identified.

25 Number 10 is a declaration of Allan C. Carlson,

1 correct?

2 **A.** Yes.

3 **Q.** Who is Allan C. Carlson?

4 **A.** Well, he's a writer and researcher and he has written
5 some books on marriage and he -- I don't know. I think the
6 group he heads is a private conservative think tank in
7 Illinois. I think it's called the Howard Center. He is --
8 his doctorate is in history.

9 **Q.** So he is not an anthropologist, or a psychologist, or a
10 sociologist; is that correct, sir?

11 **A.** No, sir. He's a historian.

12 **Q.** And then the other declaration that you identified was
13 the declaration of Maggie Gallagher, correct; number 24?

14 **A.** Well, that was one of them, yes, sir.

15 **Q.** And who is Maggie Gallagher?

16 **A.** She is one of the leading opponents of gay marriage in
17 the public debate today. She is a writer and, I guess you
18 might say an organizer, writer and organizer, whose principal
19 focus has been marriage and whose principal focus in the past
20 four or five years has been to lead a campaign and to make
21 public arguments in opposition to gay marriage.

22 **Q.** Do you consider her a scholar, as you have used those
23 words?

24 **A.** I do, yes. As I am using the term, I believe that she
25 is a serious -- an intellectually serious person, yes.

1 Q. And an intellectually serious person is what you have
2 meant when you have referred to scholars in your testimony?

3 A. No. If you want to quarrel over the terms --

4 Q. I'm not quarreling. I'm just asking what you meant.

5 A. So what's your question?

6 Q. You have used a number of times in your testimony, both
7 your direct testimony and occasionally your cross, the term
8 "scholar" to refer to people that you have relied on; do you
9 recall that?

10 A. Yes. I do not -- I did not mean -- if you think I mean
11 that I believe that the definition of scholar is someone who
12 is intellectually serious, then I misspoke. So we can --

13 Q. And when you use the term "scholar," what are you
14 referring to?

15 A. Well, let's see. I hadn't thought recently to try to
16 form a kind of dictionary definition, but I guess my
17 understanding of a scholar would be someone who is able and
18 equipped to engage seriously with intellectual competence
19 with one or more bodies of evidence and to make rigorous
20 analyses and arguments about one or more bodies of evidence.

21 And I believe that the ideals of good scholarship
22 are to be -- to have integrity; that is, to try to seek the
23 truth of the matter.

24 Q. And do you believe that one of the attributes of good
25 scholarship is objectivity?

1 **A.** Objectivity in the sense of trying to see things whole
2 and trying to understand and engage seriously with opposing
3 points of view and treat those opposing points of view
4 respectfully. In that sense yes, there is an ideal in
5 scholarship that would be -- that you might call those
6 cluster of terms or that -- those aspirations, you might call
7 those objectivity, yes.

8 See, Maggie Gallagher has a dual role. She is a
9 journalist and writer, but she is also an activist and
10 partisan in this public debate. I have tried to make that
11 clear.

12 **Q.** Has she published any peer-reviewed articles?

13 **A.** Yes.

14 **Q.** Which ones?

15 **A.** Well, I don't have her C.V. in front of me right now,
16 Mr. Boies. I mean, I happen to know that she has published
17 several articles in peer-reviewed law journals, but I'm not
18 able to recall the specifics of her 20-year publication
19 history right now.

20 **Q.** Can you recall any peer-reviewed article by Maggie
21 Gallagher that you have relied on?

22 **A.** That I have relied on?

23 **Q.** Yes.

24 **A.** Well, I have read a number of them over the years. I
25 mean, if that's what you mean, I have read them. And they

1 have helped, along with thousands of other articles and
2 books, to shape my over all views on things.

3 **Q.** What was the most recent peer-reviewed article by Maggie
4 Gallagher that you have relied on; that you think is reliable
5 as objective scholarship with integrity?

6 **A.** You are putting words in my mouth.

7 **Q.** Well, let me not put words in your mouth. Let me simply
8 ask a question.

9 Has Maggie Gallagher written any peer-reviewed
10 article that you believe is characterized by the ideals of
11 integrity and objectivity that you have described that you
12 have relied on?

13 **A.** That I have relied on for my testimony here today?

14 **Q.** Let's answer that question first. That wasn't really my
15 question, but let's put that question and get an answer to
16 that.

17 **A.** There are no such articles that I have specifically
18 relied on for my testimony here today, or my preparation for
19 my testimony here today.

20 **Q.** Okay. Another one of the items that you identified --
21 and by my count you identified a total of six items.

22 Another one of the items that you identified was
23 Norval Glenn, "The Struggle For Same-Sex Marriage" and that
24 was one of the articles that Mr. Cooper raised with you, am I
25 correct?

1 **A.** Yes, sir.

2 **Q.** And would you turn to that in Mr. Cooper's book?

3 **A.** Can someone tell me the tab?

4 **Q.** I believe that it is tab 18.

5 **A.** Okay.

6 **Q.** Okay. Now, you said that Mr. Glenn asserted that
7 permitting gay and lesbian marriage would adversely affect
8 heterosexual marriage, correct?

9 **A.** Well, I believe I was answering a question of yours, and
10 I believe the way you asked me was to -- based on reviewing
11 this list called "Index of Materials Considered," if I could
12 identify for you any documents in that list that I thought
13 the view of the author was that adopting same-sex marriage
14 would weaken the institution of marriage.

15 **Q.** Okay. I'm glad we clarified that.

16 Now, I want to go back to the list. And the six
17 items that you have identified are items which you say -- and
18 I want to get your words exactly.

19 You thought this was materials where the view of
20 the author was that adopting same-sex marriage would weaken
21 the institution of marriage. That's what you answered,
22 right?

23 **A.** That's what I just said, yes, sir.

24 **Q.** Now, I want to ask a somewhat different question with
25 respect to these items that you have identified; and that is,

1 which of these six did this material that's here, that's
2 listed here, contain an assertion that permitting gay and
3 lesbian marriage would harm heterosexual marriage?

4 Do you understand the difference between the two?
5 If not, I will explain it.

6 **A.** I'm afraid I don't.

7 **Q.** Okay. You were doing two things. One, you were giving
8 me what you thought the author believed?

9 **A.** Yes, sir.

10 **Q.** And I'm asking you not what the author believes in your
11 view, but what the author said.

12 Second --

13 **A.** Said not in some book or article that exists in the
14 world, but says specifically in the words that you have
15 stipulated in this narrow list of materials cited?

16 **Q.** Yes, sir.

17 **A.** Okay.

18 **Q.** And that's the --

19 **A.** It's a very narrow question, but I'm happy to try to do
20 my best to answer it.

21 **Q.** Yes. And so what I'm asking you is which, if any of
22 these materials themselves, not some other material --

23 **A.** Written material, a book, peer-reviewed article, so
24 forth; only these materials?

25 **Q.** Only these materials that you have listed. Which of

1 these materials contain assertions that permitting gay and
2 lesbian marriage will harm heterosexual marriage or the
3 institution of heterosexual marriage, if any?

4 **A.** Does it have to say it in that exact form of words that
5 you have offered?

6 **Q.** No. In words or in substance, so that a reasonable
7 reader could read it and say this writer in this publication
8 is asserting that gay and lesbian marriage will weaken
9 heterosexual marriage.

10 **A.** Be likely to weaken heterosexual marriage.

11 **Q.** I beg your pardon.

12 **A.** The issue is always likely, Mr. Boies. It's not --
13 there is no such thing as certainty about predicting a future
14 event. The concept is always what is likely in their
15 judgment to occur.

16 **Q.** I accept that, Mr. Blankenhorn.

17 **A.** Blankenhorn.

18 Well, I don't really -- with the proviso that I
19 can't speak with confidence about this unless I were to
20 reread each of these documents word for word right now, but
21 my best effort to answer your question right now would be
22 that the list I have given you would be the same list.

23 **Q.** So that each of the six that you have identified, you
24 believe these materials themselves assert in words or in
25 substance that permitting gay and lesbian marriage will harm

1 heterosexual marriage, is that correct?

2 **A.** I believe that a reason- -- as you put it, a reasonable
3 reader, reading these materials, would conclude that this
4 author has stated or suggested that adopting gay marriage
5 would be likely to weaken marriage as a social institution.

6 **Q.** Now, in that answer you said "stated or suggested." Do
7 you use those terms interchangeably, synonymously or do you
8 mean something different by them?

9 **A.** I mean something different by them.

10 **Q.** What do you mean?

11 **A.** Would it be okay if I gave you an example, or would you
12 rather me state it abstractly?

13 **Q.** I would rather you state it in concept.

14 **A.** "Stated" would be an unequivocal assertion that is
15 similar to the wording that you have offered in your -- you
16 know, an unmistakable, no possible way to doubt the declared
17 intent of the sentence or the paragraph.

18 A "suggestion" would be a way of making an
19 argument, stating it so that a reasonable reader would
20 understand clearly based on the written words that the author
21 has a serious concern or a serious worry or is stating his or
22 her belief that it would be likely that adopting gay marriage
23 would weaken marriage as a social institution.

24 **Q.** Now, with respect to the six items that you have
25 identified, let me ask the question separately.

1 **A.** I was afraid that might be where we were going.

2 **Q.** I'm getting predictable.

3 Which of these in your testimony does the author,
4 in this material, state -- using "state" the way you have
5 described it -- that permitting gay and lesbian marriage
6 would harm heterosexual marriage?

7 **A.** Well, I think you would probably have to take Cherlin
8 off the list, number 13, because while he argues that gay
9 marriage is contributing to the deinstitutionalization of
10 marriage, that's his statement. He does not specifically in
11 words that you're calling for him to do make the statement
12 that you are calling for him to make. So I think we would
13 probably have to take him off that very narrow list.

14 So let's keep going.

15 Well, you might have to take Norval Glenn, number
16 27, off the list, but although because he does say that
17 adopting gay marriage would be likely to result in the
18 deinstitutionalization of marriage, he does not have the form
19 of words that are in the unequivocal statement that you are
20 asking for. So let's take him off the list.

21 On number three, Agacinski. I have read a lot of
22 her work and I know that she is an opponent of same-sex
23 marriage, and I know in great detail the reasons why she is
24 an opponent, and I know that she believes that it would be a
25 result of the deinstitutionalization of marriage. And it's

1 been an important body of work for me, her work as a
2 philosopher and as a scholar, but I cannot speak with
3 certainty about the exact form of words in this one book
4 listed here called *Parity of Sexes*, so let's take her off the
5 list as well.

6 **Q.** And you do understand that it's not the exact form of
7 words. It is the unmistakable -- what you referred to as an
8 unmistakable --

9 **A.** It is an extremely narrow and rigid category that you
10 are erecting here and which is your perfect right to do. So
11 let's take her off the list.

12 **Q.** I just want to be sure that we are taking her off the
13 list because you can't say --

14 **A.** An opponent of same-sex marriage, but let's take her off
15 the list.

16 **Q.** I want to be clear that the reason we are taking her off
17 the list is because you cannot say that in this particular
18 material that's cited here, that she unmistakably
19 communicates that permitting gay and lesbian marriage would
20 harm heterosexual marriage?

21 **A.** My answer is that I know with absolutely certainty that
22 she opposes gay marriage for the reason that would contribute
23 to the deinstitutionalization of marriage.

24 My concluding part of my answer is that I do not
25 know with absolutely certainty that those sentences appear in

1 the text called *Parity of the Sexes*, and so for that reason I
2 think we should remove her from the list.

3 **Q.** And you do understand, sir, that all I am doing is
4 asking you about the materials you listed; you understand
5 that, don't you?

6 **A.** Of course I do.

7 **Q.** Okay. Now, is there anybody else you would take off the
8 list?

9 **A.** I don't think so.

10 **Q.** Okay. Now, let me follow up something that you said
11 about Norval Glenn, just because we have got his article in
12 front of us, and that's Defendant's Exhibit 60.

13 You said he did state that permitting gay and
14 lesbian marriage was likely to result in the
15 deinstitutionalization of marriage. Did I understand you
16 correctly?

17 **A.** Well, if where you're going with this is to ask me to
18 show you in his article the word "deinstitutionalization," to
19 the best of my knowledge, the word -- I don't know whether
20 the word is there or not. I don't think it is.

21 But my testimony to you is that in substance that
22 is what he is saying.

23 **Q.** Well, let me ask you to look at some of what he actually
24 said and see whether you define it as being in substance what
25 you say.

1 And first let me just ask you a general point. As
2 you understand what Mr. Glenn is doing in this article, is he
3 trying to decide or trying to assert whether gay marriage is
4 or is not a good idea, or is he trying to talk about his
5 concerns about the debate about same-sex marriage?

6 **A.** My memory of the article is that it's the latter.

7 **Q.** Okay. So what he is really concerned about here is he
8 is concerned that the debate about same-sex marriage is
9 harming or could potentially harm the institution of
10 marriage, is that correct?

11 **A.** As you have said and as I have agreed, the -- I have not
12 read this article in several years. The reason it's cited in
13 the List of Materials Considered is because I excerpted a
14 specific paragraph from it in my report.

15 But my memory of the article is as you have stated,
16 is that it is more a discussion -- this is in keeping with a
17 lot of his scholarship. This is in more of a discussion of
18 an analysis of the debate, rather than an advocacy or a
19 polemical argument in favor of one side or the other.

20 **Q.** And, for example, one of the things he believes is that
21 legalizing same-sex marriage would have a small effect, at
22 most, on the percentage of fatherless children, correct, sir?

23 **A.** I don't recall where he says that. Could you point that
24 paragraph out?

25 **Q.** Sure. If you turn to page 28? And the second column, I

1 think it seventh line down, do you see where he says,

2 Legitimate -- legitimate --

3 **A.** I see where you are. I would like to read the sentence,
4 if I may.

5 **Q.** Making it legal.

6 "Making legal same-sex marriage would
7 have a small effect, at most, on the
8 percentage of fatherless children."

9 Do you see that?

10 **A.** I'm just reading --

11 **Q.** I understand, but do you see what I just read?

12 **A.** I do see it, yes, sir.

13 **Q.** Take at much time as you want to review the context and
14 when you have finished, let me know.

15 (Brief pause.)

16 **A.** I now understand that in this paragraph --

17 **Q.** Sir, sir, I'm not asking you -- when I say please let me
18 know, I'm not saying please let me know what you think the
19 context is. I'm just saying please let me know when you
20 finish reviewing the context because I have some questions.

21 **A.** I have finished.

22 **Q.** Now, do you agree that legalizing same-sex marriage
23 would have a small effect, at most, on the percentage of
24 fatherless children? Do you agree with that?

25 **A.** No, sir, I do not.

1 Q. Did you know prior to the time that I showed you this,
2 that that was an assertion that Professor Glenn made?

3 A. Of course I did, because I read the article.

4 Q. Okay.

5 A. Wouldn't it help to know what he is trying to say here?

6 Q. What I'm trying to do is focus on the words that --

7 A. So am I. His words.

8 Q. Not your interpretation or not what you think is
9 important.

10 A. Well, could we just read the paragraph?

11 Q. You will have an opportunity to read the whole
12 paragraph --

13 A. So we don't want to know what he is actually saying.
14 Okay.

15 Q. Well, one of the things he said immediately after that,
16 to complete the sentence, the entire sentence says:

17 "Legitimizing of same-sex marriage would
18 have a small effect, at most, on the
19 percentage of fatherless children and there
20 is no precedent for prohibiting a family
21 arrangement because it creates less than
22 ideal conditions for children."

23 A. It's not the point I was trying to make. I won't make
24 it. It's okay.

25 Q. That's the complete sentence, correct? That is the

1 complete sentence?

2 **A.** Yes, sir, that is the complete sentence.

3 **Q.** Okay. Now, do you agree that there is no precedent for
4 prohibiting a family arrangement because it creates less than
5 ideal conditions for children?

6 **A.** By "prohibiting," do you mean making it illegal? Do I
7 believe that there is a family form that has been made
8 illegal because it is less than ideal for children?

9 **Q.** When Professor Glenn writes:

10 "Legalizing same-sex marriage would have
11 a small effect, at most, on the percentage of
12 fatherless children and there is no precedent
13 for prohibiting a family arrangement because
14 it creates less than ideal conditions for
15 children."

16 Do you agree that with, with what he says here;
17 there is no precedent for prohibiting a family arrangement
18 because it creates less than ideal conditions for children?

19 **A.** Well, when I think about prohibition of the family form
20 of polygamy, I believe that one of the important reasons why
21 we have historically -- if you go back to the records, I
22 believe -- I'm not an expert in this area. This is not
23 something I have studied in detail. I don't know how
24 relevant it is to our conversation, but it is certainly a
25 family form that is present in the world, in societies, and

1 it is prohibited here in the United States.

2 And I believe, based on my imperfect study, that
3 one of the reasons that it is prohibited is that it is
4 considered less than ideal for children. And I believe the
5 historical record, the discussion of that, I'm fairly
6 confident would confirm that.

7 I think there are probably other examples of family
8 forms as well, but I would have to give that some thought.

9 **Q.** Speaking of polygamy, since you raised it, and I
10 understand that you say you're not an expert on it.

11 But are you aware of what reasons were stated for
12 prohibiting polygamy in the United States?

13 **A.** Well, I believe I just -- in answer to your previous
14 question, I just stated that it is not a field of expertise
15 of mine.

16 **Q.** Are you aware of any of the reasons that were stated for
17 prohibiting polygamy in the United States?

18 **A.** In the sense of having studied it and believing myself
19 to be competent to speak with expert knowledge on this
20 subject, the answer is no.

21 **Q.** Okay. Incidentally, you have testified about your three
22 rules of the game for marriage?

23 **A.** I don't think I used those terms today or yesterday.

24 **Q.** Well, you certainly said that that was the basis of a
25 lot of your views, have you not, sir?

1 **A.** Well, I think I would rather tell you in my words what
2 my views are than have you try to put them in my mouth.

3 **Q.** Well, sir, we are going to actually go to your words in
4 your deposition, but have you described the rules of the game
5 for marriage?

6 **A.** My understanding is that the phrase "rules of the game,"
7 I think I might have used it in my book and my report.

8 I'm not trying to make a quarrel over this, but I
9 think it was actually quoting -- I think I put it in quotes
10 and I think it was from Professor North. I think I was
11 citing an article from Professor North.

12 I'm not confident of that, but I think it's true.
13 I mean, if it's important to you to pin down this wording, I
14 would be happy to take a moment and try to make sure -- try
15 to give you complete clarity on that question.

16 **Q.** Well, I would like -- I would like to get --

17 **A.** See, I think the economist --

18 **Q.** We will get to your testimony. That is, first --

19 **A.** You make it sound like kind of a jocular thing, and I
20 think I was quoting -- what I meant was --

21 **Q.** I wasn't meaning to say jocular, sir. I really wasn't.
22 I was just trying to use the --

23 **A.** I'm going for clarity here.

24 **Q.** All right. You have said that the main rules of the
25 game when it comes to marriage are three, correct?

1 **A.** Let's try to find -- I just want to pin this down. If
2 you give me a moment, I would like to see if I'm right about
3 how I used the term.

4 **THE COURT:** There is a question pending,
5 Mr. Blankenhorn.

6 **THE WITNESS:** I'm trying to answer the question
7 about did I use the term "rules of the game."

8 **A.** That's the question I'm -- and I will stop my inquiry if
9 you wish me to. Do you wish me to?

10 **BY MR. BOIES**

11 **Q.** I wish you to answer the question.

12 **A.** You've asked me if I have used this term, rules of the
13 game, and I'm trying to answer it. And I'll stop my inquiry
14 if you wish me to.

15 **Q.** Sir, the question was: You have said that the main
16 rules of the game when it comes to marriage are three,
17 correct?

18 (Brief pause.)

19 **A.** Yes, I was correct. The -- the phrase "rules of the
20 game" comes from a Nobel Prize winning economist, who wrote a
21 paper that actually won him a Nobel Prize about the role of
22 institutions in society. That's the -- that's where that
23 phrase comes from, and that's why I put it in quotes, and
24 that's why it's footnoted.

25 **Q.** Sir, let me ask you the question. I'm not asking you

1 where it came from. I will. I'm not asking you whether you
2 put it in quotes or not.

3 What I'm asking you is whether it is your view --
4 whether it is your view that the main rules of the game when
5 it comes to marriage are three. Is that your view,
6 regardless of how you have come to it?

7 **A.** I believe marriage has three fundamental foundational
8 structures, and there has been times in my writings that I
9 have referred to them as rules.

10 **Q.** And when you refer to your writings where you have
11 referred to them as rules, would you include the report that
12 you submitted in this litigation?

13 **A.** Yes, sir.

14 **Q.** Okay. And you have said that your source of these three
15 rules are principally the body of scholarship on the
16 anthropology of human marriage, correct?

17 **A.** It's what I believe. I don't -- I will just -- would it
18 be okay to say that is what I believe? You said I have
19 stated it. I don't recall being asked that question by you
20 so far, but it is what I believe.

21 **Q.** Okay. And the scholars that you rely on for your belief
22 are who?

23 **A.** Would you like a comprehensive list?

24 **Q.** I would like the most important scholars that you rely
25 on, or the scholars that you rely on the most?

1 **A.** Okay. Well, if you give me a moment to compose my
2 thoughts on that, I will give you a brief list of principal
3 scholars. I'm going to take a moment to just make a note to
4 myself here as I try to collect my thoughts on that question.

5 (Brief pause.)

6 **A.** Would it be against the -- would it be against procedure
7 for me to consult a copy of my book to see the index?

8 **Q.** Let me ask you to do it this way. Putting on the record
9 that you haven't consulted your book or your index, and
10 putting on the record that you don't have a photographic
11 memory and you don't remember everything that's in there --

12 **A.** I think there would probably be 50 or 60 names on the
13 list.

14 **Q.** What I'm asking you is, as you sit here now as a
15 testifying expert, what are the scholars that you think most
16 important in your mind?

17 **A.** Okay. Well, that's a different question. I would say
18 that the --

19 **Q.** The most important scholars. Just to be clear, that you
20 rely on for your --

21 **A.** I understand.

22 **Q.** (Continuing) -- for your three rules?

23 **A.** I hear you.

24 **Q.** Okay.

25 **A.** The scholars that have influenced me most deeply on this

1 have been Bronislaw Malinowski and Meyer Fortes.

2 **Q.** Okay. Now, the three rules, why don't you state what
3 the three rules are?

4 **A.** Well, may I just say -- I will, but may I say, you call
5 them rules and you've quoted this Nobel Prize winning
6 economist --

7 **Q.** No, no, no, no, no. I did not quote the Nobel Prize
8 winning economist, sir.

9 **A.** That's where the phrase "rules of the game" that you
10 attributed to me came from. You said -- you have referred to
11 rules of the game, and I'm trying to point out that that
12 phrase comes from a Nobel Prize winning economist --

13 **Q.** Sir --

14 **A.** -- who's studying the role of institutions.

15 **Q.** Sir. Sir, I asked you whether it was your view, your
16 view, that the main rules of the game when it came to
17 marriage were three; do you recall me asking you that
18 question?

19 **A.** We have had a pretty extended colloquy, so I certainly
20 recall the question.

21 **Q.** Okay. And you answered that that was your view.

22 And I specifically said I'm not asking about what
23 any economist is saying, whether he won the Nobel Prize or
24 not. I'm not asking what anybody else is saying. I'm just
25 asking for your views.

1 And your view is that when it comes to marriage,
2 there are three main rules of the game.

3 And let me say I'm not suggesting that that's --
4 you said before that rules of the game was taking it too
5 lightly or something like that?

6 **A.** Yes, sir. That was exactly my suggestion.

7 **Q.** I don't mean it in that sense, okay?

8 Rules of the game can be a serious principle, okay.
9 I will accept that. I don't want to -- I don't want you to
10 get --

11 **A.** Then I will not belabor it one more moment.

12 **Q.** Okay, okay. And we could even use a different
13 phraseology, if that makes you more comfortable?

14 **A.** Absolutely understood. We can proceed. That's
15 absolutely the only point I was trying to make.

16 **Q.** And I accept that point, okay.

17 Now, what are the three main rules that you believe
18 define marriage?

19 **A.** Well, the first is what you might call the rule of
20 opposites. That was the man -- what is the customary
21 man/woman basis of marriage.

22 **Q.** And second?

23 **A.** Two, that is, marriage is two people.

24 **Q.** Okay. And the third?

25 **A.** It's a sexual relationship.

1 Q. Okay. Now, let me ask you about those three rules that
2 you used to define marriage.

3 First, with respect to the rule of opposite --

4 A. By the way, I want to just clarify. I'm not saying that
5 those three rules constitute a definition of marriage. What
6 I'm referring -- that was the term you just used in your
7 question or your statement.

8 What I'm saying is that those are the three
9 essential foundations of the marital institution or the three
10 essential structures of the marital institution, and that's
11 where we get into this concept of rules. So that's what I'm
12 trying to say.

13 Q. Okay. The three essential structures of the institution
14 of marriage, is that an acceptable terminology?

15 A. Yes, sir.

16 Q. Okay. Now, the first of these three essential
17 structures of the institution of marriage is the rule of
18 opposites, correct?

19 A. Yes, sir.

20 Q. Now, are you aware of marriages in other societies that
21 have not been limited to people of the opposite sex?

22 A. Well, I'm certainly aware that assertions have been made
23 in the popular and occasionally in the scholarly literature
24 that such cases exist. And I have not in-depth studied every
25 single example of such an assertion, but I have troubled

1 myself to try to familiarize myself to the best of my ability
2 with quite a number of such assertions, and I have views
3 about them, both collectively and individually, and I will
4 share them with you, if you wish.

5 **Q.** Let me just begin first by asking you whether, in your
6 view, there are any examples in history of marriages that do
7 not comply with your first essential structure of the
8 institution of marriage; that is, the rule of opposites?

9 **A.** Well, of course, we would have to recognize that in
10 Massachusetts now there are such marriages.

11 **Q.** Massachusetts and Iowa and Spain and Sweden and the
12 Netherlands and Canada.

13 **A.** I'm aware. I'm aware. I'm just trying to be clear. So
14 that I'm not -- sure, I understand that in the localities
15 that have in recent months and years adopted same-sex
16 marriage and that's the controversy and the set of
17 disagreements that bring us here today. I'm perfectly aware
18 of the context.

19 **Q.** Let me ask you a more pointed question.

20 Are you aware of any instances of marriage in any
21 society prior to the last 50 years that was inconsistent with
22 your first essential structure of the institution of
23 marriage; that is, the rule of opposites?

24 **A.** There are two or three or four what I would call hard
25 cases in the literature. And as I said, we could discuss

1 them, if you wish.

2 I would say that as a -- if you will allow me to
3 make the proviso that I'm aware that there are probably two
4 or three hard cases that require very specific understandings
5 of the context, I will say that -- generally speaking of
6 marriage as a global phenomenon, I would say that there are
7 either no or almost no exceptions to this principle that
8 marriage is between a man and a woman.

9 So my answer, just to be very precise, is that I
10 know that the scholars have some debates, about two or three
11 small instances in the field of anthropology.

12 So my answer to you, to be on the safe side for
13 me -- for me to be on the safe side, is to say that there are
14 no or almost no exceptions to this structural feature of
15 marriage.

16 **Q.** Now, you say in that answer "no or almost no." And as
17 you --

18 **A.** I'm trying to account for the two or three hard cases.

19 **Q.** And as you probably expect, that's what I'm going to ask
20 you about.

21 **A.** I thought you might.

22 **Q.** Now, my question is not whether there is a debate, but
23 whether you, as an expert, have an opinion as to whether or
24 not in societies, prior to the last 50 years, there have been
25 marriages that are inconsistent with your rule of opposites?

1 **A.** I mean, I say that that form of the question is quite a
2 different question because the issue here is -- that the
3 scholars have concerned themselves with is, are there
4 examples of marriage in societies that in some ways resemble,
5 are precursors, are -- prefigure the concept of same-sex
6 marriage? That's is a very different question. Those are
7 two very different questions.

8 So I wish you would clarify which of them you wish
9 me to answer.

10 **Q.** The question I want you to answer is whether in your
11 view there are any instances in societies, prior to the last
12 50 years, of marriages that are inconsistent with your rule
13 of opposites?

14 **A.** Okay. So it's the former. I will not seek to answer
15 the question, is there any marriages that could be considered
16 same-sex marriages.

17 (Laughter.)

18 **A.** It's not -- it's actually not a laughing matter to me,
19 Mr. Boies, because I'll tell you, this is a very important
20 topic and your -- it's two different questions. And you can
21 take your pick, I will answer either one.

22 **THE COURT:** Mr. Blankenhorn, Mr. Boies is not
23 laughing at you. He's amused at the back-and-forth, as I
24 think many of us who are observing this are.

25 Try again, Mr. Boies.

1 **BY MR. BOIES**

2 **Q.** I had tried to take my pick, Mr. Blankenhorn. That's
3 what I was trying to do when I asked you the question.

4 **A.** Okay. Let's go.

5 **Q.** My question is whether in your view in societies, prior
6 to the last 50 years, there are marriages that have been
7 inconsistent with your rule of opposites?

8 **A.** Okay. If you will just give me maybe 10 seconds to
9 compose my thoughts on this.

10 (Brief pause.)

11 **A.** My answer is that I can think of one instance of -- in a
12 human group that has been studied where some scholars believe
13 and others disagree, but it is a hard case and there are
14 arguments on both sides; but there has been one case where
15 there is some dispute or some scholarly argumentation over
16 whether or not there is an exception to this rule.

17 So I think there's been one that I think -- I'm not
18 saying that no other person has asserted something about some
19 other phenomenon, but there is one that I think is a
20 particularly significant one to me personally, and I have --
21 so I would say my view is that I know of one instance in a
22 society in which there may have been -- according to some
23 scholars, there may have been an exception to this rule.

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

25 **A.** There is a society in Africa -- it no longer happens

1 this way, but there was a period of time when the men of the
2 group lived in -- mostly in military barracks. They were a
3 warrior group and they had an institution whereby adult men
4 would have a sexual relationship with a young boy. And this
5 was, this -- the anthropologists would sometimes translate
6 the word -- they would sometimes translate the word as
7 marrying. The man would give gifts to the boy's parents and
8 they would -- they had a sexual relationship and the boy was
9 to address the man with a great term of respect and to serve
10 him his meals and to be kind of a servant for him, as well as
11 a sexual partner.

12 And then when the boy would outgrow that initiatory
13 period, that initiatory -- was no longer a part of that
14 homosexual relationship, he would often go on to marry, to
15 marry a woman with a conventional marriage ceremony, but
16 there was a part of this experience that was a ritualized --
17 it was surrounded by custom. It was recognized in law. And
18 there was a period of time in a highly kind of a warrior
19 society the males were -- as I say, they lived in kind of
20 military barracks and they would have a marriage-like
21 relationship with a -- with a male child. And this was not
22 viewed as deviant or -- wrong or shameful in any way and it
23 was an accepted part. The kinship groups accepted this and
24 thought it was just a normal part of life.

25 And so this -- Evans-Pritchard, the anthropologist

1 who wrote of this, he -- in translation, of course, he called
2 it "man-boy marriage." And so he used the term "marriage" in
3 his scholarship. And he said, "I use it advisedly," he said.
4 "I use it advisedly." This was a ceremonial thing and so
5 forth.

6 And Gilbert Herdt, a very prominent anthropologist,
7 has written a book called *Ritualized Homosexuality in Human*
8 *Societies*, and he talks of this.

9 And there are, perhaps, some other examples where
10 you have initiation periods of time in the life of young boys
11 where they have a homosexual relationship with an adult man
12 and it's a phase of life, but sometimes this is -- this has a
13 marriage-like feeling to it in terms of language, custom and
14 law. It tends to be a transitory period of life and usually
15 the man goes on then at a later point to marry a woman.

16 But this is an example that -- the principal
17 example that I think constitutes a hard case if we are
18 looking for -- if we scour all of human history and all of --
19 across all time, we could -- if we are searching out for an
20 exception, I think that's probably the most robust
21 ethnographic evidence, would be this one.

22 **Q.** And you said this occurred in Africa?

23 **A.** Yes, sir.

24 **Q.** Are you aware of that occurring in other cultures? Just
25 to pick one at random, ancient Greece?

1 **A.** That was not marriage. That was a different thing.

2 What I'm talking about here is something that
3 scholars actually have -- they sometimes -- it's a subject of
4 debate, but they sometimes think of this as a marriage-like
5 relationship.

6 There are other -- there are, to answer your
7 question, the prominent anthropologist Raymond Kelly has
8 examined a society, a very small society, that lives in Papua
9 New Guinea. They have a similar arrangement, whereby the
10 boys of the group for a period of time during their boyhood
11 have sexual relations with males. And they believe that --
12 they believe this -- these people believe that sexual
13 activity with -- a boy having sexual activity with a man
14 contributes to his vitality, his virility, his manliness.
15 They consider it an important part of the development of his
16 potential as a member of the tribe.

17 And this is an example that Raymond Kelly -- these
18 people -- this tribe is the Etoro people. And he has written
19 a masterful book called *Etoro Social Structure* that examines
20 this in considerable detail, although Kelly makes it clear
21 that this is not marriage. He does not say that this is a
22 marriage relationship. He understands it as part of Etoro's
23 social structure that has some kind of a mimicking quality
24 for a period of time, but he views it as essentially an
25 initiation right for the boys of the tribe that is of

1 somewhat short duration, usually two or three years. And he
2 is, I think, actually the finest scholar that is working in
3 this field.

4 Q. Now, what I want to focus on is marriage. In, as you
5 say, scouring all of human history to find examples, did you
6 happen to come across Professor Young, who was an expert for
7 the defense in this case?

8 A. Are you asking me if I know her?

9 Q. Yes.

10 A. I do know her.

11 Q. And did you read her testimony in this case?

12 A. No, sir, I did not.

13 Q. Have you ever talked to her about examples of marriage
14 in prior societies that were inconsistent with your rule of
15 opposites?

16 A. No, sir.

17 Q. You do believe that she is an expert in the field, do
18 you not?

19 A. The truth is that I know her personally, but I have -- I
20 am not familiar with her writings. And I would accept her
21 expert status based on her -- the very things that you
22 pointed out that I didn't have yesterday. She is affiliated
23 with a university. She teaches courses and so forth. So
24 that's really all I know about her status as an expert.

25 Q. Now, let me go on to your second rule, your second

1 essential structure of the institution of marriage, which was
2 the rule of two people.

3 **A.** Yes, sir.

4 **Q.** Now, you are obviously aware of a lot of examples of
5 marriages that are inconsistent with that rule, correct?

6 **A.** No, sir.

7 **Q.** You are not? What percentage of marriages over the last
8 300 years have been limited to two people in your judgment?

9 **A.** The way that I and many other scholars have looked at
10 this, the answer would be that almost every single marriage
11 has been limited to two people.

12 If I may just cut to the chase, I believe that
13 perhaps...

14 (Brief pause.)

15 **A.** I'm sorry. I thought you wanted me to pause for a
16 moment.

17 **Q.** No.

18 **A.** If you wish, Mr. Boies, I can just cut to the chase and
19 perhaps you are talking about the polygamy and polyandry.
20 Was that -- do you wish me to speak to the question of
21 whether that violates the rule of two?

22 **Q.** First of all, you recognize that over the last 300 years
23 there have been more polygamous marriages than there have
24 been marriages that have been limited to two people; would
25 you agree with that?

1 **A.** I don't know, but -- my strong suspicion would be that
2 that is erroneous, but I do not know.

3 **Q.** How many -- how many societies --

4 **A.** In fact, I would be extremely surprised if that were a
5 true statement.

6 If I may --

7 **Q.** Let me ask you some questions about that.

8 What societies are you aware of that prior to the
9 last hundred years had polygamy as a regular course?

10 **A.** The best scholarly estimate I have seen on that is
11 83 percent.

12 **Q.** Eighty-three percent of the countries?

13 **A.** Eighty-three percent of societies.

14 **Q.** Eighty-three percent of societies had polygamy as a
15 regular course?

16 **A.** No, sir.

17 **Q.** My question is --

18 **A.** I'm trying to be precise here.

19 **Q.** My question is: Prior to the last hundred years --

20 **A.** If you wish, we could just say in human history, because
21 the scholarship I'm citing that says 83 percent, he's just
22 trying to --

23 **Q.** Eighty-three percent of what? What is the numerator?
24 What's the --

25 **A.** Societies, societies. Eighty-three percent of societies

1 permit polygamy.

2 **Q.** Okay. Eighty-three percent of societies permit
3 polygamy?

4 **A.** That's a very different issue than how many marriages
5 are polygamous.

6 **Q.** I do understand that. Because in a society that permits
7 polygamy, you may still have marriages that only involve two
8 people, correct?

9 **A.** You may still have the overwhelming majority of
10 marriages -- and, in fact, that is the case -- that involve
11 two people.

12 **Q.** That's what I'm asking you, okay? And let's take the
13 most populous places, India and China.

14 Is it your judgment that the majority of marriages
15 in those two places prior to the last hundred years have been
16 limited to just two people as opposed to polygamous
17 marriages?

18 (Brief pause.)

19 **Q.** Do you understand the question?

20 **A.** Completely. And I'm struggling to help you understand
21 my answer which is -- my answer to your question is yes.

22 I think I could just save us some time if I would
23 be allowed to say another sentence or two.

24 **Q.** Go ahead. But try to keep it brief.

25 **A.** I will. I promise you.

1 Even in instances of a man engaging in polygamous
2 marriage, each marriage is separate. He -- one man marries
3 one woman. That's the way it works.

4 The scholars then have pointed out that in certain
5 societies, many societies, men of wealth and power then go on
6 to marry additional women. They do not marry as a group. It
7 is not a group marriage. It permits certain men that have
8 access to power to marry more than one woman. Each marriage
9 is a separate marriage of one man and one woman.

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

11 First, just as a background question, are you aware
12 of instances in which a man has actually married multiple
13 women at the same time?

14 **A.** Well, that would be -- the term that would be used is
15 poly- -- I mean, sorry, polyamory, a group.

16 To the best of my knowledge, that is -- I know it
17 is virtually non-present in human experience and, to the best
18 of my knowledge -- I could be mistaken on this because
19 history is long and there have been many people who have
20 lived on this earth, but I do not think there are examples of
21 group marriages in the human experience.

22 **Q.** And by group marriages -- I just want to be clear -- I'm
23 saying where a man marries multiple women at the same time.
24 You are not aware of any instances like that?

25 **A.** At the same moment? They all stand together, one man

1 and a bunch of women and they say, "You are all married now"?

2 **Q.** Two or more women.

3 **A.** I am -- since you are asking me, perhaps you found an
4 example. I am certainly not aware of one.

5 **Q.** Okay. Now, let me turn to what you are aware of, and
6 that is where a man marries more than one woman at different
7 points in time, so-called polygamy, or some situations you
8 are also aware of where a woman may marry more than one man,
9 correct?

10 **A.** Well, what that is called is --

11 **Q.** I'm not asking what it's called.

12 **A.** -- polyandry.

13 There's is an important clarification here because
14 in almost all known examples of polyandry, it's the woman who
15 marries sequentially two brothers, two people who are
16 brothers to one another. And there are cases where, because
17 the sex ratio is so skewed, that as a survival adaptation for
18 these very rare subgroups, it is permitted for a woman to
19 marry two males who are brothers to one another sequentially.

20 **Q.** Is it your testimony that the only instances that you
21 are aware of women marrying more than one man sequentially,
22 so that after marrying the second one she was married to two
23 people --

24 **A.** The brothers.

25 **Q.** -- is where they were brothers? Is that your testimony?

1 **A.** It's my testimony that --

2 **Q.** I'm just asking whether that's your testimony, sir.

3 **A.** I'm trying to answer your question. This is a
4 subject --

5 **Q.** This is a "yes" or "no" question.

6 **A.** If you are going to -- we are back to where we were
7 yesterday. If you are going to make me choose between those
8 two words, then I'm going to just say --

9 **Q.** Between what two words?

10 **A.** It's not a "yes" or "no" question. I'm answering the --
11 in the time we are arguing about this, I could have given you
12 my answer. My answer is that --

13 **Q.** Which question are you answering?

14 **A.** The best scholarship --

15 **Q.** Wait a minute. What question are you answering right
16 now?

17 **A.** It seemed to me that you said, Is it your testimony that
18 there are no examples of polyandrous marriages, other than
19 the woman marrying the two brothers. And I was seeking to
20 answer that question succinctly.

21 **Q.** Now, that question is actually the question I was asking
22 you.

23 **A.** Yes, sir.

24 **Q.** Now, can you answer that question "yes" or "no"? If you
25 can't, I'm going to move on because it's not that important.

1 **A.** Okay. Then let's move on because it does not permit a
2 "yes" or "no" answer.

3 **Q.** But I want -- but I want to know whether you are
4 prepared to answer "yes" or "no"?

5 **A.** I would give a lot if I could have 15 seconds to answer
6 the question.

7 **Q.** Go.

8 **A.** The best scholarship available shows that almost all
9 examples of polyandrous marriages involve a woman marrying
10 the two brothers. There are very rare exceptions to that,
11 that have been documented by the ethnographic literature.

12 In addition, polyandry as a human phenomenon is
13 extraordinarily rare in the human record. How did I do?

14 **Q.** That was good.

15 **A.** That was okay?

16 **Q.** That was okay.

17 **A.** Good.

18 **Q.** Now -- and the reason I didn't want to spend much time
19 on it is because I agree that's unusual.

20 Polygamy, however, as you say, was present in
21 83 percent of the societies. And in those cases --

22 **A.** A very minority -- as a minority family form.

23 **Q.** I'm going to ask you about that. And I might as well do
24 that now.

25 What percentages of marriages prior to the last

1 hundred years, were polygamous? That is, what percentage of
2 the people were in polygamous marriages as opposed to
3 marriages between just two people?

4 **A.** You know, I'm a little embarrassed to tell you, I don't
5 know.

6 **Q.** But approximately?

7 **A.** I honestly don't know. I know that my -- well, I'll
8 stop there. I don't know.

9 **Q.** Okay. Now, I want to pursue whether polygamous
10 marriages are consistent with your so-called rule of two.

11 As I understand it --

12 **A.** We are now down to so-called?

13 **Q.** Well, your rule of two. It just seems to me that --
14 well, never mind. I'll put it in the form of a question.

15 If you have a man who has five wives at the same
16 time --

17 **A.** He doesn't marry them at the same time.

18 **Q.** But he has them at the same time.

19 **A.** After he has married the fifth, he has five.

20 **Q.** Right.

21 **A.** After he has married one, he has one.

22 **Q.** After he's married two --

23 (Simultaneous colloquy.)

24 **A.** has two. That's how it works.

25 **Q.** And after he has married his fifth wife, assuming they

1 all continue to live and there has been no divorce, he has
2 five wives, right?

3 **A.** Yes, sir.

4 **Q.** Now, it's your testimony that that man with five wives
5 is consistent -- that marriage is consistent with what you
6 say is your rule of two; is that correct? That is a yes or
7 no answer.

8 **A.** Based on the findings of the anthropologists who've
9 actually studied this, yes, the answer to your question is
10 yes.

11 **Q.** And when you say based on the scholars that have studied
12 this, that's because you're simply repeating the things that
13 these scholars say?

14 **A.** Yes.

15 **Q.** You're just a transmitter of the findings of these
16 scholars, correct?

17 **A.** Well, you're putting words in my mouth now.

18 **Q.** No, sir.

19 **A.** Yes, sir.

20 **Q.** Well, let's look at your words in your deposition, page
21 300. Do you have your deposition up there?

22 **A.** I don't believe I do.

23 **Q.** It's in the first book, the first book Mr. Cooper gave.

24 **MR. COOPER:** I beg your pardon.

25 **THE COURT:** It's in the plaintiffs' binder.

1 **THE WITNESS:** I might be able to save us time by
2 saying that the substance of your comment is correct. I was
3 simply trying to report the view of some scholars.

4 It's the transmitter thing. I just was trying to
5 suggest that I was basing my arguments on -- on scholarship.
6 I'm not even saying there aren't scholars that have a
7 different point of view. I'm saying there are scholars,
8 respected scholars, who have made this argument based on
9 ethnographic research. And I've read them. And that's the
10 basis for my assertion. That's all.

11 **BY MR. BOIES:**

12 **Q.** I understand. I'm really just addressing whether I was
13 putting words in your mouth. And if you look at page 300,
14 lines 7 through 12. And you can read any other portion of
15 this that you want. But you have said that you are basing
16 your analysis on the work of highly-regarded scholars. And
17 then you say --

18 **A.** Oh, a gotcha moment. I used the word "I'm a transmitter
19 of findings of eminent scholars." Gotcha. Okay.

20 **Q.** That's not a gotcha. I'm just trying to --

21 **A.** I said "transmitter" seven months ago in a deposition.

22 **Q.** And what you meant there was that what you were doing
23 was, you weren't making these conclusions on your own. You
24 were simply repeating what these scholars had said. Is that
25 correct?

1 **A.** If I may say it in my own words?

2 **Q.** Well --

3 (Simultaneous colloquy.)

4 **A.** I was basing --

5 **Q.** Let me look at your own words on page 300, at lines 7 to
6 12:

7 "I'm simply repeating things that they
8 say. I can assure you, I'm not making any of
9 this up on my own. These are not my own
10 conclusions. I'm -- I'm a transmitter here
11 of findings of these eminent scholars."

12 Did you give that testimony at your deposition?

13 **A.** That's what I said at the deposition.

14 **Q.** Okay. Now, I want to be sure that I've got an answer to
15 my question. And if you did answer it, I apologize, sir.

16 But is it your judgment that a man who is married
17 at the same time, that is, he has married multiple wives
18 along the way --

19 **A.** Sequentially.

20 **Q.** Sequentially -- and he is now married to five women --

21 **A.** Each with a separate ceremony and a separate "I do."

22 **Q.** Yes. Is it your view that that man who has married one
23 wife, and then another wife, and then another wife, and then
24 another wife, and then another wife, and now has five wives,
25 and they are all his wives at the same time, that that

1 marriage is consistent with your rule of two?

2 And that is a yes or no question.

3 **A.** I concur with Bronislaw Malinowski, and others, who say
4 that that is consistent with the two rule of marriage.

5 **Q.** Okay. Now, let me go on to your third essential
6 structure of the institution of marriage. And that is sex.

7 **A.** That's a good subject.

8 **Q.** It is. And I don't want to fall into the trap of making
9 sex boring.

10 (Laughter)

11 **A.** Maybe together we can do that.

12 (Laughter)

13 No insinuation.

14 (Laughter)

15 **Q.** My question was going to be, and is now, whether you are
16 aware of instances in which marriage -- marriages are in --
17 they are inconsistent with your rule of sex?

18 **A.** I'm sorry. You were saying the couple is married and
19 they do not have sexual intercourse, am I aware of such
20 marriages?

21 **Q.** That actually wasn't my question, but why don't you
22 answer that question. That's really easy, right? The answer
23 to that is yes, correct?

24 **A.** I -- I was going to answer no. But maybe I'm
25 misunderstanding the nature of your question.

1 Q. All right. You --

2 A. The presumption, the presumption of sex is one of the
3 foundational elements of marriage. And failure to consummate
4 the marriage through sexual intercourse, in the overwhelming
5 majority in societies, in both law and custom, is grounds for
6 divorce.

7 Q. Let me -- let me --

8 A. That's why we have terms like the "marriage bed,"
9 "culminating the marriage." That's what happens. The couple
10 gets married and then they have sexual intercourse.

11 Q. So it's your testimony that you're not aware of any
12 married couples who don't have sex?

13 A. Well, here we go. Going to make it boring again.

14 There are some married couples in the world today
15 who have never had sexual intercourse? Oh, my gosh, well, I
16 suppose, just thinking hypothetically, I'm trying to think.

17 Q. If you're not aware of them, I'm not asking you to
18 hypothesize.

19 A. There could be an example, say, of an incarcerated man
20 who marries while he's incarceration. It could be true that
21 the system he's in is one of the minority of systems that
22 does not produce -- allow for conjugal visits, and he will
23 not be able to consummate the sexual relationship with his
24 wife until he is released from prison.

25 And during the time that he is in prison and

1 married, and unable to have a conjugal visit, I guess it's
2 possible or likely that that man will not have had sexual
3 intercourse with his wife, by virtue of incarceration. And
4 he will have to wait until after he is released or he will
5 have to wait until the period of a conjugal visit. That
6 would be an example.

7 Or you might have examples of a husband and wife
8 who simply don't like sex; they don't want to have sex; it's
9 not of interest to them, or they don't hold it as a valuable
10 component of anything in life. And so they may wish to get
11 married for other reasons having nothing to do with sex. And
12 so they may just be one of these couples -- I've never met
13 one. I'm not aware of it being, at all, a pattern in humans.
14 In fact, I believe the pattern is entirely in the opposite
15 direction. But, hypothetically, could there be such a case?
16 I suppose there could.

17 **Q.** Well, sir, you know perfectly well that these are not
18 sort of just hypothetical cases. Correct, sir?

19 **A.** No, sir.

20 **Q.** You don't? You don't? Like this example of the
21 incarcerated prisoner, you know perfectly well that that's a
22 real example from a real court case; don't you, sir?

23 **A.** No, sir, I do not.

24 **Q.** You don't?

25 **A.** Why would you try to put words in my mouth of that

1 nature?

2 **Q.** Well, because it is my understanding that you have
3 previously recognized that -- this very specific example of
4 where the United States Supreme Court held that you could not
5 deprive somebody of the right to marry merely because they
6 were incarcerated and could not have sex.

7 And I thought that you had talked about that. And
8 if you tell me that that's not so, and I can't find --

9 **A.** To the best of my ability -- I mean, to the best of my
10 recollection, I'm telling you that that is not so.

11 **Q.** So you are not aware of that case, at all?

12 **A.** No, sir. Not -- no.

13 **Q.** Okay.

14 **A.** I'm not saying that in the course of a lifetime somebody
15 has never said anything to me about it. I just have no
16 recollection of it.

17 **Q.** Okay. So other -- and I don't want you to hypothesize.

18 Other than hypothetical examples --

19 **A.** I have talked about issues of -- I have thought about
20 and in conversation with others talked about the issue of
21 prisoners who marry. I have talked about that.

22 But I am not aware -- I'm not a student of -- I
23 don't know what year the court case -- I'm not even aware --

24 **Q.** Okay.

25 **A.** -- this thing that you're talking about.

1 Q. All right. Let me approach it this way.

2 I'm not asking you to hypothesize. I'm just asking
3 you whether you are aware of any examples of marriages that
4 are inconsistent with your rule of sex. If you are not aware
5 of them, I don't want you to hypothesize or try to think up
6 what might exist.

7 Just, are you aware of any examples or not?

8 A. No, sir.

9 Q. Okay. Let me --

10 A. May I clarify? You're asking me am I aware of an
11 individual marriage case, an individual married couple that
12 has not consummated their marriage through sexual
13 intercourse? Is that -- is that your question?

14 Q. No. My -- my question was whether you were aware of any
15 examples of marriages that were inconsistent with your rule
16 of sex?

17 A. Rule of sex --

18 Q. Now -- now --

19 A. I was just asking if you were asking me of an individual
20 couple, did I know of an individual couple who had not
21 consummated their marriage through sexual intercourse.

22 Q. Let me approach it this way, okay.

23 A. I'm not aware of such a couple.

24 Q. Let me approach it this way, because this has gone on
25 long enough where I have found the deposition that I thought

1 existed.

2 Would you turn to page 258 of your deposition. And
3 beginning at line 13:

4 "But in any society, if a man and woman
5 want to marry and not have sex at all, and
6 neither one seek divorce, they're free to do
7 that, right?

8 **"ANSWER:** Well, you know, the law on
9 this has changed in recent decades. And now,
10 in recent years, there has been a growing
11 permission on the part of courts to accept
12 married couples who cannot have sexual
13 intercourse. For example, when one spouse is
14 in prison."

15 Do you see that, sir?

16 **A.** That's exactly what I told you in my answer.

17 **Q.** This doesn't say it's hypothetical, does it, sir?
18 You're not talking hypothetical --

19 **A.** I did not use -- I don't think I used the word
20 "hypothetical" in my answer. I said in cases where a
21 prisoner is unable to consummate his marriage, he would have
22 to depend upon getting out of prison to do so, or conjugal
23 visits. I think that's what I said.

24 And you said, oh, no, there's a specific court
25 case. And I said, I'm not aware of a specific court case.

1 Which I'm not.

2 I do know that the courts allow, I believe, as a
3 matter of being a generally-informed person, that courts
4 allow -- many courts -- I don't know. Every court? I don't
5 know. Many courts allow prisoners to marry.

6 And it's a topic of interest to me as a person
7 interested in marriage. And I have the level of knowledge as
8 adumbrated in this definition. Which is not a deep one, but
9 I know that prisoners are allowed to marry. And I know that
10 in order to consummate the marriage, they would have to wait
11 until they get out of prison, or if they are in a system that
12 allows conjugal visits.

13 That's all I know. I'm not aware of specific court
14 cases that have or haven't done this. I know it's been a
15 tendency on the part of the courts, or at least some courts,
16 to -- to allow prisoners to marry.

17 It's not my area of expertise. I just -- that's my
18 level of knowledge.

19 **Q.** But it is clear, is it not, that the growing permission
20 on the part of courts to accept married couples who cannot
21 have sexual intercourse, for example, when one spouse is in
22 prison, is something that exists today. It's not a
23 hypothetical situation, correct, sir?

24 **A.** I don't think I ever said it's a hypothetical.

25 **Q.** I'm not asking whether you ever said it or not. I think

1 the record will show whatever it shows.

2 All I'm asking you now is --

3 **A.** If you're asking me if there are prisoners who can
4 marry, the answer, to my best knowledge, is yes.

5 **Q.** Even when they cannot have sexual intercourse, correct?

6 **A.** Until they get out of prison.

7 **Q.** Well, if they are in for life, they never get out of
8 prison, right?

9 **A.** Well, if they're in life and -- they're in prison for
10 life, and they're in a system that does not allow any
11 conjugal visits, I would have to consult experts to find out
12 if there is a human being in the country who is in such a
13 situation. He's in prison for life, he's married, and he is
14 not in a system in which any conjugal visitation is allowed.

15 And if there -- I don't know whether there is such
16 a person. But if there were, then it would be true that that
17 person would be a married person who cannot consummate his
18 marriage through sexual intercourse. That's my answer to
19 your question.

20 **Q.** And at your deposition on November 3, 2009, you say:

21 "The law on this has changed in recent
22 decades. And now, in recent years, there has
23 been a growing permission on the part of
24 courts to accept married couples who cannot
25 have sexual intercourse. For example, when

1 one spouse is in prison."

2 Correct, that's what you said on November 3, 2009,
3 correct? That is a --

4 **A.** Yes. Yes. I'm not looking at a transcript now. But,
5 yes, that's what I said.

6 **Q.** And it is your testimony that you have never looked at
7 any court cases that address whether or not prisoners can
8 marry, correct?

9 **A.** To the very best of my recollection and memory, I have
10 never consulted, by reading anything, a court document that
11 is related to the topic that we are discussing. I'm not
12 saying I never have. I have been reading things for a long
13 time. But, to the best of my knowledge, I have never read a
14 court document that is specifically focused on this topic.
15 And if I ever have, then I have forgotten it. But I don't
16 really, honestly, don't think I have.

17 I have had conversations with people who are
18 lawyers about the -- I don't even know at which level this
19 thing gets decided. But I know that there's a tendency to
20 allow more freedom, I believe -- I believe that there is a
21 tendency to allow prisoners more freedom than was heretofore
22 the case to marry. And that's about as far as I was trying
23 to go in my deposition statement.

24 **Q.** What I'm focusing on now, sir, is, in your study of
25 marriage, have you come across cases from the United States

1 Supreme Court that talk about marriage as a fundamental right
2 of all people?

3 Have you come across any cases that discuss that?
4 That is a yes or no question.

5 **A.** By "come across" do you mean have I read -- read
6 something that the courts have written?

7 **Q.** Let's start with that. Have you read any Supreme Court
8 opinions that discuss marriage as a fundamental right? Just
9 yes or no.

10 **A.** Well, I --

11 **Q.** Or "I don't remember."

12 **A.** To the best of my knowledge, the answer is no.

13 **Q.** Okay. Now, has any person summarized for you the
14 holdings of the United States Supreme Court in cases that
15 discuss the fundamental right to marry?

16 **A.** I believe the answer to that is yes, because if someone,
17 you or someone were to ask me is it my understanding that the
18 Supreme Court has stated -- at some point in time, at any
19 point in time, has used the term "fundamental right to marry"
20 and has articulated a fundamental right to marry, my answer
21 would be that I believe -- I believe that the Supreme Court
22 has stated such a right.

23 And it would be my -- I would not be surprised to
24 learn that were true. I would be happy to learn that it's
25 true. But I'm not basing it on sure knowledge of having read

1 any document.

2 **Q.** I'm not asking you whether you would be surprised by it.
3 I'm just trying to ask you whether you are aware of it and
4 whether you considered that in your work. That's all I was
5 trying to get at.

6 And having talked about it this far, does it
7 refresh your recollection that somebody has talked to you
8 about the United States Supreme Court holding that prisoners
9 had a fundamental right to marry, even if they were not able
10 to have sex?

11 Does that refresh your recollection that you have
12 either been told that or read that?

13 **A.** No, sir. I --

14 **Q.** Okay.

15 **A.** -- to the best of my knowledge, have never been told
16 that or ever read that.

17 **Q.** Okay.

18 **A.** To the best of my recollection.

19 **Q.** Okay. Let me turn to another subject.

20 And let me ask you to look at tab 8.

21 (Mr. Cooper confers with Mr. Boies.)

22 **MR. BOIES:** Absolutely. Absolutely.

23 **THE COURT:** All right. Can we resume at five
24 minutes of the hour?

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

1 **THE COURT:** All right.

2 (Recess taken from 10:40 to 10:58 a.m.)

3 **THE COURT:** Mr. Boies, you may continue.

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

5 **BY MR. BOIES:**

6 **Q.** Would you turn to tab 8 in the binder that we gave you
7 this morning.

8 **A.** Yes.

9 **Q.** This is Plaintiffs' Exhibit 2879. And it's titled, "The
10 Marriage Movement. A Statement of principles." And you're
11 familiar with this, are you not, sir?

12 **A.** Yes, sir.

13 **Q.** And this was put out by the Institute for American
14 Values; is that correct?

15 **A.** It was put out by three organizations; one of which was
16 the Institute for American Values.

17 **Q.** And did you review this before it was put out?

18 **A.** Yes, sir.

19 **Q.** And did you agree with it?

20 **A.** Well, if -- if I had -- if it had been my own writing, I
21 would have -- the words would not have been the same. But I
22 supported -- I supported the overall thrust of the document,
23 and felt that it was a valuable contribution to the public
24 discussion.

25 **Q.** And one of the things the document talks about is how

1 marriage is in crisis; is that correct?

2 **A.** I don't recall if it used the words "crisis," but it
3 wouldn't surprise me to find that it did.

4 **Q.** If you turn to page 5.

5 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
6 Exhibit 2879.

7 **MR. COOPER:** No objection, Your Honor.

8 **THE COURT:** Very well. 2879 is admitted.

9 (Plaintiffs' Exhibit 2879 received in evidence.)

10 **THE WITNESS:** Yes, okay, it does use the word
11 "crisis."

12 **BY MR. BOIES:**

13 **Q.** And it discusses why marriage has weakened, correct,
14 sir?

15 **A.** Yes, sir. I mean, I'm assuming it does. I -- I believe
16 it -- my recollection is that it does.

17 **Q.** Yes. And your recollection is correct.

18 And the reasons that are given why marriage is
19 weakened have nothing to do with homosexuality or same-sex
20 marriage, correct?

21 **A.** The reasons given in this document?

22 **Q.** Yes.

23 **A.** From the year 2000?

24 **Q.** Yes.

25 **A.** To the best of my recollection, we did not include

1 anything about homosexuality or the then not very
2 significant -- not very -- you know, very nascent gay
3 marriage legal cases. I'm not confident of this but, to the
4 best of my knowledge, this document does not make any
5 extensive or perhaps even no references to those topics.

6 **Q.** Okay.

7 **A.** That's based on my memory.

8 **Q.** Okay. Now, let me ask you to turn to page 8. And
9 there's a heading that says, "What is Marriage? Six
10 Dimensions." And it says, "Marriage Has At Least Six
11 Important Dimensions."

12 Do you see that?

13 **A.** Yes, sir.

14 **Q.** And do you agree with that?

15 **A.** Marriage has at least six important dimensions?

16 **Q.** Yes.

17 **A.** Oh, my goodness. I think I would have to take a moment
18 to review what this group of scholars wrote.

19 I was a signatory of this document, and so I read
20 it and thought it was a valuable and positive contribution.
21 But if you want me to -- I'm not quite sure if you -- if you
22 want me to, on a word-by-word basis, say I agree with every
23 single sentence in the following few paragraphs, I'm afraid
24 you're going to have to give me a moment to read them and
25 refresh my memory of what the actual wording of each one of

1 them is.

2 **Q.** My present question -- if you have to read it, read it.
3 But my present question was simply whether you, as a
4 signatory to this document, agree that marriage has at least
5 six important dimensions?

6 **A.** What I will say is that I agree that this is a -- for
7 the purposes of this document, for what this document was
8 trying to do, I believe that this is a useful way of
9 describing marriage's dimensions.

10 **Q.** The first of these six important dimensions is that
11 "Marriage is a legal contract." Do you see that?

12 **A.** Yes, sir.

13 **Q.** And taking the current subject of gay and heterosexual
14 marriage, whether you have a heterosexual couple or a gay or
15 lesbian couple, the dimension of marriage as a legal contract
16 would be the same, correct?

17 **A.** Yes, sir.

18 **Q.** And the second dimension --

19 **A.** You're saying that gay -- you're saying that same-sex
20 marriage would be a legal contract like opposite-sex
21 marriage?

22 **Q.** Yes.

23 **A.** Yes, sir. Yes, sir.

24 **Q.** And the second important dimension that's listed here
25 is, "Marriage is a financial partnership." Do you see that?

1 A. That would be the same, as well.

2 Q. And that would be the same for heterosexual couples and
3 homosexual couples, correct?

4 A. Yes, sir.

5 Q. And the next important dimension of marriage that's
6 listed here is, "Marriage is a sacred promise." And that,
7 again, would be the same for gay and lesbian couples as for
8 heterosexual couples, correct?

9 A. As would be the same in "sexual union" and "personal
10 bond."

11 Q. Which are the next two?

12 A. Yes, sir.

13 Q. "Marriage is a sexual union" was the fourth important
14 dimension. And "Marriage is a personal bond" was the fifth
15 important dimension. Correct?

16 A. Yes, sir.

17 Q. And the sixth important dimension is, "Marriage is a
18 family-making bond," correct?

19 A. Yes, sir.

20 Q. And, obviously, a heterosexual marriage can -- and by
21 "family-making bond," let me just ask, does this mean it's a
22 family-making bond even when there are only two people, or
23 does it mean that this is a way of establishing children?

24 A. I just -- I -- I'm afraid -- I'm sorry. Could you
25 repeat the question.

1 Q. Sure. Let me break it up this way. The sixth important
2 dimension is, "Marriage is a family-making bond."

3 Now, when two people are married, they become a
4 family, correct?

5 A. Yes, sir.

6 Q. And that is true for gay and lesbian couples on the one
7 hand, and --

8 A. Opposite.

9 Q. -- heterosexual couples on the other, right?

10 A. Yes, sir.

11 Q. And both gay and lesbian couples on the one hand and
12 opposite sex couples on the other can raise children within
13 that family bond, correct?

14 A. Can both opposite-sex couples and same-sex couples raise
15 children? Yes, sir.

16 Q. Okay. And in that connection, let me ask you --

17 A. The important word there is the verb "raise."

18 Q. Yes.

19 A. Yes.

20 Q. In that connection, let me ask you to turn to tab 9.
21 This is Plaintiffs' Exhibit 2898. It is an article in the
22 *Social Science Quarterly* by Laura Langbein and Mark Yost,
23 entitled "Same-Sex Marriage and Negative Externalities."

24 Do you see that?

25 A. I am looking at this article for the first time, I

1 believe, yes.

2 **Q.** So you have not seen this before?

3 **A.** To the best of my knowledge, I have not.

4 **Q.** Do you know either of these authors?

5 **A.** No, sir.

6 **Q.** So you're not familiar with either of these two authors
7 or their work?

8 **A.** I can't say that I've never read anything by them. But
9 sitting here right now, they are not -- those names are not
10 familiar to me.

11 **MR. BOIES:** Your Honor, we would ask you take
12 judicial notice of Plaintiffs' Exhibit 2898.

13 **THE COURT:** Very well.

14 **MR. COOPER:** Your Honor, we have no objection to
15 the request made by Mr. Boies. I would note, this is a
16 document we haven't seen until, I think, this morning. But
17 we have no objection to you taking judicial notice of it.

18 **THE COURT:** Fine.

19 **BY MR. BOIES:**

20 **Q.** Now, on the first page there is a summary, and there are
21 headings: "Objectives," "Methods," "Results," and
22 "Conclusions."

23 Do you see those headings?

24 **A.** Yes, sir.

25 **Q.** Now, after "Conclusions" the article states as the

1 conclusions:

2 "The argument that same-sex marriage
3 poses a negative externality on society
4 cannot be rationally held. Although many
5 might believe that this conclusion is so
6 obvious that it does not warrant testing,
7 many politicians use this argument as a
8 fact-based rationale to legitimize bans on
9 same-sex marriage."

10 Now, you have said that you don't recall having
11 seen this article before. But are you aware of scholars who
12 have asserted, in peer-reviewed articles, that the argument
13 that same-sex marriage poses a negative externality on
14 society cannot be rationally held?

15 **A.** Yes. And I'm also aware of many arguing that it's so
16 obvious that it need not warrant -- it need not be tested.

17 **Q.** So you're aware of --

18 **A.** In other words, it's a self-evident beginning
19 proposition for them. They think that it's so self-evident
20 that anybody who has an opposing point of view is not a
21 rational person.

22 **Q.** And --

23 **A.** Many articles say this.

24 **Q.** Many articles say this?

25 **A.** Yes, sir.

1 Q. Incidentally, you talked about how the issues that you
2 are addressing are issues that are addressed by sociologists,
3 anthropologists, and psychologists, and other scholars.

4 Have you looked at what associations of those
5 scholars have said about same-sex marriage?

6 A. Yes, sir. A number of them I have looked at, yes, sir.
7 I don't know that I've necessarily looked at every one, but
8 I've certainly seen a number of them.

9 Q. Do you know, for example -- I'm going to hand out
10 another binder.

11 A. Thank you.

12 Q. Do you know, for example, what position the American
13 Psychoanalytic Association takes with respect to same-sex
14 marriage?

15 A. My recollection is that their corporate kind of lobbying
16 body has endorsed it.

17 Q. When you say their lobbying body --

18 A. Or their -- the leaders of their association, let's put
19 it that way. The people that speak for them as -- as -- as a
20 professional scholarly association, their leaders.

21 Q. Let me ask you to look at tab 3 of this new binder that
22 I just handed you, where you have a publication of the
23 American Psychoanalytic Association. Do you see that?

24 A. I think my tab 3 says "Lesbian Mothers, Gay Fathers and
25 Their Children: A Review." Unless I'm --

1 Q. We must have a different -- you should have -- you
2 should have Plaintiffs' Exhibit 760 there.

3 A. Am I in the wrong book? It's a different book.

4 Q. The binder you were just given, the small binder you
5 were just given?

6 A. 3.

7 Q. Tab 3?

8 A. Here it is. He is.

9 Q. The American Psychoanalytic Association publication,
10 Plaintiffs' Exhibit 760 --

11 A. A position paper.

12 Q. Yes. And it says the American Psychoanalytic
13 Association, in 1977 [sic], endorsed the following marriage
14 resolution.

15 Do you see that?

16 A. Yes, sir.

17 Q. And it states:

18 "Because marriage is a basic human right
19 and an individual personal choice, RESOLVED,
20 the State should not interfere with
21 same-gender couples who choose to marry and
22 share fully and equally in the rights,
23 responsibilities, and commitment of civil
24 marriage."

25 Were you aware that in 1997, the American

1 Psychoanalytic Association had adopted that resolution?

2 **A.** Yes, sir, I believe I have -- I believe I have read this
3 one, or read excerpts from this position statement.

4 As I mentioned, there are many such statements.

5 And I'm -- I might be able to save us time by saying, I
6 perfectly understand that many scholarly associations, the
7 leadership groups, as a policy matter have endorsed same-sex
8 marriage.

9 **Q.** Now, you say "as a policy matter."

10 Let me ask you to look at page 4 of this exhibit,
11 where a number of references are listed. And are you aware
12 of these references? Have you read these materials?

13 **A.** Well, I've read a number of them.

14 **Q.** Okay.

15 **A.** Let me see if I've read every single one.

16 No, sir, I have not read all of them.

17 **Q.** Why don't you just identify the ones you've not read.

18 **A.** Bradford. Chan. DiPlacido. Falkner. Green, I don't
19 know. Greenan. King. Herek.

20 I've read Gilbert Herdt, but I can't recall if I've
21 read this article or not by Gilbert Herdt and his colleague
22 Kertzer.

23 House, I don't believe I've read. Kertzner.

24 Kiecolt-Glaser, I think I have read. I'm pretty sure I've
25 actually cited it somewhere, but I can't speak with certainty

1 on that.

2 Kim, no, I don't think. Although, I'm not sure.

3 Meyer, I don't think so. Morris, I don't think so.

4 Patterson, I think so, but I -- I've certainly read

5 Charlotte Patterson's work on this subject over the years.

6 She has written many articles. And I believe I've read this

7 one, but I'm not 100 percent confident that I have.

8 Peplau, I don't think so. And Williams, I don't

9 think so. Williams, I'm confident, I have not read.

10 **Q.** So you did read the Waite and Gallagher article?

11 **A.** It's a book.

12 **Q.** Book. And you think you've read the Patterson article.

13 You're pretty sure you read the Kiecolt-Glaser

14 article. And you read the two articles by Ama- -- is it --

15 **A.** Amato, Paul Amato.

16 **Q.** Amato. The two articles by Amato.

17 And the article -- or book, I guess it is, by

18 Blumstein and Schwartz. Is that correct?

19 **A.** That's my best -- that's the best answer I can give you

20 right now.

21 **Q.** Okay. Let me just, while I'm here, the American

22 Psychological Association has also adopted a resolution in

23 favor of gay marriage, correct, sir?

24 **A.** Yes, sir.

25 **Q.** And let me ask you to look at tab 4 in this binder. And

1 this is Exhibit 765.

2 Have you seen this document before?

3 **THE COURT:** I believe this is in evidence. Is it
4 not?

5 **MR. BOIES:** It is, Your Honor. It is, Your Honor.

6 **THE WITNESS:** Mr. Boies, I'm fairly confident that
7 I read it when it came out, but I can't absolutely give you
8 a -- it's my best -- I certainly know of the endorsement.
9 And I have certainly read of the endorsement.

10 And I know that I've read excerpts. And I believe
11 I read the document in its entirety when it came out, but I
12 cannot say that with absolute certainty.

13 **BY MR. BOIES:**

14 **Q.** Now, on the third and fourth and fifth pages of the
15 document, the last three pages of the document, there are a
16 series of references. Do you see that?

17 **A.** Yes, sir.

18 **Q.** Now, this is -- this is a very long list. And by
19 glancing at it, can you tell me whether you have read most of
20 these or not read most of these?

21 **A.** By "most" do you mean more than 50 percent?

22 **Q.** Yes. I'm just trying to figure out, is it faster to ask
23 you those that you have read or those you have not read?
24 Which is the faster way to go through this?

25 **A.** Just give me one moment. I think that I have not read

1 at least 51 percent of these documents.

2 **Q.** Okay. Then why don't you just tell me the ones you have
3 read.

4 **A.** The Anthropological Association statement.

5 Again, I think -- well, that's a different
6 Blumstein and Schwartz. I don't know if I've read that or
7 not.

8 Most of these I have not read. Some of them are
9 duplicative of the other, the previous list that we were
10 going through.

11 **THE COURT:** Is the question --

12 **THE WITNESS:** Eskridge.

13 **THE COURT:** -- whether he has read or not read?

14 **MR. BOIES:** Read.

15 **THE COURT:** Read.

16 **MR. BOIES:** Which are the ones that has he read.

17 **THE WITNESS:** I see. Okay.

18 American Anthropological Association, Eskridge,
19 Goodridge. I think Johnson. I think -- I think those few
20 are it, on this list.

21 **BY MR. BOIES:**

22 **Q.** Okay. Okay. So that would -- and you said Eskridge.
23 Did you read both of the Eskridge articles that are here?

24 **A.** No, sir. Just the Equality Practice. That was his
25 book.

1 Q. So it would be --

2 A. I'm sorry. That -- I'm sorry. It was a -- a law review
3 article.

4 Q. So you would have -- you would have read --

5 A. I've also read his books, but that's a different --
6 what's listed here is "Equality Practice," as a law review
7 article.

8 Q. So you would have read four or perhaps five of the 40 or
9 41 references that are listed here, correct?

10 A. I think that's fair, yes, sir.

11 Q. Let me ask you to turn to tab 10 in the first binder
12 that I gave you this morning. Not the -- not the recent
13 little binder, but the first binder I gave you this morning.
14 Plaintiffs' Exhibit 2899.

15 A. I'm sorry --

16 MR. BOIES: May I approach, Your Honor?

17 THE COURT: Sure.

18 THE WITNESS: I'm just having a hard time finding
19 out the binder that I am to look in. One of these?

20 BY MR. BOIES:

21 Q. It's this binder here.

22 A. Okay. Goes up to 15.

23 Q. Tab 10 in that binder.

24 A. 10.

25 Q. This is Plaintiffs' Exhibit 2899. It's entitled "Will

1 Providing Marriage Rights to Same-Sex Couples Undermine
2 Heterosexual Marriage?"

3 Do you see that?

4 **A.** I do, yes, sir.

5 **Q.** Is this a document that you reviewed?

6 **A.** Uhm, it's not listed on my documents included, but it --
7 Badgett is someone whose articles I have read. I don't know
8 whether or not I have specifically reviewed this article.

9 **MR. BOIES:** Your Honor, I would offer Plaintiffs'
10 Exhibit 2899.

11 **MR. COOPER:** No objection to the Court taking
12 judicial notice of it.

13 **THE COURT:** Very well.

14 **THE WITNESS:** She's a prominent proponent of
15 same-sex marriage, Ms. Badgett. So I've read -- I know I've
16 read a number of her things.

17 **BY MR. BOIES:**

18 **Q.** She is a well-regarded scholar, is she not?

19 **A.** I don't know. I don't know -- know -- know her -- I'm
20 perfectly happy to take your word for that. I am sure she
21 is.

22 **Q.** You don't know that one way or the other?

23 **A.** I'm just saying that I've read several of her articles,
24 in an attempt to acquaint myself with her work, and I
25 appreciate the integrity of those articles. I don't know

1 quite what else to say. She's obviously taking a very --
2 position quite opposite to my own, on most every possible
3 question. But I respect her as a thinker.

4 **THE COURT:** You have your answer.

5 **BY MR. BOIES:**

6 **Q.** Let me ask you to look at tab 11 in the same binder.

7 **A.** Yes, sir.

8 **Q.** This is Defendants' Exhibit 2. And I don't know whether
9 this is in evidence or not.

10 **A.** I think it's -- I think it's on my list, Mr. Boies. The
11 Amato article?

12 **Q.** Yes.

13 **MR. COOPER:** To whatever extent it is not, we have
14 no objection, Your Honor.

15 **THE COURT:** Is that a request to move it in?

16 **MR. BOIES:** It is, Your Honor.

17 **THE COURT:** All right.

18 (Defendants' Exhibit 2 received in evidence.)

19 **BY MR. BOIES:**

20 **Q.** And this is a -- an article in which Amato investigates
21 how children in households with both biological parents
22 differ from children in households with only one biological
23 parent, correct?

24 **A.** Well, I see that you've read that from a summary that
25 was written by someone else.

1 Q. Let me ask --

2 A. What I --

3 (Simultaneous colloquy.)

4 A. My understanding is that he is writing an article on the
5 impact of family formation change, on the cognitive, social,
6 and emotional well-being of the next generation.

7 Q. That's the title of the thing?

8 A. Yes, sir.

9 Q. But in terms of -- you've read this whole thing, of
10 course?

11 A. Yes, sir.

12 Q. And do you have a current recollection of it enough to
13 answer a question about what the overall methodology of this
14 article was?

15 A. Well, I believe he looked at some data from the Add
16 Health survey. And I believe he was trying to investigate
17 whether or not children who grow up in -- I believe he -- I
18 believe he, at several times in the article, refers to it as
19 "continuously married biological parents."

20 I believe he is trying to compare, using this body
21 of data in this particular article and other books and
22 articles -- he's looked at different bodies of data, but in
23 this particular article it's Add Health. And he's trying to
24 estimate outcome differences, comparing children who are
25 growing up in continuously married two biological parent

1 homes with children from other family structures. And he's
2 making certain conclusions about those inquiries.

3 And then he's making a policy recommendation, at
4 the end, that it would be much to the advantage --

5 **Q.** I'm not asking you to summarize or give a book report on
6 this. What I just want -- two quick questions that I ought
7 to be able to get answers to.

8 The first is: Is it your understanding that what
9 he compares are the outcome differences between children in
10 households with both biological parents as compared to
11 children in households with only one biological parent? Is
12 that your understanding or not?

13 **A.** Well, not really.

14 **Q.** Okay. Let me ask you to look at the second paragraph of
15 the document, okay. It says:

16 "Amato begins by investigating how
17 children in households with both biological
18 parents differ from children in households
19 with only one biological parent."

20 Do you see that?

21 **A.** Can you tell me where you're reading from?

22 **Q.** The very second paragraph of the document.

23 "Amato begins by investigating how
24 children in households with both biological
25 parents differ from children in households

1 with only one biological parent."

2 Do you see that?

3 **A.** I was reading from the --

4 **Q.** Do you see that?

5 **A.** Yes, sir, I see it.

6 **Q.** Okay. Now, is it your understanding that when Amato
7 uses the term "biological parent" in this article, he is
8 including adoptive parents to be the same as biological
9 parents?

10 **A.** Yes, sir.

11 **Q.** Okay. Now, with respect to the issue of biology, you
12 believe that it is more important that children grow up with
13 two parents than that they grow up with a single biological
14 parent, correct?

15 **A.** That -- that's not familiar to me as a statement that
16 I've made.

17 **Q.** Well, for example, have you stated that it is important
18 to encourage unmarried women who have children to give their
19 babies up for adoption by married couples?

20 **A.** In several publications with certain qualifications in
21 place, I have -- specifically with reference, in my mind, to
22 unmarried teenage girls, I have made such a recommendation.
23 To the best of my memory, I have made such a recommendation.
24 Or I may have been a part of a study that made such a
25 recommendation.

1 Q. All right.

2 MR. BOIES: May I have just a moment, Your Honor?

3 THE COURT: Very well.

4 MR. BOIES: Your Honor, we've agreed on a list of
5 documents to be admitted. And I would hand that up, if I
6 can.

7 THE COURT: Very well.

8 MR. COOPER: There's one document not on this list.
9 It's a declaration by Mr. Prentice. But it will be added to
10 the list. It was part of an arrangement.

11 THE COURT: Fair enough. Do you have an exhibit
12 number on the document to be added?

13 MR. BOUTROUS: Why don't we make that the next --
14 we'll put a --

15 THE COURT: Number it later.

16 MR. BOUTROUS: Okay. Thank you, Your Honor.

17 (Plaintiffs' Exhibits 749, 1372, 2096, 2258,
18 2259, 2866, 2876, 2877, 2878, 2879, 2898, 2899,
19 2936, 2341 and 2403 received in evidence.)

20 (Defendants' Exhibit 1109 received in evidence.)

21 MR. BOIES: Thank you.

22 BY MR. BOIES:

23 Q. All right. Mr. Blankenhorn, let me -- let me just ask
24 you, hopefully, just two more quick areas.

25 First, would you turn to tab 3 of this binder, the

1 binder that has 15 tabs to it.

2 **A.** I have it, yes, sir.

3 **Q.** And this is the review article that you referred to
4 previously, and published in *Developmental and Behavioral*
5 *Pediatrics*; is that correct?

6 **A.** I'm sorry. I'm really sorry, I must be --

7 **Q.** 3. Tab 3.

8 **A.** Sorry. "Lesbian Mothers, Gay Fathers, and Their
9 Children."

10 **Q.** Yes.

11 **A.** Yes, sir.

12 **Q.** Are you familiar with this document?

13 **A.** Uhm, I -- I don't believe so, sir.

14 **Q.** Okay. There's something that's headed the "Abstract."

15 And you know what an abstract is; do you not?

16 **A.** Of course.

17 **Q.** And the abstract says:

18 "There is a variety of families headed by
19 a lesbian or gay male parent or same-sex
20 couple. Findings from research suggest that
21 children with lesbian or gay parents are
22 comparable with children with heterosexual
23 parents on key psychosocial developmental
24 outcomes."

25 Do you see that?

1 A. Yes, sir.

2 Q. And even though you may not be aware of this article,
3 are you aware of other articles in peer-reviewed journals
4 that reach that conclusion?

5 A. Yes, sir, I am aware.

6 Q. Now, we've talked a lot about the institution of
7 marriage. You would agree that the institution of marriage
8 is constantly evolving, correct?

9 A. Yes, sir.

10 Q. And always changing, correct?

11 A. I wrote those words in my book.

12 Q. And no single universally accepted definition of
13 marriage, correct?

14 A. I wrote those words, too.

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

16 THE COURT: Redirect, Mr. Cooper.

17 MR. COOPER: Thank you, Your Honor. I can be quite
18 brief, I think.

19 REDIRECT EXAMINATION

20 BY MR. COOPER:

21 Q. Mr. Blankenhorn, is your -- is your book in front of you
22 the entire book, *Future of Marriage*?

23 A. Do you mean -- oh, no, sir. No, sir.

24 MR. COOPER: Could I hand the full book, because
25 there's a page I wanted to refer to that isn't in any of

1 these excerpts that are before him.

2 **THE COURT:** Sure.

3 **MR. COOPER:** Thank you.

4 **THE COURT:** This is Exhibit 9 -- DIX956. And I
5 believe this has already been admitted.

6 **MR. COOPER:** May I hand the book to the witness,
7 Your Honor?

8 **THE COURT:** Yes, indeed. I say, 956 is in?

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

10 **THE COURT:** All right.

11 **BY MR. COOPER:**

12 **Q.** Mr. Blankenhorn, do you recall yesterday, when Mr. Boies
13 read a passage from page 2 of your book, *The Future of*
14 *Marriage*, in which you say, among other things, that:

15 "I believe that today the principle equal
16 human dignity must apply to gay and lesbian
17 persons."

18 Do you recall that?

19 **A.** Yes.

20 **Q.** Would you look on page 3 of your book, the last two
21 paragraphs. I'd like to read those paragraphs into the
22 record:

23 "Many thinkers, perhaps most notably
24 Isaiah Berlin, the great 20th century
25 philosopher of liberalism, have pointed out

1 that many important choices we face do not
2 involve choosing between good and bad, but
3 between good and good.

4 "It is good to deter crime by punishing
5 criminals. It is also good to forgive. But
6 doing more punishing means doing less
7 forgiving because the two goods are to some
8 extent mutually exclusive.

9 "Berlin's concept of goods in conflict is
10 central to my understanding of society's need
11 to make choices regarding the definition of
12 marriage.

13 "One good is the equal dignity of all
14 persons. Another good is a mother and father
15 as a child's birthright. These goods are at
16 least partially in conflict. Resolving that
17 conflict, making a morally responsible choice
18 about the future of marriage that is faithful
19 to the essential purposes of the institution
20 while at least recognizing both of these
21 goods is a major aim of this book."

22 Earlier, I think, in your colloquy with Mr. Boies,
23 you mentioned a conflict of goods. Is this -- does this
24 essentially capture your -- your thought on that, or
25 summarize it?

1 A. Yes, sir.

2 Q. Turn to page 20 of the witness -- excuse me, the -- of
3 the document behind tab 13 of your witness binder from this
4 morning. And that is another excerpt. That is an excerpt of
5 your book.

6 A. This is from *Fatherless America*?

7 Q. No. This is from *The Future of Marriage*.

8 A. Oh, yes, I have it. I'm sorry.

9 Q. Do you recall this morning colloquy with Mr. Boies, in
10 which you made clear that to the degree you must choose
11 between the rights and interests of gays with respect to
12 same-sex marriage on the one hand, and the interests that you
13 have articulated previously that are served by customary
14 marriage, you would, with anguish, choose those interests
15 served by customary marriage; do you recall that?

16 A. Yes, sir.

17 Q. All right. I want you to refer now to page 20, the last
18 full paragraph of your -- of the page in your book *The Future*
19 *of Marriage*. And, again, I'd like to read that, as well.

20 "In the case of same-sex marriage, one
21 priority is the particular rights and needs
22 of same-sex couples, the right to equal
23 respect, the right to form loving, stable
24 partnerships and families, and the need for
25 greater social acceptance.

1 "Another priority is the collective
2 rights and needs of children. The right to
3 know and be loved by a mother and a father,
4 and the need for as many children as possible
5 to grow up under a strong shelter of
6 marriage, our society's most pro-child
7 institution.

8 "To the degree that these two priorities
9 can be in harmony, or at least exist together
10 in peace, I want to embrace them both."

11 Is that your view?

12 **A.** Yes, sir.

13 **Q.** Do you believe that they can be embraced in harmony?

14 **A.** Yes, sir.

15 **Q.** Do you believe that, for example, many of the items that
16 you identified this morning on the list of good public policy
17 outcomes that would flow from same-sex marriage can be
18 achieved through, for example, domestic partnerships?

19 **A.** I do. That's my understanding of the -- that's been my
20 own conclusion, in trying to wrestle with this concept of
21 goods in conflict.

22 And that's -- this is the conclusion that I have
23 come to, as I have tried to -- to reconcile these -- this
24 conflict, as best I can.

25 **Q.** And did you speak to that yesterday, in connection with

1 describing the process you had gone through which culminated,
2 I think, in the publication of an article in the *New York*
3 *Times* early last year?

4 **A.** Yes, sir. Endorsing the protection of marriage for its
5 distinctive purpose, but also establishing very strong
6 domestic partnership structures.

7 **MR. COOPER:** Your Honor, I have no further
8 questions.

9 I would like to submit into the record for judicial
10 review a copy of that *New York Times* article. I don't have
11 it in my hands right now. But I will get copies into my
12 hands and into the court's and into counsel's.

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

14 **THE COURT:** Very well. That will be marked as DIX
15 next in order.

16 **MR. COOPER:** Here they are now.

17 **THE COURT:** You have able assistance.

18 **MR. COOPER:** Yes, indeed. Thank you.

19 **THE COURT:** All right.

20 (Defendants' Exhibit 2720 received in evidence.)

21 **MR. COOPER:** Thank you. And so I have no further
22 questions, Your Honor.

23 **THE COURT:** Very well. Then, thank you,
24 Mr. Blankenhorn. You may step down. Thank you for your
25 testimony.

1 (Witness excused.)

2 Any additional witnesses, Mr. Cooper?

3 **MR. COOPER:** I beg your pardon, any what?

4 **THE COURT:** Call your next witness.

5 **MR. COOPER:** Your Honor, we have no further
6 witnesses.

7 **THE COURT:** Very well. Now, I understood that you
8 had some documents that you wanted to add. Have we taken
9 care of that this morning?

10 **MR. COOPER:** I think we have resolved it. And my
11 colleague, Mr. Thompson, has been the lead for us on that,
12 and he can speak to that.

13 **MR. THOMPSON:** Your Honor, this will just take a
14 very brief moment, but there are a couple of items.

15 We have a proffer of documents. And the plaintiffs
16 have not objected to this list of documents. These are the
17 official campaign speech and materials of
18 ProtectMarriage.com. And we have a list of those documents.

19 In addition, there is one other document, DIX2717,
20 which the plaintiffs have not objected to. So with the
21 Court's permission, we would submit that list. That's DIX?

22 **MR. THOMPSON:** 2717.

23 **THE COURT:** Very well.

24 (Defendants' Exhibit 2717 received in evidence.)

25 **MR. BOUTROUS:** Thank you.

1 **MR. THOMPSON:** In addition, Your Honor, a moment
2 ago there was reference to the fact that we had an additional
3 document for which we didn't have a number. We now have the
4 document. We have a number. It's under seal, but may I pass
5 that to the clerk?

6 **THE COURT:** You may.

7 **MR. THOMPSON:** And it's DIX2719.

8 **THE COURT:** Fine. And that's being admitted
9 without objection, I gather?

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

11 **THE COURT:** Okay.

12 (Defendants' Exhibit 2719 received in evidence.)

13 **MR. THOMPSON:** In addition, Your Honor, just in the
14 nature of housekeeping, we have the counterdesignations of
15 Professor Young and Nathanson, the pink and the yellow.

16 **THE COURT:** Yes.

17 **MR. THOMPSON:** We understand the Court will resolve
18 that at the Court's convenience, but we just wanted to note
19 that we would still like the pink and the yellow in the
20 record.

21 And, in addition, we have made some
22 counterdesignations of Dr. Tam's deposition. We understand
23 that there may be objections to that, but we'd still like to
24 submit those, subject to whatever objections the plaintiffs
25 have.

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.

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.

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

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

1 to reflect that.

2 **THE COURT:** All right. Anything further from any
3 party? How about the attorney general?

4 **MS. PACHTER:** 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)

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.

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?

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

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.

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.)

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