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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

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

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

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

) San Francisco, California
Defendants.) Wednesday
) January 13, 2010

TRANSCRIPT OF PROCEEDINGS

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Official Reporters - U.S. District Court

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PROCEEDINGS

JANUARY 13, 2010

8:39 A.M.

THE COURT: Very well. Good morning, counsel.

(Counsel greet the Court.)

THE COURT: Ready to proceed?

MR. THOMPSON: Yes, Your Honor.

THE COURT: Very well. Mr. Chauncey, I believe, is on the stand.

Yes. Here he is.

MR. THOMPSON: Your Honor, as Professor Chauncey is coming to the stand, I wanted to report that we were able to agree that all the exhibits that the plaintiffs wanted to move into evidence last evening we have no objection. So if they have a list that they want to provide, we're fine with that.

In addition, there was -- I believe it was PX1775, we had a authenticity objection to. We withdraw that authenticity objection. And I think Ms. Stewart has a better copy of it, and she can explain that situation.

THE COURT: All right. Ms. Stewart.

MS. STEWART: Good morning, Your Honor.

We -- yesterday, Mr. Thompson was concerned that the exhibit that was in the binders was a black-and-white copy that was a little bit blurry. And so there's another exhibit that's been marked, that's the same document, that actually is in

1 color and has no blurriness. I just wanted to ask the Court
2 for your preference. The plaintiff exhibit number that the
3 cleaner copy is, is 2288. But I thought it might make sense to
4 remark it the same as the other exhibit so that the record is
5 clear, because the witness referred to the document. And the
6 blurrier version of it was exhibit --

7 **MR. THOMPSON:** 1775.

8 **MS. STEWART:** -- 1775.

9 So I can do whichever, but I thought what I would do
10 is just mark these 1775, and, during a break, substitute them
11 in the binders that the Court has, so that we replace the
12 blurry copy with the clean one.

13 **THE COURT:** Why don't, instead, you file this as
14 1775A.

15 **MS. STEWART:** Perfect. Thank you, Your Honor.

16 And, also --

17 **THE COURT:** The record will be complete as to which
18 documents are being referred to.

19 (Plaintiffs' Exhibit 1775A marked for
20 identification.)

21 **MS. STEWART:** If the Court would allow me to, I had
22 requested that the Court allow me to have this list become an
23 exhibit, so that I could then ask the Court to admit the
24 documents that are on the list as Dr. Chauncey's sources,
25 rather than have him read those sources into the record, just

1 to spare us the extra time.

2 And so I'd like to ask that the list that
3 Mr. Thompson was referring to, that they have now agreed to, of
4 exhibits that would come in through Mr. Chauncey, to be
5 marked -- what are we up to in next in order for plaintiffs?
6 Plaintiffs' next in order. Guys?

7 **THE COURT:** What you have, I gather, is simply a list
8 of those exhibits that are coming in.

9 **MS. STEWART:** Correct, Your Honor.

10 **THE COURT:** Why don't you hand those to the clerk,
11 and we will go through the exhibit list and we will mark those
12 as entered. And that should take care of the problem, should
13 it not, Mr. Thompson?

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

15 (Plaintiffs' Exhibits 847, 848, 849, 850, 851, 852,
16 853, 854, 855, 856, 857, 858, 859, 861, 863, 864,
17 868, 872, 873, 874, 876, 877, 878, 879, 880, 881,
18 882, 2281, 2322, and 2337 received in evidence.)

19 **MS. STEWART:** We will provide the physical exhibits,
20 themselves, to the Court at a break.

21 **THE COURT:** Good. Well, I appreciate that, Counsel.
22 We're moving along.

23 All right. Mr. Thompson.

24 **MR. THOMPSON:** Yes.

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GEORGE CHAUNCEY,

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

THE COURT: Now, Mr. Chauncey, you're still under oath. You understand that, do you?

THE WITNESS: Yes, sir.

THE COURT: The oath that you took yesterday applies to this testimony as it did the testimony yesterday.

THE WITNESS: Yes.

THE COURT: Is that clear?

THE WITNESS: Yes, sir.

THE COURT: Very well. Proceed.

CROSS EXAMINATION RESUMED

BY MR. THOMPSON:

Q. Good morning, Professor.

A. Good morning.

Q. Is it fair to say that as a historian you are most struck by how quickly public opinion is changing in regard to the recognition of same-sex relationships?

A. I think that, as a historian, I'm struck both by change in opinion and by the polarization of American society and the roadblocks that have been put in place to prevent the achievement of marriage equality for gay couples.

Q. Well, I'd like to direct your attention to tab 6 in your binder, which is excerpts from your book *Why Marriage?*, which

1 has been introduced into evidence in the list that was just
2 handed to the Court. And I would like to direct your attention
3 to page xii in Roman numerals. So this would be the
4 introduction. So it's tab 6, and then Roman numeral xii, which
5 is towards the beginning, in the introduction.

6 Tell me when you're there, Professor. I don't mean
7 to rush you.

8 **A.** Yes.

9 **Q.** Okay. And so you said, in the first full paragraph:

10 "Nonetheless, as a historian I am most struck
11 by how quickly public opinion is changing in
12 regard to the recognition of same-sex
13 relationships."

14 You wrote that, correct?

15 **A.** I did write that. I wrote that in 2004.

16 **Q.** The question is just whether you wrote that. On redirect
17 you can explain whatever you like.

18 And when you wrote that, you agreed with it, correct?

19 **A.** Uhm, yes, I thought this in 2004.

20 **Q.** Yes. Okay. Very well.

21 Now, in 2002, Gallup did a poll that showed that even
22 though 44 percent of people said homosexuality was an
23 unacceptable alternative lifestyle, 86 percent thought
24 homosexuals should have equal rights in terms of job
25 opportunities, correct?

1 **A.** I'm sorry, which year did you mention?

2 **Q.** 2002. I can repeat the question, if you like.

3 In 2002, Gallup did a poll that showed that even
4 though 44 percent of the people said homosexuality was an
5 unacceptable alternative lifestyle, 86 percent thought
6 homosexuals should have equal rights in terms of job
7 opportunities; is that right?

8 **A.** I would have to look at the source again, but that seems
9 possible to me.

10 **Q.** Okay. And the contrast was even more striking among
11 African-Americans, who were more supportive of gay civil rights
12 than whites, even though they also expressed more moral
13 disapproval of homosexuality, correct?

14 **A.** I remember that being a general trend.

15 **Q.** And when Matthew Shepard was murdered, it provoked a
16 national outcry, correct?

17 **A.** It received considerable attention, yes.

18 **Q.** And it was clear that a profound change had taken place,
19 correct?

20 **A.** Uhm, well, I believe that I was referring there to a
21 growing recognition of the problem of violence against gay
22 people, and that it ought to be considered a problem; even
23 though, it continued at considerable length.

24 **Q.** But there was a -- there had been a remarkable growth in
25 acceptance of gay people in our own time, correct? There has

1 been?

2 **A.** Uhm, as I think I've said throughout my work, there's been
3 both a growth and a growing -- of support for gay people, and a
4 growing polarization in American society over gay issues.

5 **Q.** As recently as 2000, civil unions seemed like a radical
6 idea, correct?

7 **A.** Yes.

8 **Q.** And in Vermont, Governor Howard Dean was denounced for
9 supporting civil unions at the beginning of the last decade,
10 correct?

11 **A.** Yes, that's correct.

12 **Q.** But every major democratic candidate for president
13 supported civil unions in the 2004 primary, correct?

14 **A.** They supported civil unions, but not marriage.

15 **Q.** And that would have been unthinkable just four years
16 earlier, correct?

17 **A.** It did mark a change, yes.

18 **Q.** Indeed, even President George W. Bush sought to moderate
19 his image by supporting the rights of states to enact civil
20 unions for gay couples, correct?

21 **A.** In a roundabout way, yes.

22 **Q.** And more telling evidence of the growing public support
23 for gay couples was provided by several state legislatures,
24 correct?

25 **A.** You'll have to tell me what you're referring to there.

1 Q. Well, the legislatures of New Jersey and Maine passed laws
2 providing a degree of recognition and security to gay couples,
3 correct?

4 A. Yes, there were a handful of states that did that; while
5 many others enacted significant barriers to marriage.

6 Q. And California has enacted a sweeping domestic partnership
7 law that granted registered gay couples all of the state
8 benefits available to married couples. Yes or no?

9 A. Yes.

10 Q. In 2004, exit polls showed that 60 percent of voters
11 nationwide support either civil unions or marriage for gay
12 couples, correct?

13 A. Yes, I believe it was about half of those for marriage,
14 and then the others just for civil union. So they drew a
15 distinction between the two.

16 Q. Are you aware of any more recent polling data on that
17 issue?

18 A. I can't give you the particulars on the most recent polls.
19 My sense is that, broadly, there's still about a third support
20 for marriage, and about a third support for civil unions or
21 domestic partnership but not marriage.

22 Q. And the generational shift is especially noteworthy.
23 Americans in their late teens and 20s are four times more
24 likely to support same-sex marriage than their grandparents
25 are, correct?

1 **A.** I believe that figure was true at one point. I think that
2 trend is generally true. It's, of course, hard to know what
3 will happen with that trend, but that would be a fair
4 assessment of current polling data.

5 **Q.** The years stretching from the spring of 2003 to the spring
6 of 2004, were a decisive turning point in the history of
7 lesbians and gay men in the United States, correct?

8 **A.** Uhm, well, I believe when I said that, I was referring
9 both to the recognition of marriage by the Massachusetts state
10 court and the enormous debate that emerged.

11 And so it was a decisive turning point in the sense
12 that the issue had really been brought to the fore. And, of
13 course, tremendous opposition was generated, as well as
14 support.

15 **Q.** And it's hard to think of another group whose
16 circumstances and public reputation have changed so decisively
17 in so little time, correct?

18 **A.** I think, in looking back over the last generation, it is
19 really striking how much has changed and how many impediments
20 remain before gay people, and how strong resistance has been to
21 that change.

22 **Q.** Above all, there's been a sea change in the attitudes of
23 the young who have grown up in a world where they know gay
24 people and see them treated with the respect any human
25 deserves, correct?

1 **A.** I think that there has been a change on the part of young
2 people, yes.

3 **Q.** Okay. And I'd like to direct your attention to tab 9 in
4 your binder. And this is a website entitled,
5 "beyondhomophobia.com." It's written by Dr. Herek, who is an
6 expert in this case.

7 And do you know of Dr. Herek's reputation?

8 **A.** Yes.

9 **Q.** All right. And he has a solid reputation in his field?

10 **A.** Yes.

11 **Q.** All right. And I'd like to direct your attention to page
12 4 of this document by Professor Herek.

13 And looking at the fourth paragraph from the bottom,
14 the second sentence reads:

15 "The widespread opposition to Proposition 8
16 and the fact that proponents of the measure
17 have been so careful not to publicly bash
18 sexual minorities are signs of a sea change
19 in public attitudes."

20 Do you agree with Professor Herek?

21 **A.** Well, as I suggested yesterday, I do think that the Prop 8
22 campaign in, certainly, its most public, official
23 manifestations was more polite than many of the earlier
24 campaigns. Although, I believe they also drew on some of the
25 fears that were resident because of those earlier campaigns.

1 Q. In the colonial era, sodomy laws regulated conduct in
2 which anyone could engage, correct?

3 A. I'm sorry. Repeat.

4 Q. Just --

5 A. Repeat yourself.

6 Q. Yes. In the colonial era, sodomy laws regulated conduct
7 in which anyone could engage, correct?

8 A. Uhm, well, again, there were variations amongst the states
9 as a sort of general rubric. That would be fine. But that
10 would be qualified by looking at the laws that affected --
11 primarily, that regulated male sexual behavior.

12 Q. The prohibition against sodomy was not the same thing as
13 anti-gay discrimination, correct?

14 A. Yes. As I said yesterday, it was not the same thing.

15 Q. Although, anti-gay discrimination is popularly thought to
16 have ancient roots; in fact, it was a unique and relatively
17 short-lived product of the 20th century, correct?

18 A. Well, as I've suggested, the hostility towards such
19 behavior can be seen in the sodomy laws, even though they
20 didn't apply just to homosexual conduct.

21 But in that sentence, I was referring to the
22 construction of an edifice of anti-gay discrimination and
23 hostility in the context of the 20th century, when the
24 categories of gay and straight, heterosexual and homosexual,
25 became culturally powerful.

1 Q. But you agree with the sentence I read, correct?

2 A. If you would read the sentence again, please.

3 Q. Sure. The prohibition against sodomy was not the same
4 thing as anti-gay discrimination, correct?

5 A. Yes.

6 Q. All right. And, sorry, although anti-gay discrimination
7 is popularly thought to have ancient roots, in fact, it is a
8 unique and relatively short-lived product of the 20th century,
9 correct?

10 A. Well, there again, I'm drawing a distinction between
11 hostility towards behavior and discrimination against a class
12 of people based on that -- defined by that behavior. And so in
13 that sense, yes, discrimination is a product of the 20th
14 century.

15 Q. And the states began to enact discriminatory measures in
16 the 1920s and '30s against homosexuals, correct?

17 A. Yes.

18 Q. Now, in your direct you mentioned -- you discussed
19 discrimination in the context of bars. Do you remember that?

20 A. Yes.

21 Q. Okay. And gay bars were an important battleground in the
22 post-war years, correct?

23 A. Yes.

24 Q. Beginning in the 1930s and '40s, many states, including
25 California, prohibited gay people from being served in bars and

1 restaurants, correct?

2 **A.** Yes.

3 **Q.** But raids on bars of gays and lesbians are a thing of the
4 past in California today, correct?

5 **A.** Uhm, I can't give you a definitive answer on that. I
6 mean, clearly, they are not a part of the landscape now in the
7 way they were then.

8 **Q.** So that's an -- and, indeed, throughout the United States,
9 gays and lesbians are free to go -- are legally entitled to go
10 to any bar they wish to, correct?

11 **A.** Uhm, they are now -- uhm. Well, I guess that in half the
12 states there's still no laws prohibiting discrimination against
13 them. And so it could still -- they could still be ejected in
14 bars in, let's say, half the states.

15 **Q.** Are you aware of any police raids on any bars in the
16 United States that have taken place in the last ten years
17 because the bar was serving gays and lesbians?

18 **A.** Well, last summer, the police did arrest a number of
19 patrons at a bar in Fort Worth, Texas. And there was a big
20 controversy about why they had done this.

21 **Q.** Any other -- any other incidents in the last ten years?

22 **A.** Uhm, not that I can think of now.

23 **Q.** And in the -- let's turn to the medical community and the
24 discrimination that was present there in the early part of the
25 20th century. Leading physicians and medical researchers

1 claimed that homosexuality was a pathological condition or
2 disease, correct?

3 **A.** Yes.

4 **Q.** Almost all of the medical literature on homosexuality in
5 the early 20th century considered it to be a pathological
6 condition or disease, correct?

7 **A.** Yes.

8 **Q.** But the medical literature was incorrect; isn't that
9 right?

10 **A.** Uhm, well, certainly, researchers today would, yes, say
11 that that literature was incorrect.

12 **Q.** Such hostile medical pronouncements provided a powerful
13 source of legitimation to anti-homosexuality sentiment,
14 correct?

15 **A.** Yes.

16 **Q.** Such medical pronouncements were themselves a
17 manifestation of discrimination against gays and lesbians,
18 correct?

19 **A.** They reflected that and enhanced that.

20 **Q.** But the major institutions that once helped legitimize
21 anti-gay hysteria have changed their positions today, correct?

22 **A.** Well, could you talk about particular institutions.
23 That's a very general question.

24 **Q.** Well, let's turn to tab 10 in your binder.

25 Do you recall that you put in a declaration in the

1 California same-sex marriage cases?

2 **A.** Yes.

3 **Q.** And is tab 10 a -- if you turn to page 16, is that your
4 signature?

5 **A.** Yes.

6 **Q.** Okay. And, then, I'd like you to look at page 12,
7 paragraph 28. And in the second sentence you say:

8 "Major institutions that once helped
9 legitimize anti-gay hysteria have changed
10 their positions."

11 And you wrote that, right?

12 **A.** Well, I did write that. But I'd like to be able to talk
13 about particulars rather than --

14 **Q.** All right.

15 **A.** Yes. I'll say "major institutions," that's a very general
16 statement.

17 **Q.** Well, for example, the American Psychiatric Association,
18 in 1973, voted to remove homosexuality from its list of mental
19 disorders, correct?

20 **A.** Yes.

21 **Q.** And the American Psychological Association and the
22 American Medical Association soon followed, correct?

23 **A.** Yes.

24 **Q.** And today leading physicians and medical researchers no
25 longer claim that homosexuality is a pathological condition,

1 correct?

2 **A.** Yes.

3 **Q.** For more than 35 years, the leading American mental health
4 associations have made clear that homosexuality is not a
5 pathological condition or disease, correct?

6 **A.** Yes.

7 **Q.** Now, now let's talk about discrimination in academia.

8 You received your undergraduate degree from Yale; is
9 that correct?

10 **A.** Yes.

11 **Q.** And you graduated in 1977; is that correct?

12 **A.** Yes.

13 **Q.** And you got your Ph.D. from Yale, in 1989; is that
14 correct?

15 **A.** Yes, uh-huh.

16 **Q.** And after a couple of years, you went to the University of
17 Chicago, and taught there for 15 years; is that correct?

18 **A.** Yes.

19 **Q.** And then you returned to Yale as a tenured professor; is
20 that correct?

21 **A.** That's correct.

22 **Q.** All right. And since returning, you've been astonished to
23 see how much Yale has changed; isn't that right?

24 **A.** Yes. I have noted many changes at Yale.

25 **Q.** And almost all of that change has been for the better,

1 correct?

2 **A.** Uhm, that's my sense, yes.

3 **Q.** One of the most remarkable transformations has been in the
4 place of the lesbian, gay, bisexual, and transgender students
5 and faculty, correct?

6 **A.** Yes.

7 **Q.** As a graduate student, even with the support of a
8 prominent historian like Nancy Cott, you encountered
9 considerable scepticism when you decided to write a
10 dissertation in gay history, correct?

11 **A.** Yes.

12 **Q.** But 20 years later, Yale hired you precisely because of
13 that scholarship, correct?

14 **A.** Yes.

15 **Q.** And Yale is a hospitable place to be gay, correct?

16 **A.** Yes.

17 **Q.** And this change hasn't occurred at Yale alone, correct?

18 **A.** It hasn't occurred at Yale alone. Although, I would
19 hardly take Yale as a bellwether for the entire United States.

20 (Laughter)

21 **Q.** Thank heavens.

22 There has been a sea change in the place of lesbians,
23 gays, bisexual, and transgender people in American society in
24 the last generation, correct?

25 **A.** As I've already said, yes, I've noted dramatic changes in

1 the place of gay people in American society. That's also
2 included dramatic escalation and opposition to gay rights.

3 **Q.** Now, let's talk about discrimination in the news media.
4 And I would like to direct your attention to tab 12 in your
5 binder.

6 And this is an excerpt from a report by Kenneth
7 Miller. And it shows, on the second page, the 15 largest
8 newspapers by circulation in the State of California. And all
9 of them were opposed to Proposition 8.

10 Is it a fair to say that the news media in California
11 is supportive of gay rights?

12 **A.** Uhm, you show these editorials, and I'm sure these
13 editorials were there.

14 I don't find I am in a position to broadly
15 characterize the news media in California.

16 **Q.** Okay. Do you read the *New York Times* with some frequency?

17 **A.** I do read the *New York Times*.

18 **Q.** All right. And the *New York Times* is supportive of the
19 rights of gays and lesbians, correct?

20 **A.** Yes. The editorial pages of the *Times* are supportive of
21 those rights.

22 **Q.** And it's one of the most influential papers in the
23 United States, correct?

24 **A.** For many people. And, of course, it's reviled by many
25 others.

1 Q. I understand that.

2 Let's talk about television. In your report in this
3 case, you drew on statistics concerning the number of regular
4 gay characters in television melodramas and sitcoms in the
5 1990s. Do you recall that?

6 A. Yes.

7 Q. And you found there was an increase in the number of
8 regular gay characters in television melodramas and sitcoms,
9 correct?

10 A. Yes.

11 Q. And during the 1990s, gay and lesbian characters were a
12 regular part of the television landscape, correct?

13 A. I think by the end of the '90s they had become that, yes.

14 Q. And gay people became part of the cultural landscape, even
15 for the people without openly-gay friends, correct?

16 A. I think more than had been the case before, yes.

17 Q. And this dramatically changed the dominant representation
18 of homosexuals, correct?

19 A. It certainly put forward a wider range of images.

20 Some people have been critical of many of those
21 images. They feel that they rehearse certain stereotypes. Not
22 ominous ones I discussed yesterday, but the more gender-bending
23 ones.

24 But, yes, I do think that they increased the range of
25 images available to people, even though certain other images

1 persisted.

2 Q. And it didn't just increase the range. It dramatically
3 changed the dominant representation of homosexuals, correct?

4 A. Yes, by increasing the variety of images, it did mean that
5 there were many images out there, as opposed to a handful of
6 just hostile images.

7 Q. And some of the images -- Will & Grace was an immensely
8 popular TV show?

9 A. Will & Grace was an immensely popular TV show.

10 Q. And you didn't think it bore anti-gay hostility, did you?

11 A. No, I did not.

12 I know some people feel it played on the sort of
13 comedic role of gay people.

14 Q. Let's now talk about movies.

15 In your direct testimony, you referenced a censorship
16 code that Hollywood used to have; is that right?

17 A. Yes.

18 Q. And it was replaced in the 1960s, with rating systems we
19 are accustomed to know today; is that right?

20 A. Yes.

21 Q. And when the censorship code was no longer in effect, it
22 meant that there could -- for the first time in a long time, it
23 was possible to discuss homosexuality overtly, correct?

24 A. Yes.

25 Q. And you would agree that it was important that there were

1 films that included gay characters, correct?

2 **A.** Yes.

3 **Q.** The movie *Philadelphia* was the first Hollywood studio film
4 to address AIDS, correct?

5 **A.** Yes. Certainly, the first large-budget film to do so,
6 yes.

7 **Q.** And it was a huge success, correct?

8 **A.** Yes.

9 **Q.** And that was in 1993?

10 **A.** Yes.

11 **Q.** And, more recently, *Brokeback Mountain* was a box office
12 success, correct?

13 **A.** Yes. Although, I'm actually struck by how few such movies
14 there are. But, yes, it was.

15 **Q.** And it received numerous awards; did it not?

16 **A.** I believe so.

17 **Q.** Okay. Now, let's talk about some of the governmental
18 discrimination that you referenced during your direct
19 testimony.

20 In the 1980s, gay right activists secured the
21 enactment of gay rights ordinances in 40 cities, counties, and
22 suburbs, bringing the total to 80; is that right?

23 **A.** Yes.

24 **Q.** And there are more today, aren't there?

25 **A.** Yes.

1 Q. Just recently, Salt Lake City passed an ordinance that
2 extended protection against discrimination in the workplace to
3 gays and lesbians; is that right?

4 A. I was not aware of that, but I'm sure it's true if you say
5 it is.

6 Q. In California, over the last decade, there has been a
7 consistent track record of the legislature voting in favor of
8 extending rights to gays and lesbians; is that correct?

9 A. I would have to review the California record more fully to
10 give you an adequate answer to that; but, certainly, there have
11 been a number of votes in the California state legislature
12 supportive of gay rights.

13 Q. And in looking at the federal government, it's true that
14 the federal government once prohibited the employment of
15 homosexuals, correct?

16 A. Yes.

17 Q. But today the federal government now prohibits its
18 agencies from discriminating against homosexuals in employment,
19 correct?

20 A. Well, the military continues to discriminate against
21 homosexuals in its employment.

22 Q. We will talk about that. But with that footnote, federal
23 agencies are prohibited from discriminating against gays and
24 lesbians, correct?

25 A. Yes.

1 Q. Okay. In the house of representatives, gays and lesbians
2 have a powerful ally in speaker Nancy Pelosi?

3 A. What do you mean by "an ally," a "powerful ally"?

4 Q. Someone who is a champion of their cause.

5 A. Well, I'm not sure I would accept that assessment. There
6 are a range of issues that gay rights groups have put before
7 the Congress, that they would like to see put forward. And
8 with the exception of the Hate Crimes law, they have not moved
9 forward.

10 So I think that many people would question how
11 powerful an ally Nancy Pelosi has been of the gay rights
12 movement.

13 Q. Didn't the House of Representatives pass ENDA, the
14 Employment Non-Discrimination Act?

15 A. Has the House of Representatives passed that?

16 Q. Yes. Well, we'll move on.

17 No lawmaker would grant a homosexual a hearing in the
18 1950s, correct?

19 A. Uhm, right. No lawmakers would grant a hearing to
20 homosexuals.

21 Q. But today congressmen -- you would concede that
22 Congressman Barney Frank is a powerful ally of gays and
23 lesbians, correct?

24 A. I would agree that he is a strong supporter of gay rights.
25 So he has often been criticized by gay rights groups.

1 Q. And Senator Boxer is an ally of gays and lesbians?

2 A. Well, in what sense do you mean "an ally of gays and
3 lesbians"?

4 Q. Someone who supports their causes.

5 A. I would need to review the particulars of her record.
6 Although, I think she's been supportive of some issues, but I
7 would need to look at her record in particular.

8 Q. Over the last decade, labor unions have consistently
9 supported the rights of gays and lesbians, correct?

10 A. Well, that's a very large generalization. And I'm not
11 sure, when you say that, do you mean support in the sense of
12 passing a resolution, or support in the sense of mobilizing
13 their activists to go out and support a particular bill? Or --

14 Q. Or giving money.

15 A. -- referendum.

16 Q. I mean, unions gave a lot of money to defeat Prop 8; isn't
17 that right?

18 A. I don't know that, but I would have to ask what level of
19 support you're talking about.

20 I don't know that unions, even if they have passed
21 resolution, if they have actually dedicated resources that --
22 both in volunteer power, staffing, mobilization of people, and
23 money.

24 Q. Now, you believe that the federal government was slow to
25 respond to the AIDS crisis, correct?

1 A. Yes.

2 Q. And, in your opinion, the association of this disease with
3 a despised group is a significant part of why the government
4 responded so slowly, correct?

5 A. I do think that that's one of the reasons, yes.

6 Q. And funding of AIDS research is an important priority to
7 the gay and lesbian community, correct?

8 A. Yes.

9 Q. It's fair to say that even today the majority of Americans
10 would still think that homosexuals would be more likely to have
11 AIDS than heterosexuals, correct?

12 A. I haven't seen that cite, but I imagine that's the case.

13 Q. And if we look at the level of funding today, for AIDS
14 research, it has increased dramatically since the early days of
15 the AIDS crisis, correct?

16 A. Yes. Though, of course, any increase would be dramatic,
17 given how little there was initially, yes.

18 Q. Do you have a rough idea as to how much money a year the
19 federal government spends on AIDS research?

20 A. No. But I do think it is a significant amount.

21 Q. Now, you testified that not all states have bans on
22 discrimination on the basis of sexual orientation.

23 But isn't it true that thousands of private employers
24 have adopted nondiscrimination measures?

25 A. Many have. Certainly, it could be thousands.

1 Q. Let's look at your California report, which was behind tab
2 10, paragraph 28. And it's page 13. And you say in the third
3 full sentence:

4 "A substantial number of cities and counties
5 have prohibited discrimination based on
6 sexual orientation. Thousands of private
7 employers have adopted similar measures."

8 And that was true when you wrote that?

9 A. It must have been. I would have just reviewed that
10 literature at that time, which I haven't just done now.

11 Q. Okay. Local gay rights ordinances became in the 1980s an
12 important barometer of public attitudes towards homosexuality,
13 correct?

14 A. Yes.

15 Q. Local gay rights ordinances also became an important
16 barometer of the relative strength of pro- and anti-gay forces,
17 correct?

18 A. Yes, in the context of the referendum battles over gay
19 rights laws, yes.

20 Q. The efforts of gays and lesbians collectively constituted
21 a massive and remarkably successful grassroots campaign to
22 challenge the misconceptions and daily habits sustaining
23 anti-gay bigotry, correct?

24 A. I think over the sweep of the last generation, yes, it is
25 remarkable, the change that's been produced, even as it's

1 produced a reaction.

2 Q. As a result of both individual and collective efforts, gay
3 political clout has grown in many parts of the country,
4 correct?

5 A. I'm sorry, I'm --

6 Q. Sure. As a result of both individual and collective
7 efforts, gay political clout has grown in many parts of the
8 country, correct?

9 A. Yes. Certainly, in parts of the country, yes.

10 Q. And a growing number of heterosexuals have taken up the
11 causes -- have taken up gay causes as their own, correct?

12 A. Uhm, yes. More heterosexuals have come to support gay
13 rights, yes.

14 Q. Although, the statistics are imprecise, the best figures
15 we have now, in your opinion, are that somewhere between 2 and
16 5 percent of the population is gay and lesbian, correct?

17 A. Yes.

18 Q. And the support for the 2 to 5 percent number comes from a
19 study by the University of Chicago researcher, Edward Laumann,
20 correct?

21 A. Yes. As I recall, it is in the 2 to 3 percent category.

22 Q. It was one of the most highly regarded of the studies that
23 were conducted at the time, in the '90s, correct?

24 A. Yes.

25 **MR. THOMPSON:** Your Honor, we would move the

1 admission -- this is a plaintiffs' expert -- exhibit, PX943.
2 It's the Edward Laumann study that was just referenced. We
3 would ask the Court to take judicial notice of it.

4 **THE COURT:** PX9 --

5 **MR. THOMPSON:** -- 43.

6 **THE COURT:** 43.

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

8 **THE COURT:** Very well. 943 is admitted.

9 (Plaintiffs' Exhibit 943 received in evidence.)

10 **BY MR. THOMPSON:**

11 **Q.** And even as early as 1992, there was a distinct shift
12 towards support for gay people evident in the presidential
13 election year, when gay issues moved to the center of the
14 national debate for the first time, correct?

15 **A.** Well, I think that in 1992, yes, on the one hand, you had
16 a major presidential candidate, Bill Clinton, who voiced
17 support for gay rights more forcefully than it had been done in
18 the past.

19 And you had a very strong conservative position in
20 the Republican party, on gay rights.

21 **Q.** And President Clinton became the first president to
22 appoint openly-gay officials, correct?

23 **A.** Yes.

24 **Q.** And, in fact, he appointed more than 150 openly-gay
25 officials to his administration, correct?

1 A. Yes.

2 Q. President Clinton issued executive orders banning
3 discrimination in the federal workplace on the basis of sexual
4 orientation, correct?

5 A. Yes.

6 Q. And President Clinton issued executive orders barring the
7 use of sexual orientation as a criterion for determining
8 security clearance, correct?

9 A. Yes.

10 Q. And you've stated that -- and you would agree that, at the
11 national level, gay advocates remained relatively powerless to
12 win gay rights protections in the 1990s, correct?

13 A. Yes.

14 Q. And when you use the phrase "relatively powerless," what
15 you mean is gay activists and their supporters had reached the
16 point where they could at least have their issues considered;
17 but they had not achieved the power to win the proposals that
18 they put forward at the federal level, or to defend them
19 against determined opposition. Yes or no?

20 A. Yes.

21 Q. The federal government now prohibits agencies from
22 discriminating against homosexuals in employment, correct?

23 A. Yes.

24 Q. And surveys of the largest employers in the United States
25 show that more than 90 percent of them have adopted

1 antidiscrimination measures that protect the rights of gays and
2 lesbians, correct?

3 **A.** Yes.

4 **MS. STEWART:** Objection. Your Honor, I think it
5 misstates the testimony.

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

7 **MS. STEWART:** Never mind.

8 **THE COURT:** Objection withdrawn.

9 **BY MR. THOMPSON:**

10 **Q.** And, in the past, in the past, state and local the
11 government's used to try to ferret out and discharge their
12 homosexual employees, correct?

13 **A.** Yes.

14 **Q.** But that's no longer the case today, is it?

15 **A.** No. Those employees still report large levels of
16 discrimination; but, no, they do not -- they are not ferreted
17 out by state agencies now.

18 **Q.** And federal and local agencies in the past sought to
19 curtail gay people's freedom of speech, correct?

20 **A.** Yes.

21 **Q.** But that's no longer the case today, correct?

22 **A.** Correct.

23 **Q.** And homosexuals used to be barred from entry into the
24 United States, correct?

25 **A.** Correct.

1 Q. But that's no longer the case today, correct?

2 A. Correct.

3 Q. Okay. Now, let's talk about Don't Ask, Don't Tell.

4 And during the second World War, the Armed Forces put
5 in place screening mechanisms to ferret out homosexuals during
6 the induction process, correct?

7 A. Yes.

8 Q. The military, however, no longer tries to screen out
9 homosexuals during the induction process, correct?

10 A. I assume that's the case. I don't understand the exact
11 workings of this.

12 Q. Military police used to cooperate in anti-vice raids
13 against gay bars and other meeting places, correct?

14 A. Yes.

15 Q. But the military or police no longer conduct anti-vice
16 raids against gay bars, correct?

17 A. I assume that's correct.

18 Q. The don't -- you testified yesterday that the Don't Ask,
19 Don't Tell policy was a compromise; is that right?

20 A. Yes.

21 **MR. THOMPSON:** And, Your Honor, if I may, I think we
22 have some additional -- an additional binder. May I get that
23 and pass that around?

24 **THE COURT:** Of course.

25 **MR. THOMPSON:** Thank you, Your Honor.

1 **THE COURT:** It's too bad we are not all in the
2 notebook business.

3 **BY MR. THOMPSON:**

4 **Q.** And, Professor, I would like to direct your attention to
5 tab 14A. It actually says, "Exhibit A," but it's after 14.

6 And specifically to pages 9 and 10 of this document,
7 which is produced by the Congressional Research Service. It's
8 entitled, "Don't Ask, Don't Tell. The Law and Military Policy
9 on Same-Sex Behavior."

10 And we can see that when President Reagan was the
11 president, close to 2,000 individuals, in 1982, were discharged
12 from the Armed Services, correct?

13 **A.** Yes.

14 **Q.** And in the year immediately before Don't Ask, Don't Tell
15 was put in place, 949 individuals were discharged, in 1991,
16 right?

17 **A.** I'm sorry, what page?

18 **Q.** Sorry. If you turn the page.

19 **A.** Uh-huh.

20 **Q.** Okay. But in 2008, under President George W. Bush, only
21 634 individuals were discharged, correct?

22 **A.** Uhm, that's correct. Although, I believe that the size of
23 the military had declined.

24 So as I look at the percentages, they go up and down.
25 And we have roughly the same percentage being discharged in

1 2008 as were discharged in 1989.

2 **Q.** But as compared to President Reagan, in 1982, it's less
3 than half, correct?

4 **A.** A little bit more than -- yes. That was the high point,
5 under President Reagan.

6 **THE COURT:** You're referring to what page,
7 Mr. Thompson?

8 **MR. THOMPSON:** Oh, yes.

9 **THE COURT:** 10?

10 **MR. THOMPSON:** Page 9 has the Reagan numbers. And
11 page 10 has the more recent numbers, Your Honor.

12 **THE WITNESS:** Right. Of course, another one of the
13 Reagan numbers is from 1988, where it's roughly the same
14 percentage discharged as in 2008.

15 **BY MR. THOMPSON:**

16 **Q.** And in your report, you truncated your analysis at the
17 year 2000; is that right?

18 **A.** Yes.

19 **Q.** Now, let's look at the -- the role of courts and the level
20 of discrimination that's been directed against gays and
21 lesbians in the courts, Professor.

22 Courts used to be able to confine individuals deemed
23 in need of a cure for what was termed their homosexual
24 pathology, correct?

25 **A.** Yes.

1 Q. That doesn't happen anymore, does it, in this country?

2 A. No, I don't believe it does.

3 Q. So that's a form of discrimination that's vanished,
4 correct?

5 A. Uhm, I don't -- yes.

6 Q. And was the Supreme Court's decision in *Bowers vs.*
7 *Hardwick*, in your opinion, itself a reflection of moral
8 disapproval of gays and lesbians?

9 A. Well, certainly, there were indications in the supporting
10 opinions of that, and in the way they construed the sodomy law
11 at issue itself, and made it an anti-homosexual law. When, in
12 fact, it was a law that penalized heterosexual as well as
13 homosexual intercourse of certain kinds.

14 Q. Courts in Connecticut, Massachusetts, Iowa, California,
15 have all held that gays and lesbians have a constitutional
16 right to marry under their state constitutions, correct?

17 A. Yes.

18 Q. And those court decisions reflect increased level of
19 support for the rights of gays and lesbians, correct?

20 A. Well, I think those court decisions reflect the rulings of
21 the decisions of those courts that there was a guarantee of
22 equality, equal protection, and that they themselves may not
23 have reflected growth of support. They certainly went against
24 much public opinion.

25 Q. Now, let's talk about religion and discrimination against

1 gays and lesbians.

2 The first American laws against homosexual conduct
3 were rooted in the earliest English settlers' understanding of
4 the religious and secular traditions that prohibited sodomy,
5 correct?

6 **A.** Yes.

7 **Q.** And what were the secular traditions that prohibited
8 sodomy?

9 **A.** Well, those grew out of the English Reformation
10 Parliament's secularization of the law.

11 **Q.** And Puritan New England penalized many forms of carnal
12 knowledge, including adultery, fornication, and men lying with
13 men, correct?

14 **A.** Yes.

15 **Q.** And Puritan clergy in the New England colonies were
16 especially vigorous in their denunciation of sodomy as contrary
17 to God's will, correct?

18 **A.** Yes.

19 **Q.** The condemnation of the Puritan clergy was motivated by
20 the pressing need to increase the population and to secure the
21 stability of the family, as well as their reading of the
22 scripture, correct?

23 **A.** Uhm, that is what a number of historians have argued. And
24 I think it's probably correct.

25 **Q.** And the Puritans had no concept of homosexuals as a

1 distinct minority of humankind, correct?

2 **A.** Uhm, they certainly -- the Puritan clergy did not. This
3 was not a term available to them.

4 You know, it gets a little more complex when we look
5 at the reality of sort of the on-the-ground engagement with
6 people. But, yes, there was no concept of a homosexual as
7 such.

8 **Q.** And Puritans believed that all men and women were children
9 of fallen humanity and, thus, sinners, correct?

10 **A.** Yes.

11 **Q.** And even today, conservative Christians' traditions teach
12 that all men and women are sinners, correct?

13 **A.** Yes.

14 **Q.** We all know how divided our churches are today over the
15 issue of homosexuality, correct?

16 **A.** Yes.

17 **Q.** Religious attitudes have begun to change, though, correct?

18 **A.** Yes.

19 **Q.** In the 1970s, many mainline Protestant denominations
20 issued official statements condemning discrimination against
21 homosexuals, and affirming that homosexuals ought to enjoy
22 equal protection under criminal and civil law, correct?

23 **A.** Yes. Of course, as I go on to say in the passage you were
24 quoting, they continue to debate the place of gay people in the
25 religious life of the church. And they represent a fairly

1 small percentage of religious affiliations in the
2 United States.

3 **Q.** Several of these groups descended from the historically
4 influential denominations whose religious authority had been
5 invoked to justify colonial sodomy statutes and the policing of
6 homosexuality as one more sign of urban vice, correct?

7 **A.** Yes.

8 **Q.** The Christian Right's fierce opposition to gay rights is
9 already a minority position among Protestant denominations,
10 correct?

11 **A.** Uhm, you know, I think I'm -- I wrote that, and I'm -- I'm
12 not sure that that's correct.

13 **Q.** But you did write that?

14 **A.** Yes. And I do occasionally make mistakes.

15 **Q.** The Lutheran Church in America has issued a statement in
16 support of gay rights, correct?

17 **A.** Yes.

18 **Q.** The Unitarian Universalist Association has issued a
19 statement in support of gay rights, correct?

20 **A.** Yes.

21 **Q.** The United Methodist Church has issued a statement in
22 support of gay rights, correct?

23 **A.** Yes.

24 **Q.** The United Church of Christ has issued a statement in
25 support of gay rights, correct?

1 A. Yes.

2 Q. The Protestant Episcopal Church has issued a statement in
3 support of gay rights, correct?

4 A. Yes.

5 Q. The Disciples of Christ has issued a statement in support
6 of gay rights, correct?

7 A. Yes.

8 Q. The United Presbyterian Church in the United States has
9 issued a statement in support of gay rights, correct?

10 A. Yes.

11 Q. Many clergy have offered their support to gays and
12 lesbians by making their churches available for gay meetings,
13 correct?

14 A. Yes.

15 Q. And the Unitarians, Quakers, and Methodists were
16 especially noted for this, correct?

17 A. Yes.

18 Q. In the last generation, a growing number of faiths have
19 begun to celebrate the marriages of same-sex couples, correct?

20 A. Yes. Although, it still encompasses a tiny percentage of
21 people, religious affiliations in the United States.

22 Q. On the day same-sex marriage became legal in
23 Massachusetts, the Unitarians Reformed Judaism,
24 Reconstructionist Judaism, and the Metropolitan Community
25 Church encouraged their clergy to officiate at such weddings,

1 correct?

2 **A.** Yes. And, altogether, that would account for churches
3 representing a very small percentage of the American
4 population.

5 **MR. THOMPSON:** I would like to ask permission to play
6 a video on the screen, if possible. This is DIX 2648. It's a
7 short video relating to, the D.C. City Council just passed a
8 bill permitting same-sex marriage in the District of Columbia.

9 **BY MR. THOMPSON:**

10 **Q.** Were you aware of that, Professor?

11 **A.** Yes.

12 **Q.** And the signing was in a church. Were you aware of that?

13 **A.** No.

14 **MR. THOMPSON:** Can we --

15 **THE CLERK:** I'm sorry, what is the number, again?

16 **MR. THOMPSON:** Oh, yes. DIX 2648.

17 **THE CLERK:** Is this in evidence?

18 **MR. THOMPSON:** Well, I hope that it will be in
19 evidence. But we'd like to play it, and then --

20 **THE COURT:** Do you want to play it before it's in
21 evidence?

22 **MR. THOMPSON:** Either way. We would move -- we would
23 ask the Court to take judicial notice of this video that comes
24 from the *Washington Post* website, Your Honor.

25 **THE COURT:** Any objection, Ms. Stewart?

1 **MS. STEWART:** Your Honor, I would like to reserve
2 objection until we see the video. I am not familiar with it.

3 **THE COURT:** Fair enough. One of the advantages of a
4 bench trial.

5 (Laughter)

6 (Video played in open court.)

7 **BY MR. THOMPSON:**

8 **Q.** Does the signing of the D.C. bill, allowing same-sex
9 marriage, in a church symbolize the growing support among --
10 for same-sex marriage among certain faiths?

11 **A.** Uhm, excuse me. As I've said, yes, there is growing
12 support in the churches. Although, those churches represent a
13 very small percentage of people with religious affiliation in
14 the United States.

15 So there is a growing debate, but the churches
16 overall are still opposed to this.

17 **THE COURT:** Ms. Stewart, objection to 2648?

18 **MS. STEWART:** Yes, Your Honor.

19 I would just object to its admission into evidence
20 because I don't think it's relevant. It shows very little. It
21 doesn't give any sense of -- we saw two religious leaders
22 supporting marriage equality. I don't think that's a terribly
23 relevant fact.

24 **THE COURT:** Well, the witness has addressed a matter
25 related to it. And I think I'll admit it for the value that it

1 may have.

2 So 2648 will be admitted.

3 (Plaintiffs' Exhibit 2648 received in evidence.)

4 **BY MR. THOMPSON:**

5 **Q.** Now, mean evangelical Christians continue to oppose
6 same-sex marriage, correct?

7 **A.** Yes.

8 **Q.** But it is less acceptable to demonize homosexuals today
9 than it used to be, correct?

10 **A.** Yes. I believe in many circles it is.

11 **Q.** And Rick Warren is a prominent evangelical minister; is
12 that correct?

13 **A.** Yes.

14 **Q.** He wrote *The Purpose Driven Life*; is that correct?

15 **A.** Yes.

16 **Q.** It's a big bestseller; is that correct?

17 **A.** That's my understanding.

18 **Q.** And let's hear what --

19 **MR. THOMPSON:** I would like the Court's permission to
20 play a short video from Rick Warren.

21 I'm not intending, Your Honor, to offer it into
22 evidence. I just want to get the reaction from the witness as
23 to how this compares in the history of discrimination.

24 He spoke yesterday about what Jerry Falwell, one of
25 the leaders of the Christian Right, said about homosexuals in

1 the 1950s.

2 I would like to ask him whether Pastor Warren's
3 comments here reflect a change in attitudes among the religious
4 community that continues to oppose same-sex marriage.

5 **THE COURT:** Ms. Stewart.

6 **MS. STEWART:** Your Honor, I would like to reserve my
7 objection because I haven't determined whether we've worked out
8 authentication issues on this document. We may have. But I'm
9 afraid I don't know, at this moment.

10 So I don't -- I mean, I don't want to get in the way
11 of the witness showing it. But I may object to its admission.
12 I don't know if it's an authentic document.

13 **THE COURT:** Let's deal with the matter after --

14 **MR. THOMPSON:** Yes.

15 **THE COURT:** -- we have heard the excerpt and the
16 witness has been asked to address it.

17 **MR. THOMPSON:** Thank you, Your Honor.

18 (Video played in open court.)

19 **BY MR. THOMPSON:**

20 **Q.** So, Professor, this represents a stark shift from the
21 rhetoric of Jerry Falwell, when Rick Warren talks about love
22 and respect for all people, correct?

23 **THE COURT:** Did he say "love"?

24 **MR. THOMPSON:** He did, Your Honor.

25 **THE WITNESS:** He -- he talked about freedom of

1 choice. He talked about a lifestyle.

2 His suggestion was that homosexuality is a choice.
3 He did not demonize gay people, but he also clearly did not
4 think that their relationships deserve to be treated as equal
5 to heterosexual relationships.

6 **BY MR. THOMPSON:**

7 **Q.** Now, the bottom line of all the discussion we've had this
8 morning is that there has been a significant shift in public
9 opinion toward acceptance of gay people, correct?

10 **A.** Uhm, there have been -- there has been a shift in public
11 opinion and growing support for gay people. And gay people
12 continue to encounter menaced hostility.

13 **Q.** Now, in terms of the level of discrimination against gays
14 and lesbians in California, you would agree that there are,
15 certainly, many indications that large numbers of gay people
16 have left more hostile settings for the relative openness of
17 California, correct?

18 **A.** There are indications that people have migrated here
19 because it's less hostile than where they came from.

20 **Q.** And California has more protections for gays and lesbians
21 against discrimination than any other state, correct?

22 **A.** I don't know that as a precise fact, but there are
23 certainly many protections in California.

24 **Q.** Now, you talked -- you were asked yesterday about the
25 purposes and effect of Proposition 8. And, more generally, you

1 had some preparatory remarks about, I believe, 60 ballot
2 initiatives that were directed at gays and lesbians. Do you
3 recall that?

4 **A.** Yes.

5 **Q.** And how many of those 60 ballot initiatives were in
6 California?

7 **A.** I'm not sure. And I wasn't bringing -- I think, in that
8 particular figure I was basing it on something that had not
9 come into -- into the last decade. But -- so I'm not sure
10 precisely. There were several.

11 **Q.** And do you know what the win -- winning percentage was for
12 the gay and lesbian community in California, as opposed to the
13 rest of the country was?

14 **A.** I'm sorry. Could you reformulate that question.

15 **Q.** Didn't you testify yesterday that two-thirds of the
16 initiatives had prevailed against the will of the gay and
17 lesbian community?

18 **A.** I testified that three-quarters had.

19 **Q.** Three-quarters. I apologize, yes.

20 But do you know what the percentage is for
21 California?

22 **A.** No, I don't.

23 **Q.** But the Briggs Initiative, that came before the people in
24 California in the 1970s, correct?

25 **A.** Correct.

1 Q. It would have prohibited public school teachers from
2 saying anything that could be construed as advocating
3 homosexuality, correct?

4 A. Correct.

5 Q. And gay rights groups opposed the Briggs Initiative,
6 correct?

7 A. Gay rights groups, and many teachers groups which were
8 very concerned about this. And even noted politicians opposed
9 to it.

10 Q. Like Ronald Reagan?

11 A. Like Ronald Reagan, yes. That seemed a quite ominous
12 censorship of teachers.

13 Q. And the people of California sided with the gay rights
14 groups in rejecting the Briggs Initiative, correct?

15 A. Yes.

16 Q. Now, as I mentioned, you were also asked about the
17 purposes behind Prop 8. And I would like to quote from you
18 something that President Obama said in his book, *The Audacity*
19 *of Hope*, where he said:

20 "I believe that American society can choose
21 to carve out a special place for the union of
22 a man and a woman as the unit of
23 child-rearing most common to every culture."

24 In your opinion, does -- do President Obama's views
25 on same-sex marriage reflect moral disapproval of gays and

1 lesbians?

2 **A.** I believe that they reflect a sense that gay relationships
3 are not equal to heterosexual relationships; that they don't
4 deserve that same recognition.

5 **Q.** That's almost definitionally and tautologically true.

6 My question is in terms of his motivation. And you
7 spoke to the purposes behind Prop 8, which is why I'm asking
8 you this.

9 Do you believe that that statement by President Obama
10 reflects moral disapproval of gays and lesbians?

11 **A.** I'm reluctant to plumb the mind of a presidential
12 candidate. But -- it's hard for me to assess. But Barack
13 Obama mentioned that.

14 **Q.** Is it possible for someone to have the position that he
15 articulated, and not to morally disapprove of gays and
16 lesbians?

17 **A.** Uhm -- uhm, it would be possible. Certainly, though, as
18 I've said, I believe it reflects a belief in the inequality of
19 lesbian and gay relationships.

20 **Q.** I would like to direct your attention to tab 16 in your
21 binder, which is the California Supreme Court's decision in the
22 In Re Marriage decisions.

23 And, in particular, I would like to direct your
24 attention to footnote 73, which appears at page 61, I believe,
25 in this printout.

1 And, as you'll recall, Professor, this decision dealt
2 with the validity of Proposition 22. Do you recall that?

3 **A.** Yes.

4 **Q.** Okay. And tell me when you're there.

5 **A.** Okay.

6 **Q.** Okay. And in the first sentence, the Supreme Court of
7 California said:

8 "We emphasize that in reaching this
9 conclusion" -- meaning the conclusion of
10 invalidating Prop 22 -- "we do not suggest
11 that the current marriage provisions were
12 enacted with an invidious intent or purpose."

13 Do you agree that Prop 22 was not enacted with an
14 invidious intent or purpose?

15 **A.** It's not clear to me what they are referring to when they
16 say "the current marriage provisions."

17 **Q.** Let's say that's Prop 22.

18 **A.** You are -- this is not referring to long-standing and
19 current marriage provisions?

20 I'm sorry. I just need a little more context for
21 this, to be able to assess it.

22 **Q.** You were an expert in this case, right?

23 **A.** Yes. I submitted an affidavit in this case.

24 **Q.** Yes. It's Prop 22 that's at issue here.

25 **A.** Okay. I'm just sorry, I need a little more context to

1 understand what they are saying here.

2 **Q.** Well, let me just ask, wholly apart from what they're
3 saying, let me ask you what your opinion is.

4 Do you have an opinion as to whether Proposition 22
5 in California was passed because of invidious discriminatory
6 intent?

7 **A.** Again, I believe it reflected a belief in the inequality
8 of gay relationships.

9 **Q.** And then the question becomes: What's the source of that
10 belief? And do you believe that it was -- reflected an
11 invidious animus and hatred of gays and lesbians?

12 **A.** I think that to talk about hatred of lesbians and gay men
13 would only account for some; that there are others who would
14 not, certainly, express hatred towards lesbians or gay men, but
15 would still regard them as unequal, and their relationships as
16 not deserving the same status and rights as heterosexual
17 relationships do. And I think that's premised on a belief in
18 the inferiority of such relationships.

19 **Q.** Professor, I would like to direct your attention to tab
20 17. This is DIX81. It's an excerpt from Jonathan Rauch's
21 book, which is entitled, *Gay Marriage: Why it is Good for*
22 *Gays, Good for Straights and Good for America.*

23 And are you aware of Mr. Rauch? Do you know of him?

24 **A.** I know of him.

25 **Q.** Yes.

1 **MR. THOMPSON:** Your Honor, we would ask the Court to
2 take judicial notice of DIX81.

3 **THE COURT:** Very well.

4 **BY MR. THOMPSON:**

5 **Q.** And, Professor, I would like to direct your attention to
6 page 7 of this book. And on the right-hand column, third
7 sentence from the bottom, Mr. Rauch -- and Mr. Rauch is an
8 advocate for same-sex marriage, correct?

9 **A.** Yes.

10 **Q.** And he's openly gay; is that correct?

11 **A.** Yes.

12 **Q.** Okay. And he says:

13 "Some gay marriage opponents may be bigoted
14 or homophobic, or otherwise out to get gay
15 people. But most of them are motivated by a
16 sincere desire to do what's best for their
17 marriages, their children, their society."

18 Isn't it true that there are some people among the
19 7 million Californians who voted for Prop 8 who fall into
20 precisely this category?

21 **A.** You know, it's difficult for me to know the variety of
22 reasons in which people -- which people opposed marriage.

23 It's easier for me to comment on the sort of
24 arguments that were made against marriage equality by the
25 Prop 8 advocates, than to assess the various reasons that

1 people might have opposed this.

2 **Q.** So you just don't know why people opposed Prop 8 -- I
3 mean, supported Prop 8?

4 **A.** Well, I assume that there were a range of reasons that
5 people supported Prop 8. But that the -- an underlying premise
6 of them was that gay relationships were unequal.

7 **Q.** But were some of the people within that range -- and I
8 understand it's a range and that there are all sorts of
9 reasons -- but would some of the people in California, some of
10 the 7 million who voted for Proposition 8, fall into the
11 category that Mr. Rauch indicates here?

12 **A.** Yes. But we have to ask why people believe that opposing
13 marriage equality is best for their marriages, their children,
14 and society.

15 **MR. THOMPSON:** Okay. Your Honor, I would like
16 permission to play a very short video, which is DIX 2553.

17 **THE COURT:** DIX, again?

18 **MR. THOMPSON:** 2553, Your Honor.

19 **THE COURT:** Thank you, sir.

20 **MS. STEWART:** Your Honor, before we play it, might we
21 have a description of it so I know whether to object or not?

22 **MR. THOMPSON:** Yes. This is a video of Carrie --
23 it's a very short video, which has the excerpt of
24 Carrie Prejean's statements, and then Mayor Gavin Newsom's
25 reaction as to her motivation for having the religious

1 convictions she has.

2 So I think it speaks directly to the issue we are
3 talking about, which is: Why is it that some people were
4 opposed to same-sex marriage in California?

5 **MS. STEWART:** Your Honor, I would object that it's
6 not relevant, one individual's reasons.

7 **MR. THOMPSON:** I'm much more interested in what
8 Mayor Newsom has to say about it, Your Honor.

9 **THE COURT:** I'm really more interested in what the
10 witness has to say.

11 **MR. THOMPSON:** Well, as --

12 **THE COURT:** If it ties into this witness's testimony,
13 why, I think it's appropriate.

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

15 And the reason it ties in to what is being said is,
16 it goes to -- he was asked about the purposes behind Prop 8.
17 He testified to that.

18 And I have been asking him about why it is that some
19 people -- he's just testified there's a range of reasons why
20 people supported Prop 8. Mayor Newsom makes a statement about
21 that, and I would like his reaction whether he agrees with
22 Mayor Newsom.

23 **MS. STEWART:** Your Honor, we didn't put this witness
24 up -- and the witness's testimony has been about the history of
25 discrimination and the backdrop in the campaign messaging.

1 And I think this whole line of testimony is going
2 beyond the scope of direct. And I think we're getting even
3 further out on a limb with these kind of extraneous little bits
4 of video and asking him to comment on what he believes other
5 people's intent may have been, particular people. So I think
6 it's way beyond the scope, and it's also not relevant.

7 **THE COURT:** Well, it does appear to certainly push
8 the outer boundaries of the scope of direct examination. But
9 let's see where it goes.

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

11 **THE COURT:** And see what the witness's reaction is to
12 the statement.

13 **MR. THOMPSON:** Okay.

14 (Video played in open court.)

15 **BY MR. THOMPSON:**

16 **Q.** Would you agree, Professor, with Mayor Newsom, that some
17 people who take the position that Carrie Prejean did are simply
18 speaking their conscience?

19 **MS. STEWART:** Objection, Your Honor. Vague.

20 **THE COURT:** Sustained.

21 **MR. THOMPSON:** We'll move on, Your Honor.

22 **BY MR. THOMPSON:**

23 **Q.** The quest for equal rights in marriage has always been a
24 contentious issue within the gay movement itself, correct?

25 **A.** Uhm, initially, it was much more contentious. I think

1 that there's been a shift amongst gay activists who fairly
2 widespread support for gay marriage.

3 **Q.** But it's always been a contentious issue, correct?

4 **A.** Again, I think there's been a shift in the tenor of that
5 debate amongst gay activists. So that it was very contentious
6 at one point, and there's much more widespread support for this
7 now.

8 **Q.** There was a time when support for gay marriage was a
9 distinctly-minority position in the lesbian and gay community,
10 correct?

11 **A.** Amongst lesbian and gay activists, people who were lesbian
12 and gay organizers, there was minority support. Certainly,
13 have indications of this. Amongst ordinary lesbians and gay
14 men, indications would be otherwise, actually. There probably
15 was more support early on.

16 **Q.** Isn't it true that one critic in a New York newspaper
17 wrote, "This isn't the freedom we want"? And this was a gay
18 writer?

19 **A.** What's the date on that?

20 **Q.** It's in your book, *Why Marriage?*, at page 93.

21 **A.** I know. And I would like to get the date on it.

22 **Q.** Sure. It's page 93. That's behind tab 6 now.

23 Your book has footnotes. And so we may not -- but
24 I'm happy to let you look at it, to see if it refreshes your
25 recollection. The newspaper was called --

1 A. Ninety --

2 Q. 93, sir. And it's a newspaper entitled *Gay Power*. So I
3 don't know if that helps with the date, because maybe it was
4 only printed for a while.

5 A. Right. It was a fairly short-lived publication, late
6 '60s, early '70s.

7 Q. Okay. And that editorial captured the dominant spirit
8 among gay male liberationists for whom liberation centered on
9 sexual liberation, correct?

10 A. Yes. I believe it reflected dominant attitude of gay
11 activists at that time.

12 Q. And it is pretty clear that the majority sentiment among
13 gay rights activists was not interested in marriage as an issue
14 at that time, correct?

15 A. At that time, that's probably correct.

16 Q. Okay. And most lesbian feminists activists were even less
17 interested in pursuing marriage rights, correct?

18 A. That's probably correct, yes.

19 **THE COURT:** This was the 1960s?

20 **BY MR. THOMPSON:**

21 Q. And '70s?

22 A. 1960s and '70s, we are talking about.

23 Q. Yes.

24 A. That's the height of the sexual revolution.

25 Q. And after an initial flurry of activity, marriage

1 virtually disappeared as a goal of the gay rights movement,
2 correct?

3 **A.** Uhm, yes, because, as I pointed out in the book, there
4 were actually a number of lesbian and gay activists who did
5 seek the right to marriage; thought it was due them as it was
6 to heterosexuals. But it receded as an issue for a while.

7 **Q.** But the courts dismissed their petitions as preposterous,
8 right?

9 **A.** Yes.

10 **Q.** And both lesbian and gay activists agreed, correct?

11 **A.** I think for many people in that period the idea that the
12 courts would recognize gay couples' right to marry just seemed
13 unimaginable.

14 **Q.** And that was true of gay rights activists, too, correct?

15 **A.** Yes.

16 **Q.** Now, some feminists, such as the founder of the ACLU's
17 lesbian and gay rights project, Nan Hunter, regarded marriage
18 as a more flexible institution, which had been profoundly
19 changed since 1970s, and would be changed again by the
20 inclusion of same-sex couples, correct?

21 **A.** I believe that was the argument Nan Hunter made.

22 **Q.** And some gay men and lesbians felt making marriage a
23 central movement goal, or even supporting it, would dishonor
24 the innovative forms of intimacy that had taken shape in their
25 culture, correct?

1 **A.** Would you refresh me on what period we have moved into, in
2 this account.

3 **Q.** Well, we can look at your book, page 121.

4 **A.** So, I think, in this section I'm describing the emergence
5 of the debate over -- within the gay movement over marriage in
6 the 1980s and early '90s, when it became more of an issue,
7 again, and received extensive attention.

8 And, certainly, some gay activists opposed the
9 movement for marriage equality. And I'm beginning here to
10 describe the sort of period in which the shift in sentiment
11 occurred, in which the right to marry became a more widespread
12 and deeply-held goal of many gay activists.

13 **MR. THOMPSON:** Your Honor, I was wondering if we
14 might take our morning break sooner rather than --

15 **THE COURT:** I was thinking maybe you were close to
16 finishing with this witness.

17 **MR. THOMPSON:** Well, I think if I have a break, I
18 might be able to separate some of the wheat from the chaff, and
19 streamline this a little bit. I am getting closer, Your Honor.

20 **THE COURT:** Well, a promise to separate wheat from
21 chaff is one that I can't turn down.

22 (Laughter)

23 We will take until 15 minutes after the hour.

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

25 (Recess taken from 9:59 to 10:23 a.m.)

1 **THE COURT:** Very well. Mr. Thompson, to the wheat.

2 **MR. THOMPSON:** Yes, your Honor. Yes, your Honor,
3 absolutely.

4 **BY MR. THOMPSON:**

5 **Q.** Professor Chauncey, let us skip to tab 23, and this is a
6 *Los Angeles Times* story dated July 10th, 1996. It's entitled
7 "Area Lawmaker Rejects Same-Sex Marriages, But Backs
8 Partnership Role."

9 And then at the bottom of this first page, and this
10 is DIX-1482, it states:

11 "O'Connell, a Democratic, who represents
12 Santa Barbara and San Luis Obispo counties,
13 as well as parts of western Ventura County,
14 said he supported granting same-sex couples
15 certain legal rights that heterosexual
16 couples enjoys, such as, hospital visitation
17 rights and shared healthcare benefits, but
18 that he had difficulty supporting gay and
19 lesbian marriages. 'My impression is that
20 the term marriage is too steeped in
21 socio-religious traditions and mores for
22 people to feel comfortable with its
23 applications to gays and lesbians, O'Connell
24 said in a prepared statement.' Neil
25 Demers-Grey, director of Unity Pride

1 Coalition of Ventura County, applauded
2 O'Connell's vote. I think it's a very
3 equitable position for him to take, she
4 said."

5 Professor, isn't it true that during the mid-1990's,
6 gay rights activists thought it was an equitable position for
7 people to take to support domestic partnerships even while
8 preserving the traditional definition of marriage?

9 **A.** Well, I don't want to generalize about all gay activists
10 on the basis of a single quote.

11 **Q.** But many took that view, isn't that right?

12 **A.** Well, this is at time when marriage was beginning to
13 really explode on the national scene with the Hawaii decision
14 in 1993; but still seemed a far distant prospect to many gay
15 activists given the strength of the opposition to it.

16 I'm not quite sure of the date, but this would have
17 been issued about the time that DOMA, the federal Defense of
18 Marriage Act had been passed. So I don't know the particulars
19 here, but I could imagine that in this context someone would be
20 happy to get at least this part of what people were looking
21 for, given the scope of opposition to marriage.

22 **MR. THOMPSON:** Your Honor, we would ask the Court to
23 take judicial notice of DIX-1482.

24 **THE COURT:** Very well, 1482.

25 **MR. THOMPSON:** And, your Honor, at this point we

1 would like to put the binder aside and skip the rest of the
2 tabs -- so it was time well spent during the break -- and move
3 to some videos.

4 And if we may, we would like to play DIX-2616.

5 **MS. STEWART:** Your Honor, may I have a brief
6 description of that before I have to decide whether to object?

7 **MR. THOMPSON:** Well, it's a video of an elderly
8 couple who have been beaten up by opponents of Prop 8.

9 **MS. STEWART:** I think I know this video from a
10 deposition, and we do object to it. We think that it lacks
11 foundation and it also is not relevant to the issues that this
12 witness testified to.

13 **MR. THOMPSON:** And, your Honor --

14 **MS. STEWART:** No bearing on his testimony, quite
15 frankly.

16 **MR. THOMPSON:** And, your Honor, the reason it's
17 highly relevant is because we intend to show some videos now in
18 which supporters of Proposition 8 were harassed subject to
19 violence.

20 And I want to ask the witness whether one of the
21 reasons that the -- he has testified that there is still
22 discrimination against gays and lesbians today, and I want to
23 ask him if one of the reasons why there is still that
24 discrimination is because of the types of tactics we saw
25 employed against supporters of Prop 8.

1 **MS. STEWART:** Your Honor, if I might, number one,
2 this is hearsay evidence of people who -- the video basically,
3 if it's the one I'm aware of, and I think it was introduced in
4 the Sanders deposition, it completely lacks foundation.

5 It also has zero to do with what this witness has
6 testified about. And they are going to put up claim -- things
7 where people claimed that they were harassed. There's no
8 foundation to even prove that they were harassed. And then
9 he's going to ask this witness to speculate about whether some
10 people may have voted for Proposition 8 because somebody was
11 harassed and they put out news reports claiming that.

12 I think we are far afield. I think chafe doesn't
13 then begin to state where we are at this point.

14 **THE COURT:** It does seem to me, Mr. Thompson, you can
15 explore this topic without showing the video.

16 **MR. THOMPSON:** I could. I just thought that it might
17 make it more concrete, but I'm happy to do it either way, your
18 Honor.

19 **THE COURT:** Well, if you can explore it without the
20 video, since there isn't a foundation for the video, that's
21 fine.

22 **MR. THOMPSON:** Okay.

23 **THE COURT:** I think it's a fair enough line of
24 inquiry.

25 **MR. THOMPSON:** Okay.

THE COURT: So you may proceed.

BY MR. THOMPSON:

Q. Professor Chauncey, are you aware of the fact that there were some churches that were defaced and vandalized during the Proposition 8 campaign?

A. I have no detailed knowledge of these things. I have heard that there were various incidents.

Q. And have you heard that there were incidents in which people had their businesses boycotted as a result of donating as little as \$100 to Proposition 8?

A. I have heard things to that effect said.

Q. And have you heard that some people were subjected to physical violence as a result of their support for Proposition 8?

A. I had not heard that.

Q. Were you aware that the mayor of Fresno was subject to a death threat that was so severe that the police went out and tried to arrest the person who sent the email?

A. No.

Q. Isn't it true that these types of tactics by supporters of the LGBT community have the potential to backfire and create resentment against the LGBT community?

A. Well, honestly, I don't know the details here. I don't know what the basis is for claiming that these were perpetrated by members of the LGBT community. And I -- I'm really not in a

1 position to assess what effect they may or may not have had
2 here. I'm really --

3 **Q.** Just so the record is clear, in terms of the level of
4 discrimination against gays and lesbians in the United States
5 today, you don't know the extent to which it's attributable to
6 aggressive, violent acts that supporters of the LGBT community
7 have taken?

8 **A.** I think that you would have to make a very elaborate case
9 for me to believe that that is the case.

10 **Q.** But you haven't studied it?

11 **A.** I have not studied that, but it seems unlikely to me on
12 the face of it. But, again, that's not something I have
13 studied.

14 **MR. THOMPSON:** Your Honor, at this point we would
15 like to play PX 116, which has been admitted -- well, actually,
16 before we play that --

17 **THE COURT:** PX?

18 **MR. THOMPSON:** 116, which has been admitted into
19 evidence.

20 **BY MR. THOMPSON:**

21 **Q.** But before we get to that, let me ask you, Professor, it's
22 true that the voters of California received information about
23 Prop 8 from a myriad of sources, correct?

24 **A.** Yes.

25 **Q.** From friends, correct?

1 A. I assume that was the case.

2 Q. From radio, correct?

3 A. I assume so.

4 Q. From the internet?

5 A. I assume that was the case.

6 Q. From the newspapers?

7 A. I assume that was the case.

8 Q. From their places of worship?

9 A. I assume that was the case.

10 Q. From TV?

11 A. Yes.

12 Q. And many people don't form their opinions on important
13 political topics based on TV ads, correct?

14 A. You know, I'm really best at just describing what I see as
15 the messaging being developed --

16 **THE COURT:** This seems to be a little beyond the --

17 A. -- and I don't consider myself an expert on, you know,
18 election analysis.

19 **MR. THOMPSON:** Okay. Well, I'm asking these
20 questions as a run-up since he had opined on the TV ads that
21 were run on it.

22 **BY MR. THOMPSON:**

23 Q. Let me ask you, Professor, isn't it true that -- you
24 testified you were asked about the purposes and effects of
25 Proposition 8.

1 Isn't it true that some people voted on Prop 8 based
2 on their sincerely-held moral values without regard to what was
3 on TV?

4 **A.** I imagine that that is the case. And, again, one has to
5 understand the history shaping those moral values and the
6 meaning of those moral values.

7 Many people have, as I said yesterday, have opposed
8 desegregation and interracial marriage on the basis of
9 deeply-held moral values. And because of the context of
10 hostility and prejudice towards the groups that would have --
11 whose lives would have been changed by desegregation and
12 interracial marriage. I think that's probably the case today.

13 **Q.** It's true that most people when they vote try reflect
14 their moral values, correct?

15 **A.** I'm not really in a position to answer that question.

16 **Q.** Well, you have taught survey classes on twentieth century
17 U.S. history, correct?

18 **A.** Yes. And I think we could say that a wide-range of
19 factors effect people's vote. A wide-range of factors affect
20 people's voting behavior.

21 **Q.** But it's part of the American political tradition for
22 people to vote on important issues consistent with their
23 religious views, isn't that right?

24 **A.** We see that on some issues, more than on others.

25 **Q.** And there is nothing wrong where that, is there?

1 **A.** They have the right to do what they wish, but we, as
2 historians, would want to understand what shape those values
3 and those attitudes.

4 **MR. THOMPSON:** Now I would like to play PX 116.

5 **MS. STEWART:** Your Honor, again, if we might have a
6 description before we play and head down the path.

7 **MR. THOMPSON:** It's been admitted into evidence and
8 what it is, it's the four-and-a-half minute version of the
9 thirty-second ad that he was shown yesterday. So it's directly
10 relevant, your Honor to his direct testimony.

11 This is the Wirthlins. This is the Wirthlins, the
12 couple from Massachusetts, who describe the reason -- what
13 happened in Massachusetts, then that was created and turned
14 into a thirty-second ad, which Professor Chauncey testified to
15 yesterday.

16 **THE COURT:** Has the witness seen this four-minute
17 version?

18 **MR. THOMPSON:** I'd like to ask him if he did.

19 **BY MR. THOMPSON:**

20 **Q.** Did --

21 **A.** No, I don't believe I have.

22 **THE COURT:** All right. You may play 116.

23 (Videotape played in open court.)

24 **BY MR. THOMPSON:**

25 **Q.** Now, Professor, did you review that as one of the

1 materials you considered in this case?

2 **A.** No. Though, actually, now that I have seen it, I realized
3 that I hadn't seen it before.

4 **Q.** Okay. Is it reasonable for parents who morally disapprove
5 of homosexuality to want to wait until the fifth or sixth grade
6 for those sorts of issues to be taught in public school?

7 **A.** Well, would you say that people who morally disapprove of
8 racial equality or racial marriage should be able to insist
9 that no books showing black and white people as equal or black
10 and white people in relationships should be kept out of the
11 schools?

12 I mean, I think there is a general sense in the
13 schools that if you wish, you can send your child to a private
14 school, but there are things that will be discussed in a public
15 school and that this is a part of the reality of life in
16 Massachusetts now and the country.

17 **Q.** And would you agree that at least the parents have the
18 primary responsibility for raising their own children?

19 **A.** Umm, parents certainly have primary responsibility in
20 raising their children, but they also raise them in a society
21 which provides many other mechanisms to teach them and educate
22 them.

23 **Q.** Do you agree that the parents' responsibility for raising
24 their child includes development of the child's moral
25 character?

1 **MS. STEWART:** Your Honor, I'm going to object to this
2 line of questioning. Again, it kind of goes beyond the scope
3 of direct.

4 **MR. THOMPSON:** Your Honor, he testified about what
5 these ads were intended -- what subliminal messages about
6 stereotypes they were played on. So I want to probe whether
7 that's really true or whether it was going to a different
8 issue, which was parents wanting to inculcate their children on
9 their moral values.

10 **THE COURT:** How much longer do you have on this?

11 **MR. THOMPSON:** Three more questions, your Honor.

12 **THE COURT:** Objection overruled.

13 **MR. THOMPSON:** Thank you.

14 **BY MR. THOMPSON:**

15 **Q.** And you would agree that parents have responsibility for
16 developing their child's moral character, including on issues
17 relating to sexual morality?

18 **A.** There have been debates for a very long time about what
19 exactly can happen in schools and where parents can withdraw
20 their children, and in general I think the understanding is
21 that schools are free to and are encouraged to teach broader
22 social values.

23 And in this case the child is simply being exposed to
24 the existence of gay people. And I take note that the parents
25 don't express concern just about marriage, but about

1 homosexuality at all.

2 **Q.** Do you agree that issues relating to homosexuality and
3 same-sex marriage are issues for parents to discuss with their
4 children according to their own values and beliefs?

5 **A.** I agree that parents can do that, yes.

6 **Q.** And then you would agree with the proponents of
7 Proposition 8, that parents would have a right to object if
8 their young children were being taught in public school that
9 there is no difference between same-sex marriage and
10 traditional marriage, if that teaching contradicted the
11 parents' own moral values and beliefs, correct?

12 **A.** Well, I don't think that they would be able to object to
13 schools teaching about interracial marriage, if that conflicted
14 with their moral beliefs.

15 **Q.** And so they shouldn't be able, in your opinion, to object
16 if the children are being taught about same-sex marriage, even
17 if it conflicts with their moral beliefs; that's your view?

18 **A.** I think they are welcome to object, but I don't think that
19 that objection would be binding in this case, no.

20 **MR. THOMPSON:** No further questions, your Honor.

21 **THE COURT:** Very well. Thank you, Mr. Thompson.

22 Redirect, Mrs. Stewart.

23 **REDIRECT EXAMINATION**

24 **BY MS. STEWART:**

25 **Q.** Good afternoon, Professor Chauncey.

1 **THE COURT:** Not yet.

2 **THE WITNESS:** It just feels like that long a day.

3 **MS. STEWART:** It feels like afternoon.

4 **THE COURT:** It just seems like afternoon.

5 (Laughter.)

6 **BY MS. STEWART:**

7 **Q.** Good morning, Professor Chauncey.

8 **A.** Good morning.

9 **Q.** Does Proposition 8 say anything about when sex education
10 takes place?

11 **A.** No, it does not.

12 **Q.** Does it say anything about what parents can teach their
13 children?

14 **A.** No, it does not.

15 **Q.** Does it say anything about what schools or parents discuss
16 with children and when?

17 **A.** No.

18 **Q.** Does it say anything about what parents can object to in
19 terms of the schools?

20 **A.** No.

21 **Q.** We were just looking at the long ad with the Wirthlins,
22 and I'm wondering if you have think thoughts about the
23 reference to gay marriage or homosexuality as a, quote,
24 homosexual relationships as an adult issue?

25 **A.** Well, again, I think it implies that there is something

1 wrong with homosexuality. It focuses entirely -- it suggests
2 the focus on homosexuality entirely as a matter of sexuality,
3 not love, not relationships.

4 This is actually a book about two princes falling in
5 love and it's a fairy tale. It doesn't talk about sex. It's
6 another fairy tale that seems appropriate to that age.

7 **Q.** Are there fairy tales about men and women falling in love?

8 **A.** I believe there are, yes.

9 (Laughter.)

10 **Q.** Is heterosexual marriage viewed as an adult issue in our
11 culture?

12 **A.** I don't believe that it's something that we keep our
13 children from, no.

14 **Q.** Do children sometimes even play a role in heterosexual
15 weddings?

16 **A.** I believe they have been exposed to heterosexual weddings,
17 yes.

18 **Q.** Well, have you ever heard of a flower child -- or flower
19 girl, ring bearer?

20 (Laughter.)

21 **A.** Yes. I have heard that children have been allowed to be
22 present at and even been allowed to play a role in heterosexual
23 marriages.

24 **Q.** Are there any other themes in the Wirthlin's ad that you
25 care to comment on, the one that with just saw?

1 **A.** Well, again, I think there is the implication here that
2 the very exposure to the idea of homosexuality in gay people
3 somehow threatens the children, threatens their sexual
4 identity, as if that's a choice; that this is something, again,
5 that's being imposed on them.

6 Historically gay rights have often been depicted in
7 that way, assuming the very fact that gay people are asking to
8 be recognized and to have their relationships recognized even
9 by marriage is seen as an imposition on other people rather
10 than simply an extension of fundamental civil rights to those
11 people.

12 **Q.** I want to move on to a subject that you testified about a
13 little bit on cross that Mr. Thompson asked you about, and he
14 asked you a number of questions about your book and, I think,
15 your report in this case regarding when Americans and sort of
16 western society began to understand that homosexual people were
17 a class of people, people with a primary attraction or
18 relationship with someone of the same sex.

19 But I want to ask you to put aside the issue of when
20 people began to understand that concept and ask you whether
21 there is evidence in the historical record, even before those
22 categories were understood, that there were people whose
23 primary erotic and emotional attraction was to people of the
24 same sex:

25 **A.** Okay. This is certainly something that historians are

1 studying today. There is a broad sense. It's contested as
2 most issues in history are, but a broad sense that the to
3 categories of hetero and homosexual emerged and became primary
4 organizing categories of state regulation and personal identity
5 beginning in the late nineteenth century.

6 But a number of studies have been published -- and I
7 actually use some of these in my teaching studies and primary
8 sources and so forth -- that do suggest that there were people
9 who had a primary erotic and affectual interest in people in
10 the same sex before then.

11 So I will give you just a couple of examples. One is
12 in Puritan New England, in Connecticut in the seventeenth
13 century, a case of Nicholas Sension, who's one of the most
14 extensive court records we have access to. And what's clear
15 there is that although people did not first call him a
16 homosexual, this was not a term available to him and that
17 wouldn't fully explain his mode of life, that he had developed
18 a reputation over the course of almost 30 years in his small
19 town in Connecticut as someone who persistently indicated
20 sexual interest in other males and approached them. He
21 actually developed a reputation for this.

22 Now, in this period people didn't use a term like
23 "identity." They talked about character. They had a variety
24 of ways of other frameworks through which to understand someone
25 like Sension.

1 So we wouldn't call him a homosexual in the sense of
2 having a homosexual identity of that period and, yet, there is
3 strong evidence that, in fact, he had consistent erotic
4 interest in people of the same sex.

5 Likewise, a lot of attention has been paid to the --
6 and I have written about as well, the culture of romantic
7 friendship in the nineteenth century. There were a wider range
8 of bounds of the kinds of relationships that people of the same
9 sex could have, the degree of affection that they could express
10 for one another.

11 What's striking when you got into some of the diaries
12 and correspondence that we depend on to reconstruct those
13 relationships, are the moments when, say -- I'll just give you
14 an example. It's a diary that I assign in my lecture course in
15 Lesbian and Gay History written by Frances Willard, who later
16 went on to found the Woman's Christian Temperance Union. She
17 is young, in the 1860's. She falls in love with a woman. The
18 other woman falls in love with her. Everyone thinks it's
19 great. It's very conventional. Yet, a moment comes when
20 Frances realizes that her attraction is much more powerful and
21 sustaining than her friend Mary's. And there is sort of a
22 crisis for her, so that the boundaries of what is acceptable
23 and the conventions allow them to take the relationship so far
24 and then, for instance, Willard realizes that this is something
25 different for her and she doesn't have a ready language for

1 it -- certainly not the language of homosexuality and
2 heterosexuality -- but she draws on all sorts of framework to
3 try to understand how she is different from other women because
4 of this passion that she feels for her friend Mary and would go
5 on to feel for others.

6 Likewise, in the early twentieth century, in a period
7 that we discussed at the very end of the day yesterday in
8 direct -- or cross examination, rather, talking about my book
9 on the *Social Organization of Sexuality and Male Sexuality in*
10 *the Early Twentieth Century New York*.

11 Yes, there was a wider range of sexual possibilities
12 for conventional sexual patterns in the part of some immigrant
13 working class communities in the early twentieth century. It
14 was easier in that context for some men to shift back and forth
15 between male and female partners, but their male partners were
16 conventionally typically men who did define themselves on the
17 basis of their difference from other males, on the basis of
18 their consistent desire for sex with those -- with other men
19 and relationships with other men. Again, understood somewhat
20 differently than we would understand it today, the alliance of
21 gender inversion and so forth.

22 But there were people at that time who were --
23 identified themselves and were identified by others on that
24 basis.

25 **THE COURT:** Perhaps you could throw a question in

1 there somewhere.

2 **MS. STEWART:** I was about to do that, your Honor.

3 **BY MS. STEWART:**

4 **Q.** Shifting to another topic, Dr. Chauncey, Mr. Thompson
5 asked you a number of questions about various lesbian and gay
6 people who at some points weren't supportive of pursuing the
7 right to marry. And a lot of those questions focused on the
8 period of 60's and 70's.

9 And I want to ask you: During the 60's and 70's,
10 what were some of the priorities of the lesbian and gay civil
11 rights movement?

12 **A.** Well, in the '60s and 70's the fundamental priorities of
13 most gay activists were to simply try to stop the policing of
14 everyday life, the widespread arrest, the raids on bars and
15 restaurants, and then to achieve fundamental -- protections
16 against discrimination at the workplace and in housing and so
17 forth, and simply to be able to come out and to be openly known
18 as gay without facing a whole range of forms of harassment and
19 discrimination because of that.

20 **Q.** And before the mid-70's, were they also working on trying
21 to get the medical establishment to change its view?

22 **A.** Yes. That's certainly was a priority of some activists,
23 given the long --

24 **THE COURT:** Let's the witness testify, Ms. Stewart.

25

1 **BY MS. STEWART:**

2 **Q.** Dr. Chauncey, during the period when African-American
3 civil rights were being sought in this country, were there
4 black people who sometimes were not in favor of segregation?

5 **A.** Were there black people who were not in favor of
6 segregation?

7 **Q.** Yes. Pushing for segregation.

8 **A.** Desegregation, do you mean?

9 **Q.** I'm sorry, desegregation.

10 **A.** Yes, yes. There were debates amongst African-American
11 activists about the best way to go, the priorities that the
12 movement should have, fears about pushing the white power
13 structure too far.

14 **Q.** Mr. Thompson asked you this morning about a statement in
15 your book *Why Marriage* about 92 percent of companies providing
16 benefits to -- well, actually, let me just have you turn in
17 your book to page 52.

18 **A.** Sorry, which exhibit is my book? Six, I think? Yeah.

19 **Q.** I think it's six.

20 **A.** Yes. Right. So there is a reference to is a survey this
21 2002, a survey of 319 of America's largest companies and that
22 survey of those 319 companies found that 92 percent of them
23 prohibited workplace discrimination against gays and lesbians.

24 **Q.** And so your reference earlier to 92 percent was to that
25 subset of companies, 319 large companies?

1 A. Yes, yes.

2 Q. Is there still employment discrimination in this country
3 today?

4 A. Yes, there is. On the basis of sexual orientation, yes.

5 Q. Mr. Thompson asked you the question, and I think you
6 responded, whether it's true that the federal government no
7 longer prohibits people from entering the United States; do you
8 remember that?

9 A. Yes.

10 Q. Can a heterosexual person marry a non-U.S. citizen and
11 bring their spouse into this country under current law?

12 A. No, in fact --

13 Q. A heterosexual person.

14 A. Excuse me. No, a heterosexual person can bring their
15 married partner from abroad into the country.

16 Q. And is the same thing true for gay people?

17 A. No, it is not.

18 Q. You mentioned in your testimony in response to a question
19 of Mr. Thompson that some people need to move to California or
20 do move to California to find a more open society; do you
21 remember that statement?

22 A. Yes.

23 Q. Why do people need to move to California to find a more
24 open society?

25 A. They do so because they continue to face hostility and

1 discrimination in the places they live. And like other groups,
2 which have faced marginalization in the past, people have --
3 often there are enormous migrations of African-Americans from
4 the deep south to the relative freedom of northern cities and
5 western cities over the course of the twentieth century, and
6 there they found more freedom than they would have found at
7 home, but still certainly not complete freedom and rights.

8 Without drawing a sharp analogy between the two
9 groups, I think that's a pattern that we saw on the part of gay
10 men and lesbians who we have records since the late nineteenth
11 century moving away from small towns to larger cities where
12 they would be more likely to find people like themselves,
13 relative freedom, but still, of course, encountered enormous
14 hostility and discrimination.

15 **Q.** Thank you. Mr. Thompson also asked you about a reference
16 in that same exhibit, your book *Why Marriage* to -- and it's on
17 page 51, to a statement that:

18 "The 1990's marked a major turning point of
19 lesbians and gay men in American society."

20 Do you remember that --

21 **A.** Yes.

22 **Q.** (Continuing) -- testimony?

23 **A.** Yes.

24 **Q.** I believe you said that -- tell me again when the book was
25 written?

1 **A.** It was written in 2004.

2 **Q.** Since it was written, have there been some further laws
3 enacted that reflect discrimination against gay people?

4 **A.** Well, the majority of states have enacted legislation or
5 constitutional amendments that would prohibit same-sex couples
6 from marrying.

7 **Q.** Have there been -- how have those measures been enacted?

8 **A.** Well, there have been -- both by legislative vote, but
9 there have also been a tremendous number of popular referenda
10 which have enacted that sort of discrimination.

11 **Q.** You believe that those measures have an impact on the
12 ability of lesbian and gay people to seek equality through the
13 political process?

14 **A.** Yes, I do. And maybe this is a moment to say that --
15 since I wasn't able to in cross-examination, that I was
16 actually -- I thought at the time that I published this book in
17 2004 that there was a greater chance of marriage equality
18 moving forward, and that's the way I ended the book.

19 Since then so many states have enacted these
20 constitutional amendments and statutes, have put such enormous
21 roadblock in the way of movement on that issue that I'm much
22 less likely, much less inclined to believe that that's the
23 case.

24 **Q.** I want to now turn to an area where Mr. Thompson focused a
25 little bit on religion and religious beliefs.

1 And I think he asked you some questions about
2 religious organizations or churches that support -- supported
3 marriage equality; do you remember that?

4 **A.** Yes.

5 **Q.** And I was wondering if you could tell us what some of the
6 major faith groups were, some of the churches that were
7 strongly in support of Proposition 8 against marriage equality?

8 **A.** The Baptists, the Catholic church, a range of groups that
9 would constitute a much larger percentage of the population,
10 much larger percentage of the population than the small old
11 mainline, as they called them, Protestant churches.

12 **Q.** And I believe that when he showed you a video of Pastor
13 Warren, he asked you a question along the lines of, you know,
14 has the religious rhetoric or language being used about
15 homosexuals by religious -- people of faith become more polite
16 or nicer, or something along those lines; do you remember that?

17 **A.** Yes.

18 **Q.** I would like to ask you to look at Plaintiffs' Exhibit
19 301, which --

20 **MS. STEWART:** May I approach, your Honor?

21 **THE COURT:** Very well.

22 (Whereupon, document was tendered
23 to the witness.)

24 **BY MS. STEWART:**

25 **Q.** This is a document from the website of the Vatican or a --

1 the Catholics For A Common Good, I should say. It's from a
2 Catholic organization. And it's excerpts from a Vatican
3 document on legal recognition of same-sex unions.

4 And I would ask you to read the third paragraph --
5 third paragraph on this page, on the first page.

6 **A.** "There are absolutely no grounds"?

7 **Q.** Yes.

8 **A.** (As read)

9 "There were are absolutely no grounds for
10 considering homosexual unions to be in any
11 way similar or even remotely analogous to
12 God's plan for marriage and the family.
13 Marriage is holy, while homosexual acts go
14 against the natural moral law. Homosexual
15 acts close the sexual acts to the gift of
16 life. They do not proceed from a general
17 affective and sexual complementarity. Under
18 no circumstances can they be approved."

19 **Q.** Would you also read the last sentence of the next
20 paragraph?

21 **THE COURT:** Is this in evidence?

22 **MS. STEWART:** I'm sorry, your Honor. I would like to
23 move this document into evidence.

24 **MR. THOMPSON:** Your Honor, no objection.

25 **THE COURT:** Very well. 301 is admitted.

1 (Plaintiffs' Exhibit 301 received in evidence.)

2 **A.** (As read)

3 "The homosexual inclination is, however,
4 objectively disordered and homosexual
5 practices are sins gravely contrary to
6 chastity."

7 **BY MS. STEWART:**

8 **Q.** I would like to have you turn to the third page of this
9 document and look at the third full paragraph and read the
10 sentence beginning with "Allowing children."

11 **A.** I'm sorry. Which --

12 **Q.** Third full paragraph, which begins with, "The absence of
13 sexual complementarity." Do you see that?

14 **A.** Okay.

15 **Q.** The second -- the sentence that begins, "Allowing
16 children."

17 **A.** (As read)

18 "Allowing children to be adopted by persons
19 living in such unions would actually mean
20 doing violence to these children in a sense
21 that their condition of dependency would be
22 used to place them in an environment that is
23 not conducive to their full human
24 development."

25 **Q.** Finally, I would ask you to look at the last paragraph on

1 the page, about the middle of the paragraph there is a sentence
2 that starts, "The legal recognition of homosexual unions."

3 Would you read that sentence into the record?

4 **A.** Umm --

5 **Q.** Third sentence of the last paragraph, "Legal recognition."

6 **A.** I'm sorry. We are still on the same page?

7 **Q.** We are on the third page of the document -- the last page
8 of the document.

9 **A.** What is the first word in that paragraph?

10 **Q.** "The church teaches."

11 **A.** Third sentence...

12 **Q.** "Legal recognition."

13 **A.** Right.

14 "Legal recognition of homosexual unions or
15 placing them on the same level as marriage
16 would mean not only the approval of deviant
17 behavior with the consequences of making it a
18 model in president day society, but it would
19 also obscure basic values which belong to the
20 common inheritance of humanity."

21 **Q.** Are those statements more moderate framing of religious
22 views on homosexuality in your view?

23 **A.** Well, compared to some statements, they are more moderate,
24 but I think they express the fundamental view, obviously, of
25 the inferiority of homosexuals, the dangers that they pose to

1 children.

2 **Q.** I'd ask you to look now at Plaintiffs' Exhibit 168, which
3 I'm going to move into evidence.

4 **MS. STEWART:** May I approach, your Honor?

5 **THE COURT:** Very well.

6 (Whereupon, document was tendered
7 to the witness.)

8 **MR. THOMPSON:** No objection, your Honor.

9 **THE COURT:** Thank you Mr. Thompson.

10 (Plaintiffs' Exhibit 168 received in evidence)

11 **BY MS. STEWART:**

12 **Q.** Dr. Chauncey, this is a document, a resolution from the
13 Southern Baptist Convention website on the topic of same-sex
14 marriage, and I would ask you to look at the second page of the
15 document, about the fourth paragraph up from the bottom. Would
16 you read that into the record?

17 **A.** "Whereas legalizing," that one?

18 **Q.** Yes.

19 **A.** (As read)

20 "Whereas, legalizing 'same-sex marriage'
21 would convey a societal approval of a
22 homosexual lifestyle, which the Bible calls
23 sinful and dangerous both to the individuals
24 involved and to society at large" -- quotes
25 Romans and Corinthians in Leviticus -- now,

1 therefore, be it."

2 **Q.** And there's a number of resolutions, and I'd ask you to
3 look at the next page and read the second paragraph?

4 **A.** (As read)

5 "Resolve that we oppose all efforts by media
6 and entertainment outlets in public schools
7 to mainstream homosexual unions in the eyes
8 of our children."

9 **Q.** Would you also read the last paragraph?

10 **A.** (As read)

11 "Resolve that we call on Southern Baptists
12 not only to stand against same-sex unions,
13 but to demonstrate our love for those
14 practicing homosexuality by sharing with them
15 the forgiving and transforming power of the
16 gospel of Jesus Christ," quoting Corinthians.

17 **Q.** I have one more of these exhibits. I would like you to
18 look at Plaintiffs' Exhibit 170.

19 **MS. STEWART:** Your Honor, may I approach?

20 **THE COURT:** You may.

21 (Whereupon, document was tendered
22 to the witness.)

23 **MR. THOMPSON:** We have no objection, your Honor.

24 **THE COURT:** Very well. 170 will be admitted.
25

1 (Plaintiffs' Exhibit170 received in evidence.)

2 **BY MS. STEWART:**

3 **Q.** This, also, is a resolution that is on the Southern
4 Baptist Convention website reflecting its policies.

5 Would you look at -- let's see, one, two, three,
6 four -- the sixth paragraph down on the first page that begins,
7 Whereas, any action giving homosexual unions," do you see that?

8 **A.** Yes.

9 **Q.** And read that into the record.

10 **A.** (As read)

11 "Whereas, any action given homosexual unions
12 the legal status of marriage denies the
13 fundamental immorality of homosexual
14 behavior," citing Leviticus 18-22, Romans --
15 1 Romans 26-27, 1 Corinthians 6:9-11.

16 **Q.** And if you look four paragraphs down from that, "Resolve
17 that we encourage," would you read that into the record and the
18 one following?

19 **A.** (As read)

20 "Resolve that we encourage all Christian
21 pastors in California and in every other
22 state to speak strongly, prophetically and
23 redemptively concerning the sinful nature of
24 homosexuality and the urgent need to protect
25 biblical marriage in accordance with God's

1 word. And be it further resolved that we
2 call on all Southern Baptists and believers
3 from all denominations everywhere to pray for
4 the people of California as they seek to
5 right this terrible wrong that has been
6 forced upon them by the California Supreme
7 Court's overturning of the vote of the people
8 and to pray for the people of every state
9 where biblical marriage is under attack."

10 **Q.** Dr. Chauncey, are these pronouncements by the Catholic
11 Church and Baptist Convention consistent with your
12 understanding of the religious beliefs or at least some of them
13 that were voiced in support of Proposition 8?

14 **A.** Yes.

15 **Q.** Professor Chauncey, I believe Mr. Thompson asked you a
16 number of questions about people who may believe that
17 homosexuality is sinful or have other religious beliefs that
18 led them to support Proposition 8. Do you recall that?

19 **A.** Yes.

20 **Q.** I would like you to assume for a minute that these
21 religious beliefs are sincerely held. Would you nevertheless
22 say that they could be affected by stereotypes of gay people
23 that emerged from the twentieth century or even earlier and
24 still endure?

25 **A.** Yes.

1 Q. You also described segregation theology yesterday, and I
2 think you talked about it again today. And during the battles
3 over segregation and interracial marriage, did people hold
4 sincere religious beliefs that were rooted in prejudice?

5 A. Yes. That that certainly was a point of that testimony
6 yesterday; that people do often hold deeply sincerely religious
7 convictions which seem to them timeless, but historians have
8 shown and have seen how they, in fact, change over time and
9 naturally are shaped by the larger culture in which they live.

10 And so, again, people, many people in the south
11 deeply believed that interracial marriage was against God's
12 will.

13 I don't question their sincerity. I believe, though,
14 that that reflect the larger system of prejudices that had
15 shaped their understanding of the world.

16 Q. Thank you.

17 Professor Chauncey, has there been significant
18 progress toward reducing discrimination against gays and
19 lesbians over the last several decades?

20 A. There has been significant progress, yes.

21 Q. Is there still today significant discrimination against
22 gays and lesbians?

23 A. Yes, there is significant discrimination.

24 Q. Now, I have -- my last line of questions this morning have
25 to do with -- or my last before I consult counsel anyway, my

1 colleagues -- with questions Mr. Thompson asked or one he asked
2 about whether the tone of political discourse has improved
3 regarding gay rights issues.

4 And I would like to show you a video relating to this
5 topic and ask you some questions about it.

6 **MS. STEWART:** And we -- your Honor, we had submitted
7 to the Court and opposing counsel a list of excerpts from the
8 depositions that we intended to use in this trial. And these
9 are the deposition excerpts for the defendant-intervenor -- or
10 at least heretofore to the defendant-intervenor and proponent,
11 official proponent Hak-Shing William Tam.

12 And I would like to ask that those excerpts be shown,
13 stopping where there has been a document that we can then ask
14 the witness about.

15 **MR. THOMPSON:** Your Honor, we would object to
16 Professor Chauncey being asked about this on multiple grounds.

17 One of them is that it's not something he considered
18 in his expert report. It's not a material considered. We
19 weren't given an opportunity to cross examine -- to depose him
20 on this, and it's plainly outside the scope of Rule 26.

21 **MS. STEWART:** Your Honor, may I respond to that?

22 **THE COURT:** Of course.

23 **MS. STEWART:** He opened the door to it. He asked the
24 question on cross about whether the dialogue about this issue
25 has changed to be less hostile and whether people are much more

1 polite and less hateful in their commentary, and the witness
2 testified about that, and this goes directly to that topic.

3 **THE COURT:** Well, I think Mr. Thompson did open the
4 door to that subject. The question is whether this particular
5 document is one appropriate to use with this witness.

6 **MS. STEWART:** It's --

7 **THE COURT:** This, I gather, is the document that the
8 Court of Appeals attached to its amended opinion in the --

9 **MS. STEWART:** I believe one of the documents is, your
10 Honor. It's a series of documents by one of the official
11 proponents of Proposition 8 that were sent out to people he
12 tried to persuade to support Proposition 8, including that
13 document, to answer your Honor's question.

14 **MR. THOMPSON:** I would only add, your Honor, that
15 this gentleman had nothing to do with the campaign. Even
16 though he was an official proponent, the evidence will show
17 quite clearly that he had nothing to do with the campaign. So
18 this is -- I didn't open the door to what specific individuals
19 may or may not have thought.

20 We have no problem with him testifying to the subject
21 generally just to these documents, which he has never seen
22 before, to my knowledge.

23 **MS. STEWART:** Your Honor?

24 **THE COURT:** Ms. Stewart.

25 **MS. STEWART:** As Mr. Thompson suggested earlier in a

1 question to the witness, there was broad messaging in this
2 campaign from a lot of sources.

3 And I can't remember if it's Dr. Tam, I think it is,
4 did a great deal of messaging via the web on various websites
5 about Prop 8. He was an official proponent.

6 And so I -- I disagree completely with the idea that
7 he had nothing to do with the campaign. He had a tremendous
8 amount to do with the campaign.

9 **THE COURT:** Are you representing that these exhibits
10 that you are referring to were produced by the intervenor
11 defendants?

12 **MS. STEWART:** I am not, your Honor. They were not
13 produced and, in fact, we had defined them --

14 **THE COURT:** No, no, no, no. Were put out as part of
15 the campaign?

16 **MS. STEWART:** I think they were put out by Dr. Tam as
17 part of the campaign.

18 **THE COURT:** I see. And the connection is that he was
19 one of the official proponent of Proposition 8?

20 **MS. STEWART:** Absolutely, your Honor. And he was
21 speaking about the campaign to a broad constituency of Chinese
22 voters.

23 **MR. THOMPSON:** Your Honor, the official campaign
24 committee was ProtectMarriage.com, and these materials were not
25 in any way associated with or paid for by or did anyone at

1 ProtectMarriage.com have any cognizance of these documents.

2 And depending on what they are going to show, many of
3 them predated by years Prop 8.

4 **THE COURT:** Well, but Dr. Tam was an official
5 proponent of Proposition 8, was he not?

6 **MR. THOMPSON:** He was, your Honor.

7 I think one of the problems with allowing this line
8 of questioning is we don't even know the date of these
9 documents. And depending on what they are showing, some of
10 them are based on translations from Chinese.

11 I think that they have said that they are going to
12 call Dr. Tam on Friday. I believe the Court will be able to
13 hear from him and will have a complete record and it will be
14 put in context.

15 Again, we have no objection to the line of questions,
16 just the use of the documents.

17 **MS. STEWART:** Your Honor, at the deposition Dr. Tam
18 testified about the documents, authenticated the documents.

19 I just want to point out, not only is he an official
20 proponent and will the deposition indicate what the documents
21 are and the context in which they were used, but if we can look
22 at messaging or beliefs articulated by Carrie Jean Prejean, I
23 would think, certainly, the witness could be asked to comment
24 on messages put out by one of the official proponents of the
25 campaign.

1 **THE COURT:** Well, let's see where the questioning
2 goes with these documents. I may cut you off at some point, if
3 it goes too far afield. Let's see how -- how the testimony
4 goes.

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

6 If you would show the first excerpt?

7 (Videotaped deposition played in open court.)

8 **BY MS. STEWART:**

9 **Q.** If I could now ask the witness to look at Plaintiffs'
10 Exhibit 513, which is the document Dr. Tam had just been asked
11 about.

12 And if you would, would you just read the first
13 paragraph of this --

14 **THE COURT:** Why don't you just go right to the
15 question?

16 **MS. STEWART:** Okay.

17 **THE COURT:** Ask him to read it to himself and then go
18 right to the question.

19 **MS. STEWART:** Okay. Let me play the video a little
20 bit longer.

21 (Videotaped deposition played in open court.)

22 **BY MS. STEWART:**

23 **Q.** Now, looking at the beginning of this document, Dr.
24 Chauncey, can you tell me if you think this messaging by
25 Dr. Tam, this letter that he wrote, reflects sort of a lower

1 hostility level than past communications about gay people or
2 homosexuality?

3 **A.** No. This is consistent in its tone with a much longer
4 history of anti-gay rhetoric. It describes the right to marry
5 as the legalization of prostitution.

6 It says that it's put forth by the San Francisco city
7 government which is under the rule of homosexuals.

8 It talks about them pushing the gay agenda, and says
9 that after legalizing same-sex marriage, they want to legalize
10 prostitution, and that the next item on their agenda is
11 legalizing having sex with children.

12 So this reproduces many of the major themes of the
13 anti-gay rights campaigns of previous decades and a longer
14 history of anti-gay demonization.

15 **MS. STEWART:** I would like to offer this document
16 into evidence, your Honor.

17 **THE COURT:** Mr. Thompson?

18 **MR. THOMPSON:** We have no objection to the Court
19 taking judicial notice of it, your Honor.

20 (Plaintiffs' Exhibit 513 received in evidence)

21 **MR. THOMPSON:** May I read two sentences from his
22 deposition to give context, since we have seen a long portion
23 of it?

24 **THE COURT:** You may. With respect to the document,
25 it does appear that during deposition, the witness -- the

1 deposition witness, who is a party to the lawsuit, indicated
2 that he had written the document and, therefore, it would
3 appear to be appropriate to be admitted.

4 **MR. THOMPSON:** Yes, your Honor. And as I say, we
5 have no objection to that. I did want to make clear that
6 Mr. Tam said in his deposition at page 19, lines 19 to 22, he
7 was asked how many times during 2008, from January to November,
8 he had had a conversation with Mr. Schubert. He said, "One or
9 two times, very rare."

10 The impression that's being created that this was
11 part of the campaign is not true. We have no problem with
12 discussions about an individual, a private citizen, who is now
13 attempting to withdraw to avoid precisely this sort of focus on
14 his individual views.

15 **THE COURT:** All right. Thank you, Mr. Thompson.
16 You may proceed, Ms. Stewart.

17 **MS. STEWART:** Can we go on to the next excerpt?
18 (Videotaped deposition played in open court.)

19 **BY MS. STEWART:**

20 **Q.** I would like to direct the witness's attention to Exhibit
21 516.

22 I would like to ask you to look at the second
23 paragraph of this document --

24 **THE COURT:** Are you moving 516 in?

25 **MS. STEWART:** Yes, your Honor.

1 **THE COURT:** Based on the deposition testimony of
2 Mr. Tam. Very well.

3 **MR. THOMPSON:** No objection.

4 (Plaintiffs' Exhibit 516 received in evidence.)

5 **BY MS. STEWART:**

6 **Q.** You see that that paragraph is talking about legislation
7 passed by a local school board in Alameda County on gay,
8 lesbian bisexual education?

9 **A.** Yes.

10 **Q.** You see that it says that:

11 "Education such as this used to brainwash
12 children so that one day they will vote for
13 same-sex marriage."

14 **A.** Yes.

15 **Q.** Can you comment at all on that messaging in terms of
16 whether it reflects a kind of less hostile messaging towards
17 gay people?

18 **A.** Well, I think that talking about brainwashing children is
19 not a moderate phrasing.

20 It certainly reflects sort of a continuing concern
21 about homosexuals putting themselves forward, often having an
22 agenda.

23 **THE COURT:** This appears to have been posted after
24 the election.

25 **MR. THOMPSON:** And, your Honor, that's one of the

1 problems we have with this whole line of questions with this
2 witness, is that there is not a tight temporal connection. You
3 are going to see some of the documents in this binder are from
4 2005. Others are translations for Chinese that haven't been
5 certified.

6 So we continue to object to this entire line of
7 inquiry.

8 **MS. STEWART:** Your Honor, I think, to my knowledge --
9 and I apologize. I wasn't aware that one was in here. But
10 most of these documents, we can represent to the Court, were on
11 the -- Dr. Tam's website at the time of the Prop 8 battle.

12 And, also, in any event, this -- the document we just
13 saw goes to the history of discrimination and the kind of
14 messaging that is still out there more broadly even since
15 Proposition 8.

16 **THE COURT:** Well, let's focus on what was the
17 messaging at or before the election, at the time of the
18 election or before.

19 If you represent that the Exhibit 516 was, in fact,
20 posted in this form or substantially the same form prior to the
21 election, why, I think that's a sufficient connection.

22 But let's move along, Ms. Stewart.

23 **MS. STEWART:** Yes, your Honor.

24 Can you proceed?

25 (Brief pause.)

1 **MR. THOMPSON:** Your Honor, thinly after the election,
2 because it starts by talking about a six-to-one win on Prop 8.

3 **MS. STEWART:** I did -- I think indicated, your Honor,
4 that this one is post election. There is no question about
5 that.

6 **THE COURT:** All right. Well, let's move along. I'm
7 sure that we will get into these documents when Mr. Tam
8 testifies.

9 (Brief pause.)

10 **MS. STEWART:** Technical glitch, your Honor.

11 **THE COURT:** What?

12 **MS. STEWART:** Technical delay.

13 (Brief pause.)

14 (Videotaped deposition played in open court.)

15 **BY MS. STEWART:**

16 **Q.** Dr. Chauncey, if you would, I'm particularly interested in
17 the commentary by Dr. Tam about children growing up to think
18 they could marry John or Jane and what you thought about that
19 messaging in terms of what it was reflecting?

20 **A.** Well, again, it's consistent with the ads that -- major
21 ads put out by the Prop 8 campaign in which the little girl or
22 boy comes forward and says that they have read a book in school
23 about a prince marrying a prince, so that makes them think that
24 they could, too. So there is a deep fear about -- the idea
25 that simple exposure to homosexuality or to same-sex marriage

1 will lead children to become gay.

2 And I think the phrasing here actually makes it clear
3 that the issue is not just marriage equality itself, but it's
4 in sympathy to homosexuality. It's about the -- they could be
5 subjected to an education on homosexuality in public schools.
6 It's not just being introduced to the idea of gay marriage, but
7 being introduced to the idea that there are gay people in the
8 world, which is taken to be -- they oppose, they clearly see
9 this as a -- an inferior, despicable way of life.

10 **MS. STEWART:** Thank you.

11 (Videotaped deposition played in open court.)

12 **MS. STEWART:** Your Honor, I would like to move
13 Exhibit 515 into evidence.

14 **MR. THOMPSON:** No objection, your Honor.

15 **THE COURT:** Is that 516 or 515?

16 **MS. STEWART:** This one is 515, your Honor.

17 **THE COURT:** Very well.

18 **MS. STEWART:** And I'd also, just before I turn to the
19 witness, I would like to move in the last Exhibit 514, which I
20 think I forgot to do.

21 **THE COURT:** 514.

22 **MR. THOMPSON:** No objection, your Honor.

23 **THE COURT:** All right. 514 is in and 515.

24 (Plaintiffs' Exhibits 514 and 515 received in
25 evidence.)

1 **BY MS. STEWART:**

2 **Q.** Dr. Chauncey, I'm interested in you speaking about the
3 messaging and how it relates to prior messaging and sort of the
4 relative level of antipathy towards gay people that this kind
5 of messaging expresses.

6 **A.** Well, I think it's pretty consistent with the messaging in
7 earlier campaigns. Certainly, again, the persistent theme that
8 homosexuality is a choice; that children who are exposed to
9 homosexuals, to gay marriage, but really to homosexuals in any
10 form, are likely to become homosexuals. So a deep fear about
11 the instability of children's sexuality.

12 The association of homosexuality with disease. The
13 claim that Aids, associating Aids exclusively with
14 homosexuality without thinking about the widespread
15 heterosexual transmission of Aids in Africa and in the United
16 States.

17 And I think you sort of have a pretty clear sense
18 here of one of the themes that ran through all the referenda
19 campaigns beginning in 1977 with Anita Bryant's campaign that
20 to pass an anti-discrimination measure or measure that in some
21 way granted equality to and recognition of gay people would
22 legitimize them and that we should oppose this, this rhetoric
23 as claimed, just because we don't in any sense want to
24 legitimize homosexuality and gay life as a legitimate equal
25 part of our society, and that marriage is one of those powerful

1 symbols of that for them.

2 So it's premised on a notion of equality and strong
3 hostility towards homosexuality.

4 (Videotaped deposition played in open court.)

5 **MR. THOMPSON:** Your Honor, we would object to that
6 document. It says March-April, 2006 on it, plainly, before
7 Proposition 8 was -- had even been qualified for the ballot.

8 In addition --

9 **THE COURT:** Which document are we talking about?

10 **MS. STEWART:** It's Exhibit 543, your Honor.

11 **THE COURT:** 543?

12 **MR. THOMPSON:** Yes. It says, your Honor, right under
13 TFC News "March-April 2006."

14 So we object to that relevance ground and on the
15 relevance ground that these are the views of one individual and
16 not ProtectMarriage.com.

17 **MS. STEWART:** Your Honor, this document, first of
18 all, it's -- earlier in the testimony Dr. Tam indicated that
19 the Traditional Family Coalition, of which he is the head,
20 supported Proposition 8 and advocated for it, and that's at
21 page 50 to 52 of the deposition in the excerpts that we have
22 already seen.

23 And, secondly, this was on their website, along with
24 a lot of other materials at the time they were on that website
25 advocating in favor of Proposition 8.

1 And so we think it is relevant and it also goes to
2 the overall messaging that led up to the campaign.

3 **THE COURT:** I'm going to sustain the objection based
4 on what we have heard to date.

5 We may revisit this when Dr. Tam testifies, if the
6 facts are as you represent them with respect to the posting of
7 this document; but for the moment I think that Mr. Thompson has
8 appropriately objected and the objection will be sustained.

9 All right. Let's see if you can wrap up with this
10 witness.

11 (Videotaped deposition played in open court.)

12 **MR. THOMPSON:** Your Honor, I'm going to ask that this
13 be paused so I can make an objection.

14 **THE COURT:** Very well.

15 **MR. THOMPSON:** Number one, these documents have no
16 dates on them, so we don't know whether they are relevant or
17 not. And as we have seen from some other portions of this
18 binder, they are temporally all over the place; after the
19 election, years before the election.

20 In addition, many of these are in Chinese and have
21 translations. And although it is true they were shown to Dr.
22 Tam, we have seen from these snippets his diction is festooned
23 with errors. English is not his first language and the fact
24 that they showed a translation to someone who doesn't speak
25 very good English and said, "Is this correct," doesn't prove

1 anything. It's not a certified copy of the translation.

2 **THE COURT:** Well, I wouldn't characterize Dr. Tam's
3 English in that manner.

4 **MR. THOMPSON:** I'm persnickety, your Honor.

5 **THE COURT:** It does seem to me, Ms. Stewart, that we
6 have exhausted this topic and would ask you to conclude your
7 redirect examination.

8 **MS. STEWART:** Okay, your Honor. I will do that. We
9 will return to this later with Mr. Tam or the deposition
10 excerpts.

11 **THE COURT:** I would think that would be the
12 appropriate place to take it up.

13 All right. Please conclude.

14 **BY MS. STEWART:**

15 **Q.** Dr. Chauncey, in what we have seen so far since the last
16 question I asked you is, are there any messaging that we -- you
17 haven't already spoken about that came through in some of what
18 Dr. Tam has written that you would like to comment on?

19 **A.** Well, I think it reinforces for me the sense that although
20 gay marriage was the topic at hand, the arguments being made
21 were often against gay rights of any sort. So as a reference
22 to the right of same-sex couples to adopt children, what
23 effects that would have on children.

24 And so it -- it does seem to me to express the kind
25 of hostility and kinds of arguments that have been made for

1 several decades now, in the context of these referenda battles
2 and that, again, it draws on the long history of hostility,
3 stereotyping and fears that I have described.

4 **Q.** Dr. Chauncey, in some of the documents I noticed the
5 phrase "gay agenda."

6 In your knowledge as a historian of the gay civil
7 rights movement, is there a gay agenda?

8 **A.** There has -- at various times there have been a range of
9 degrees of agreement or disagreement on various issues.

10 My understanding is that that term, the "gay agenda"
11 was mobilized particularly effectively in the late 80's and
12 early 90's in combating -- or in support of the referendum
13 initiatives designed to overturn gay rights laws and it's tried
14 to construct the idea of a unitary agenda that includes any of
15 the age of consent laws and, again, just sort of fills -- picks
16 up on these long-standing stereotypes.

17 **Q.** Professor Chauncey, earlier in Mr. Thompson's questions he
18 asked whether -- he asked a question about conservative
19 traditions teaching that everyone is a sinner; do you recall
20 that?

21 **A.** Yes.

22 **Q.** Are you aware of any movements in our recent history, or
23 for that matter going back further, trying to deny adulterer
24 the right to marry?

25 **A.** I'm not aware of those.

1 Q. In your testimony earlier today when Mr. Thompson was
2 talking to you about your book on gay marriage, he asked you
3 had -- or actually I take it back. I think he was referring to
4 an exhibit that had to do with television characters and the
5 increasing television coverage of people and your prior
6 testimony about censorship.

7 And I noticed that in a part of your book, your
8 marriage book that he also read from, close to where he read
9 you used the term "erased" to describe what's happened to the
10 historical record of discrimination against gay people.

11 Can you describe what you meant by that and tell us
12 whether the increasing number of gay characters on television
13 has fully counter-acted the effect of the erasure that you have
14 spoken of?

15 **THE COURT:** Which question do you want him to answer?

16 **MS. STEWART:** Both, your Honor.

17 **THE COURT:** Then ask them one at a time.

18 **BY MS. STEWART:**

19 Q. What you meant by the term "erased"?

20 A. What I meant by it was that for a very long time very
21 little research was done on the history of homosexuality or the
22 place of gay people in American history. And it was actively
23 discouraged, was not seen as a suitable topic.

24 Certainly, even in my own career, which Mr. Thompson
25 referred to -- it's been a very fortunate career, but it's not

1 a typical career. And I found which I decided to write a
2 dissertation in gay history, that many people advised me that
3 it would be professional suicide to do so.

4 When I finally got a job at the University of Chicago
5 in 1991, I became only the second person in the country to get
6 an academic position in the history department with a
7 dissertation in lesbian or gay history.

8 And certainly, again, this -- there has been some
9 change on this front in recent years and there are more
10 students now writing dissertations in this field. They have
11 continued to experience trouble in getting jobs. More of them
12 are beginning to get jobs, but I think that there are still
13 many advisors around the country who would caution a student
14 who would consider publishing in the field.

15 And I have to say I'm still struck, as I try to put
16 together the syllabus for a lecture course at Yale in Lesbian
17 and Gay History both by how limited the literature still is to
18 draw on for that course and that -- that one of the most
19 consistent comments I receive on the course evaluations at the
20 end of that course is that they had never heard about any of
21 this before in their high school or public school education or
22 in college; that they were completely unaware of this history.

23 And so it's pretty clear to me that the erasure of
24 this history, the history of discrimination and of gay life
25 itself, continues to be very prevalent in our culture.

1 Q. Thank you, Professor Chauncey. Nothing further.

2 THE COURT: All right, Ms. Stewart. You have brought
3 us to afternoon after all.

4 All right. Let's resume, counsel, at 1:30 -- make it
5 1:40. And the next witness is going to be?

6 MR. BOUTROUS: Dr. Peplau, your Honor.

7 MS. STEWART: Dr. Peplau, your Honor.

8 THE COURT: Very well.

9 MR. COOPER: What time did you say, your Honor?

10 THE COURT: 1:40, Mr. Cooper. Is that okay?

11 MR. COOPER: It certainly is.

12 THE COURT: All right. Good.

13 (Whereupon at 12:12 p.m. proceedings
14 were adjourned for noon recess.)

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PROCEEDINGS

P R O C E E D I N G S

JANUARY 13, 2010

1:42 P.M.

THE COURT: Very well. Shall we have the next witness?

MR. DUSSEAULT: Yes, Your Honor. Plaintiffs call Dr. Anne Peplau.

THE COURT: Very well.

THE CLERK: Raise your right hand, please.

LETITIA ANNE PEPLAU,

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

THE WITNESS: I do.

THE CLERK: State your name, please.

THE WITNESS: My name is Letitia Anne Peplau.

THE CLERK: And spell your last name.

THE WITNESS: P-e-p-l-a-u.

THE CLERK: And your first name.

THE WITNESS: Letitia, L-e-t-i-t-i-a.

THE CLERK: Okay. Thank you.

MR. DUSSEAULT: And, for the record, my name is Christopher Dusseault, Gibson, Dunn & Crutcher, for the plaintiffs.

Very good. Mr. Dusseault.

MR. DUSSEAULT: Thank you.

DIRECT EXAMINATION

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BY MR. DUSSEAULT:

Q. Good afternoon, Dr. Peplau.

A. Good afternoon.

Q. Dr. Peplau, what is your educational background?

A. I have a bachelor's degree in psychology from Brown University, and a Ph.D. in social psychology from Harvard University.

Q. What is social psychology?

A. Social psychology is the sub branch within psychology that studies human relationships, human groups, social influence, basically the relationships among people.

Q. And where are you currently employed?

A. I'm a professor at the University of California Los Angeles.

Q. When did you join the faculty at UCLA?

A. I joined the faculty in 1973.

Q. And are you tenured?

A. Yes.

Q. When did you become tenured?

A. In 1982.

Q. What is your position within the psychology department?

A. I'm a professor of psychology. And I'm also the vice chair for graduate studies in psychology.

Q. And what is the general reputation of UCLA's psychology

1 graduate department?

2 **A.** It's a very respected department. And we are ranked in
3 the top five nationwide.

4 **Q.** Dr. Peplau, do you lead any programs at UCLA?

5 **A.** I do. I am the director of the UCLA interdisciplinary
6 relationship science program. It's a graduate training program
7 funded by the National Science Foundation.

8 **Q.** And in what does it train?

9 **A.** It trains doctoral students from several disciplines who
10 want to specialize in studying social relationships. That can
11 include family relationships, marriage, friendship, as well as
12 same-sex relationships.

13 **Q.** Have you received any professional honors for your work?

14 **A.** I have. I have received a number of lifetime achievement
15 or scientific contribution awards. One is from the Society for
16 the Scientific Study of Sexuality. And several of them are
17 from different divisions of the American Psychological
18 Association.

19 **Q.** And have you served as president of any societies?

20 **A.** Yes. I was elected president of the International
21 Association for Relationship Research.

22 **Q.** In the course of your professional work in social
23 psychology, has your study focused on any particular topics?

24 **A.** It's focused on three interrelated topics: Close personal
25 relationships, sexual orientation, and gender.

1 Q. Have you conducted research on heterosexual couples?

2 A. Yes, I have.

3 Q. And also on same-sex couples?

4 A. Yes.

5 Q. And in studying relationships, have you looked at
6 marriage?

7 A. Uhm, I have primarily looked at relationships other than
8 marriage, but I have done some studies that have involved
9 marriage, yes.

10 Q. Do you study the relationships of lesbians and gay men?

11 A. Yes, I do.

12 Q. When did you begin doing that?

13 A. I began studying same-sex couples in the early 1970s. At
14 that time, there was very little research in the area, and I
15 was one of the first psychologists to do that research.

16 Today, of course, there are many more people studying
17 same-sex relationships, and the field has grown substantially.

18 Q. Have you authored any books?

19 A. I've written or coauthored about ten books.

20 Q. On what subjects?

21 A. Some have been general topics in psychology, introductory
22 psychology, social psychology. Others have been
23 professional-level books. One is on close relationships,
24 another on loneliness.

25 I edited a book on gender, culture, and ethnicity.

1 I've edited a volume on same-sex couples, and another volume on
2 women's sexuality.

3 **Q.** Have you written articles?

4 **A.** Yes. I've written, oh, probably, 120 journal articles and
5 chapters for scholarly books.

6 **Q.** Are your articles generally published in peer-reviewed
7 journals?

8 **A.** I believe all of them have been published in peer-reviewed
9 scientific journals.

10 **Q.** And have you done reviews of other scholars' work?

11 **A.** Yes. I've written what I would call literature reviews.
12 That is, chapters for edited books in which I have reviewed the
13 current state of research and theory on a particular topic.

14 **MR. DUSSEAULT:** Your Honor, I would -- actually, if I
15 may direct the witness to Plaintiffs' Exhibit 2329.

16 Just to be clear, the way we have the witness binder
17 organized, Your Honor, is, certain exhibits that will be
18 introduced individually are in the front. Then there's an A, B
19 and C tab at the bottom, for certain exhibits that will be
20 introduced collectively.

21 **BY MR. DUSSEAULT:**

22 **Q.** So if we could look at 2329, Dr. Peplau --

23 **A.** I'm not finding that in this binder.

24 **MR. DUSSEAULT:** Your Honor, may I approach?

25 **THE COURT:** Perhaps you can guide us both through.

1 I'm having the same problem the witness is.

2 **MR. DUSSEAULT:** Are you?

3 **THE WITNESS:** Actually, I think I just found it. And
4 it's just prior to tab A.

5 **MR. DUSSEAULT:** Yes.

6 **THE COURT:** I see. I see. All right.

7 Numerical order is a wonderful thing, Counsel.

8 (Laughter)

9 **MR. DUSSEAULT:** Understood, Your Honor.

10 **BY MR. DUSSEAULT:**

11 **Q.** Dr. Peplau, is that a true and correct copy of your CV?

12 **A.** Yes, it is.

13 **MR. DUSSEAULT:** Your Honor, I would submit Exhibit
14 2329 into evidence.

15 **MS. MOSS:** No objection.

16 **THE COURT:** Very well.

17 (Plaintiffs' Exhibit 2329 received in evidence.)

18 **MR. DUSSEAULT:** And, Your Honor, we would tender
19 Professor Peplau as an expert on couple relationships within
20 the field of social psychology.

21 **THE COURT:** Any voir dire?

22 **MS. MOSS:** No, Your Honor. No objection.

23 **THE COURT:** Very well. You may proceed,
24 Mr. Dusseault.

25 **MR. DUSSEAULT:** Thank you.

1 **BY MR. DUSSEAULT:**

2 **Q.** Dr. Peplau, do you intend to offer opinions today in this
3 case?

4 **A.** Yes. I will be offering four opinions.

5 **Q.** What are those?

6 **A.** My first opinion is that for those adults who choose to
7 enter into marriage, that marriage is often associated with
8 many important benefits.

9 I will also offer the opinion that research examining
10 the relationships of gay and lesbian couples has found
11 remarkable similarities between the research of same-sex
12 couples and heterosexual couples.

13 I will offer the opinion that when same-sex couples
14 are permitted to enter into civil marriage, that they will
15 likely have the same benefits from marriage that heterosexuals
16 do.

17 And, fourth, I'll offer the opinion that permitting
18 same-sex civil marriage will not be harmful to heterosexual
19 marriage.

20 **Q.** Thank you.

21 Dr. Peplau, let's start with the first opinion that
22 you mentioned. Have there been research and studies into how
23 Americans feel about marriage?

24 **A.** Americans are very enthusiastic about marriage. Most
25 Americans view marriage as one of the most important

1 relationships in their life. Many people view getting married
2 as a very important life goal.

3 And when researchers have surveyed Americans and
4 asked their opinions about marriage, they find a similar
5 pattern.

6 For example, a recent Gallup opinion poll asked a
7 representative sample of Americans about marriage. And
8 91 percent of those people reported that they either have been
9 married or plan to get married at some time in the future.

10 **Q.** Is there any evidence, of which you are aware, that
11 lesbians and gay men feel the same way about marriage as
12 heterosexuals?

13 **A.** Yes. Of course, for, in most states, asking lesbians and
14 gay men about marriage is a hypothetical question, but that
15 question has been asked.

16 In a recent survey conducted by the Kaiser Family
17 Foundation the question asked was: "If you were able to
18 legally marry someone of the same sex, would you like to do so
19 at some time in your life?"

20 And the majority of lesbians and gay men, 74 percent,
21 said that, yes, indeed, they would like to get married if they
22 had that option.

23 **Q.** And turn, if you would, in your binder, to Plaintiff's
24 Exhibit 938. And this is in the first section before the tab

25 **A.**

1 **A.** Yes, I have it.

2 **Q.** And, Dr. Peplau, is this the study you were just referring
3 to?

4 **A.** Yes, it is.

5 **Q.** And this is something you have relied on in reaching your
6 opinions?

7 **A.** Yes. This is the Kaiser Family Foundation study of
8 lesbians and gay men.

9 **MR. DUSSEAULT:** Your Honor, we would submit
10 Plaintiffs' Exhibit 938 into evidence.

11 **MS. MOSS:** No objection.

12 **THE COURT:** Very well. 938 is admitted.

13 (Plaintiffs' Exhibit 938 received in evidence.)

14 **BY MR. DUSSEAULT:**

15 **Q.** Dr. Peplau, are you aware of any research on the subject
16 of whether people in this country value domestic partnerships
17 to the same extent as they value marriage?

18 **A.** Researchers have been interested in whether lesbians and
19 gay men would prefer to get married or would prefer other
20 options such as civil unions or registered partnerships.

21 Evidence on this point comes from research done by
22 Gary Gates, Lee Badgett, and others. And what these
23 researchers did was to ask the question -- we now have several
24 states that have options for civil unions or registered
25 partnerships. And they asked the question, across all of those

1 states that permit that: In the first year, what percent of
2 same-sex cohabiting couples in the state actually took
3 advantage of that option?

4 And then they asked, in Massachusetts, where marriage
5 is the option: In the first year that marriage was available
6 to same-sex couples, what percent got married?

7 And what they found was that, whereas, across the
8 states that permit civil unions and partnerships, about 10 to
9 12 percent of couples in the first year took that option.

10 In contrast, in Massachusetts, when marriage became
11 available, something like 37 percent of the couples got
12 married. Suggesting that couples were three times more likely
13 to get married than to enter into one of these other
14 quasi-marital options.

15 **Q.** Dr. Peplau, if you could turn to tab 909, which is in the
16 front section, before tab A of your binder. And this the Gates
17 Badgett and Ho study that you referred to?

18 **A.** Yes, it is.

19 **MR. DUSSEAULT:** Your Honor, plaintiffs would move
20 Exhibit 909 into evidence.

21 **MS. MOSS:** No objection.

22 **THE COURT:** Very well, 909 is admitted.

23 (Plaintiffs' Exhibit 909 received in evidence.)

24 **BY MR. DUSSEAULT:**

25 **Q.** Are you aware of research regarding the impact of

1 marriage, if any, on health?

2 **A.** There is a very large body of research on the impact for
3 heterosexuals of marriage on health. These are studies that
4 have compared the health of married individuals to the health
5 of other adults who are not married.

6 And the very consistent findings from those research
7 are that, on average, married individuals fare better. They
8 are physically healthier. They tend to live longer. They
9 engage in fewer risky behaviors. They look better on measures
10 of psychological well-being.

11 **Q.** Now, are you aware of any recent studies, of particular
12 note, that document the health benefits associated with
13 marriage?

14 **A.** Yes. One of the recent studies on that is a government
15 study conducted by researchers at the Centers for Disease
16 Control.

17 And what they did was to interview a representative
18 sample of Americans, a very large sample, more than a
19 hundred-thousand people, and to do these comparisons between
20 married individuals and other individuals on a range of
21 questions about health.

22 And what they found was that if you control for age
23 and for income and education, for few things like that, for
24 race, that across all of these groups, the married individuals
25 did better on virtually every measure.

1 So the married couples reported fewer health
2 problems. They were less likely to indicate that their daily
3 activities at home or at work were restricted because of a
4 physical ailment of some sort.

5 They were less likely to smoke. They were less
6 likely to drink in excess. They were less likely to report
7 headaches and migraines.

8 We could go on, but the consistent pattern was that,
9 on average, the married couples were better in terms of health.

10 **Q.** And does the research tell us anything about why marriage
11 is associated with health benefits?

12 **A.** That's certainly been an important question for
13 researchers. And there are two main explanations that have
14 been considered.

15 One is what's been called a selection effect. And
16 the idea here is that, perhaps, people who are healthier to
17 start out with are more likely to be able to attract a partner,
18 to get married. And maybe because of their health and --
19 mental health, as well, they are better able to maintain a
20 satisfying relationship. That would be a selection effect.

21 The second hypothesis or second explanation is what's
22 been called a protection effect. And that's the idea that
23 there are things associated with marriage that actually enhance
24 and contribute to health; things that people didn't bring into
25 the relationship, that they experience as a result of being

1 married.

2 And research pretty clearly demonstrates that the
3 selection effect is only a partial answer; that there does
4 definitely appear to be a protective effect for many couples,
5 for individuals in many couples, of being married.

6 **Q.** Can you explain to us why marriage might be associated
7 with what you describe as protective effects?

8 **A.** Yes. I think there would be at least four reasons for
9 that. One is that, for many people, getting married reflects a
10 change in identity.

11 That when psychologists sometimes ask people to
12 describe who are you, if you ask me, I might say, I'm a wife.
13 I'm a psychologist. I'm an American. And I would be
14 indicating important identities that I valued and that were
15 part of who I am as a person.

16 And for many people, marriage is one of these
17 identities. So it is -- I said earlier, it's an important life
18 goal. Achieving that life goal can lead people to feel good
19 about themselves, can enhance their self-esteem.

20 Marriage is a valued status in society. So being
21 part of that institution can make you feel good about yourself.

22 As well, part of being married may mean: Now I'm an
23 adult. Now I really need to be a kind of mature, responsible
24 person. And maybe that would lead us to take better care of
25 ourselves.

1 Or maybe we'll feel more responsible for our spouse
2 and say, Well, you know, I'm not just in it for me. I'm in it
3 for my partner, as well. So perhaps I ought to give up rock
4 climbing and be more careful about how much I drink.

5 So these would be ways in which marriage, the status
6 of being married, might affect the individual.

7 A second thing is that marriage is about a
8 relationship between two people. And there are often important
9 ways in which spouses support each her, help each other, try to
10 encourage each other to lead healthy lifestyles. And so this
11 kind of support from another person can enhance your health.

12 So we talked about the individual and then the
13 couple. There's also a broader social network, that when
14 people get married, they develop relationships not only with
15 their partner, but also within an extended family, with kin,
16 that marriage links two families.

17 So that if prior to marriage each person had
18 relatives who cared about them, and friends, now they may have
19 two networks and two groups of people who are there as
20 resources to them, who can help them through tough times.

21 And so this connection to an extended community and
22 family network can be helpful to people's health.

23 And, finally, marriage can also lead to various kinds
24 of supports from government, to beneficial laws or being
25 eligible for programs or for health insurance through an

1 employer, or a slew of things that can also contribute to
2 health and well-being.

3 Now, of course, this doesn't happen automatically in
4 every marriage. These are things that happen in good
5 marriages. Some marriages are conflict-ridden and miserable,
6 and don't confer those benefits.

7 But, on average, marriage does seem to be associated
8 with benefits. And I think for many good reasons.

9 **Q.** Now, Dr. Peplau, if you could turn to your exhibit binder,
10 and now turning to tab A. There is a series of exhibits here
11 that I've grouped together. And I'll read the numbers into the
12 record. They are Plaintiff's Exhibit 781, 913, 937, 964, 1043,
13 1171, 1173, 1250, 1254, and 1474.

14 Do you see those?

15 **A.** I do. I don't think they are all in the order you read
16 them in.

17 **Q.** Are we behind tab A?

18 **A.** I thought so, yeah. As I look through them, these are all
19 articles that are relevant to the issue of the benefits of
20 marriage.

21 **Q.** And are these articles that you've relied on in forming
22 your opinions that you've testified to today, about the
23 benefits of marriage?

24 **A.** Yes, they are.

25 **MR. DUSSEAULT:** Your Honor, I would move those

1 exhibits into evidence.

2 **MS. MOSS:** If I could have just one minute to flip
3 through the binder.

4 **MR. DUSSEAULT:** Certainly.

5 **MS. MOSS:** No objection, Your Honor.

6 **THE COURT:** Very well. I won't read the entire list,
7 but those exhibits are admitted.

8 (Plaintiffs' Exhibits 781, 913, 937, 964, 1043, 1171,
9 1173, 1250, 1254, 1474 received in evidence.)

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

11 **BY MR. DUSSEAULT:**

12 **Q.** Now, Dr. Peplau, let's talk about the second opinion that
13 you mentioned when you were beginning your testimony regarding
14 similarity between opposite-sex and same-sex relationships.

15 Has social science research been done that compares
16 same-sex relationships and heterosexual relationships?

17 **A.** Yes, there have been quite a number of studies that
18 include samples of both same-sex and heterosexual couples, and
19 that compare them in a variety of systematic ways.

20 **Q.** And has that body of work been well-received in your
21 field?

22 **A.** Yes, it has. It's been published in peer-reviewed
23 journals. It's been presented at major scientific meetings,
24 and so on.

25 **Q.** What are the primary topics of study in this body of work?

1 **A.** One major topic has been to examine the quality of
2 same-sex relationships, and to ask how similar or different it
3 is to the quality of heterosexual relationships.

4 A second major topic has been to look at the
5 stability of relationships, their durability over time.

6 And then a third major topic has to look at the
7 processes or the dynamics that affect relationships, to ask
8 questions about whether the quality and the stability of
9 same-sex couples' relationships are influenced by the same
10 kinds of factors that apply in heterosexual couples.

11 **Q.** And I'd like to ask you about each of those individually,
12 but, first, let me ask you, does this research as a whole show
13 whether there is or is not a similarity, generally, between
14 same-sex and opposite-sex relationships?

15 **A.** One of the striking things about this research is the
16 consistency of findings across different studies conducted by
17 different researchers, using somewhat different methodologies.
18 And the consistent finding is one of great similarity across
19 couples, both same-sex and heterosexual.

20 **Q.** Now, the first topic that you mentioned was the quality of
21 relationships. Has research been done examining and comparing
22 the overall quality of same-sex and opposite-sex relationships?

23 **A.** Yes. And let me just say, for a moment, what I mean by
24 "quality." Because researchers have tried to study quality, or
25 to measure it in a variety of different ways.

1 Researchers have developed standardized measures of
2 relationship adjustment. We have developed standardized
3 measures of love, of commitment, feelings of closeness in
4 relationship. These are multiple items, standardized measures.

5 In addition, researchers have also conducted
6 observational studies, in which they bring couples into the
7 laboratory and ask them to talk with each other about an
8 assigned topic while they are being videotaped.

9 And then the researchers systematically code those
10 interactions, and they ask questions like: How much warmth
11 does the couple express for each other? Do they express
12 sarcasm? What's the quality of their interaction?

13 So I want to emphasize that a lot of different
14 methods have been used to assess quality. And regardless of
15 how it's measured, the consistent finding, time and again, has
16 been that, on average, same-sex couples and heterosexual
17 couples are indistinguishable.

18 That does not mean that all couples are enormously
19 happy. It means there are some happy couples, some okay
20 couples, and some not-so-happy couples in all groups. But, on
21 average, the level of quality is the same.

22 **Q.** Dr. Peplau, have you ever heard a view or stereotype
23 expressed that same-sex couples are somehow generally unhappy
24 or dissatisfied?

25 **A.** Yes. I think a common stereotype has been -- there's been

1 several pieces to it. One, that gay men and lesbians have
2 trouble forming relationships. That if they do form
3 relationships, they are kind of unstable; they don't last very
4 long. And that maybe the quality of those relationships is
5 inferior to the quality of heterosexual relationships.

6 **Q.** And is there any support in your field, that you have
7 seen, for that stereotype of the relationships?

8 **A.** None at all.

9 **Q.** You also mentioned the stability of relationships. Has
10 research been done comparing the stability of same-sex and
11 opposite-sex relationships?

12 **A.** Yes, it has.

13 **Q.** What has that shown?

14 **A.** Uhm, the stability of a relationship refers to how long
15 the relationship lasts over time.

16 For married couples, we have government statistics
17 that tell us when couples marry and when they divorce, or when
18 the relationship is dissolved in various ways. So we have
19 pretty good national data sets about heterosexual marriages and
20 their length.

21 We do not have comparable data for same-sex couples.
22 Nonetheless, researchers have been able to rely on large-scale
23 surveys, some of them now representative surveys, that address
24 this question, and that have really provided evidence that a
25 substantial proportion of lesbians and gay men are in

1 relationships, that many of those relationships are long-term.

2 **Q.** Are there any examples of studies that have shown that
3 lesbians and gay men are, in fact, able to form committed,
4 long-lasting relationships?

5 **A.** I think one of the best studies is a study by Carpenter
6 and Gates, that was published in *Demography*, the leading
7 journal for demographers.

8 What these researchers did was to analyze data from a
9 survey conducted in California, of a representative sample of
10 lesbians and gay men in the state.

11 And one of the questions that was asked on that
12 survey was: Are you currently in a cohabiting relationship
13 with a same-sex partner?

14 And what the researchers found was that 61 percent of
15 the lesbian respondents said, yes, they were living with
16 another woman in a loving relationship. And about 46 percent
17 of the gay men said that they were currently in a cohabiting
18 relationship.

19 And just for comparison, the researchers mention that
20 if you looked in the same age range of 18 to 59, at
21 heterosexuals, you would find that about 62 percent of
22 heterosexuals were either married or cohabiting.

23 So the percent for heterosexuals and for lesbians was
24 essentially the same. And for gay men it wasn't terribly
25 different.

1 Q. And did that study also look at whether gay men and
2 lesbians are typically able to form long-lasting relationships?

3 A. Yes. Another question that was asked was: How long has
4 your current cohabiting relationship been going on?

5 And what the researchers found was that, on average,
6 these relationships had lasted about 8 to 10 years.

7 Now, to put that in context, the average person who
8 was part of this survey was about 41 years old. So if you
9 think they are 41 now, their relationship's been going on, say,
10 for ten years, they were 31 when the relationship began.

11 I think that indicates that these are people who,
12 early in adulthood, found a partner, established a
13 relationship, and for the bulk of the -- the -- their young
14 adulthood, that they were with the same partner.

15 So I think the survey provides compelling evidence
16 both that many lesbians and gay men are in a relationship, and
17 that at least some of those relationships are of quite long
18 duration.

19 Q. Now, to your knowledge, are there any professional
20 organizations that have weighed in on the subject of whether
21 lesbians and gay men can and do form committed relationships?

22 A. Yes. My own organization, the American Psychological
23 Association, the largest association in the world of
24 professional psychologists, has recently adopted a position
25 paper, a resolution on that topic.

1 Q. And turn, if you would, Dr. Peplau, to Exhibit 765, in
2 your binder, which is the second exhibit from the front.

3 Is this the document to which you are referring?

4 A. Yes, it is. It's the APA policy statement on sexual
5 orientation and marriage. And it was adopted by the APA
6 Council of Representatives in July 2004.

7 MR. DUSSEAULT: Your Honor, we would offer
8 Plaintiff's Exhibit 765 into evidence.

9 MS. MOSS: No objection.

10 THE COURT: 765 is admitted.

11 (Plaintiffs' Exhibit 765 received in evidence.)

12 MR. DUSSEAULT: If we could put the first
13 demonstrative on the screen here.

14 (Document displayed.)

15 BY MR. DUSSEAULT:

16 Q. Dr. Peplau, is this one of the findings from the study
17 that you're referencing, that many lesbians and gay men have
18 formed durable relationships?

19 A. Yes, it is.

20 MR. DUSSEAULT: And could we turn to the second
21 slide, please.

22 (Document displayed.)

23 BY MR. DUSSEAULT:

24 Q. And is it also one of the findings, Dr. Peplau, that the
25 factors that predict relationship satisfaction, relationship

1 commitment, and relationship stability are remarkably similar
2 for both same-sex cohabiting couples and heterosexual married
3 couples?

4 **A.** Yes.

5 **Q.** Now, is there some evidence that, on average, cohabiting
6 gay and lesbian relationships are of slightly shorter duration?

7 **A.** As I mentioned before, we don't have directly-comparable
8 information. But there is some suggestion that that might be
9 the case.

10 **Q.** Okay. And do you have any explanation for that?

11 **A.** Well, I think there are several possible explanations.

12 One is that, because the data aren't directly
13 comparable, married couples may be a more -- may be a group
14 that's more selected for high levels of commitment and
15 intentions to stay together for a long time.

16 Cohabiting couples, in contrast, may be a more
17 diverse group of people; some of whom feel great levels of
18 commitment, and others of whom don't. So it's a comparison
19 that may, to some extent, be mixing apples and oranges.

20 But I think there are several other reasons, as well.
21 One is that gay men and lesbians don't have the benefits of
22 marriage, and that marriage is for many relationships a
23 stabilizing influence. And we've talked about and will talk
24 more about why that may be the case.

25 Another reason may be that sexual orientation, being

1 gay or lesbian, is still a stigmatized identity in the
2 United States. And so there may be ways in which stigma and
3 prejudice and discrimination take a toll on the relationships
4 of lesbians and gay men.

5 **THE COURT:** Let me see if I understand the testimony.

6 Are you saying that there is a difference in
7 durability of relationships among cohabiting heterosexuals from
8 married heterosexuals?

9 **THE WITNESS:** That's true.

10 But the comparison I meant to be giving was between
11 same-sex cohabiting or not cohabiting couples and married
12 heterosexuals.

13 I was really trying to do a comparison between
14 same-sex couples and heterosexual couples. And what I was
15 saying was that we have a very clear idea of who those
16 heterosexual couples are because they are typically married
17 couples; but that the same-sex couples can be a more mixed
18 group.

19 **THE COURT:** What do the data show with respect to
20 differences, if any, between married couples, presumably
21 heterosexual couples, and cohabitating heterosexual couples; is
22 there a difference in the durability of those two
23 relationships?

24 **THE WITNESS:** Yes, there is. On average -- and,
25 again, we are talking about gross averages. But, on average,

1 heterosexual cohabiting relationships are of shorter duration
2 than heterosexual marriages.

3 **BY MR. DUSSEAULT:**

4 **Q.** Dr. Peplau, you referenced earlier the issue of processes
5 in relationships.

6 Has research been done into whether the same
7 processes are at work in the relationships of same-sex couples,
8 on one hand and opposite-sex couples on the other?

9 **A.** Yes, it has.

10 Let me just give one example of what I mean by a
11 process. One of the things researchers have studied is, what
12 factors determine the quality or the level of satisfaction in a
13 relationship?

14 And, obviously, an important factor would be
15 arguments or conflict between the partners. And so researchers
16 have examined the extent to which same-sex and heterosexual
17 couples have the same frequency of arguing. Which they do.
18 The extent to which they may be arguing about similar sorts of
19 things. And the answer is yes. The extent to which they may
20 try to work out their disagreements, to negotiate in similar
21 ways. And the answer is they do.

22 And, then, the process question is: Is the
23 relationship between high levels of conflict and low
24 satisfaction the same for both types of couples? And the
25 answer there is that, yes, it is; that level of conflict

1 influences the quality of both kinds of relationships.

2 **Q.** And, now, looking at the three factors that you mentioned,
3 together, quality, stability, and the sameness of processes
4 that affect those factors, is there a consensus in the research
5 as to whether these factors are similar between same-sex and
6 opposite-sex couples?

7 **A.** Yes. The overwhelming finding and the consensus of
8 professionals in the field is of similarity across these two
9 types of couples.

10 **MR. DUSSEAULT:** What I'd like to do now is just move
11 into the record a group of documents that are behind tab B,
12 that support Dr. Peplau's opinion about the similarities
13 between opposite-sex and same-sex relationships. These are the
14 documents found at tab B.

15 And, for the record they are Plaintiffs' Exhibits
16 921, 942, 1050, 1054, 1130, 1137, 1142, 1144, 1150, 1166,
17 1231 --

18 **THE COURT:** 1156?

19 **MR. DUSSEAULT:** 1166, Your Honor.

20 **THE COURT:** 66.

21 **MR. DUSSEAULT:** 1231, 1234, 1236, and 1245.

22 Your Honor, plaintiffs would submit those documents
23 into evidence.

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

25 **MS. MOSS:** Your Honor, if I could just have, again, a

1 moment to look at the tab.

2 **THE COURT:** Of course.

3 **MS. MOSS:** No objection, Your Honor.

4 **THE COURT:** Very well. Thank you, Ms. Moss.

5 Proceed, Counsel.

6 (Plaintiffs' Exhibits 921, 942, 1050, 1054, 1130,
7 1137, 1142, 1144, 1150, 1166, 1231, 1234, 1236, 1245,
8 received in evidence.)

9 **MR. DUSSEAULT:** Thank you, Your Honor.

10 **BY MR. DUSSEAULT:**

11 **Q.** Dr. Peplau, let's talk about the third opinion that you
12 mentioned at the beginning of your testimony.

13 Do you have an opinion as to whether gay and lesbian
14 individuals would benefit from marriage?

15 **A.** Yes, I do.

16 **Q.** What is that opinion?

17 **A.** My opinion, based on the great similarities that have been
18 documented between same-sex couples and heterosexual couples,
19 is this if same-sex couples were permitted to marry, that they
20 also would enjoy the same benefits.

21 **Q.** Now, to your knowledge, have any professional
22 organizations come to the same conclusion?

23 **A.** Yes. The American Psychiatric Association, which is the
24 national organization of physician psychiatrists, medical
25 experts who study mental health and illness, have issued a

1 policy statement on that.

2 **Q.** If I could, Dr. Peplau, direct your attention to
3 Plaintiffs' Exhibit 787, which is the third exhibit from the
4 front of your binder.

5 Is this the policy statement of the American
6 Psychiatric Association that you referenced just a moment ago?

7 **A.** Yes, it is. And I would just note that it was approved by
8 their assembly and also approved by the board of trustees. So
9 it went through a vetting process in the professional
10 organization. And that happened in 2005.

11 **MR. DUSSEAULT:** Your Honor, plaintiffs would submit
12 Exhibit 787 into evidence.

13 **MS. MOSS:** No objection.

14 **THE COURT:** 787 is admitted.

15 (Plaintiffs' Exhibit 787 received in evidence.)

16 (Document displayed.)

17 **BY MR. DUSSEAULT:**

18 **Q.** And, Dr. Peplau, we've highlighted a statement from this
19 policy statement of the American Psychiatric Association.
20 Could you please read the highlighted portion?

21 **A.** Sure. It says:

22 "In the interest of maintaining and promoting
23 mental health, the American Psychiatric
24 Association supports the legal recognition of
25 same-sex civil marriage with all rights,

1 benefits, and responsibilities conferred by
2 civil marriage, and opposes restrictions to
3 those same rights, benefits, and
4 responsibilities."

5 **Q.** Now, Dr. Peplau, have there been any empirical studies on
6 the effects of marriage on American gay and lesbian individuals
7 who choose to marry and are able to?

8 **A.** My -- let me just step back and say that my strong belief
9 that same-sex couples would benefit from civil marriage is
10 based, primarily, on the large body of research about
11 heterosexuals benefiting from marriage, and the body of
12 research about similarities and differences.

13 Based on that, I would predict that in states in the
14 United States that permit same-sex marriage, that we would not
15 see any change either in the rate of people getting married or
16 in the rate of people getting divorced.

17 And in order to look at that prediction, I went to
18 the government website that provides statistics, federal
19 statistics on the annual rates for marriage and for divorce in
20 Massachusetts. And I looked at the four years prior to
21 same-sex marriage being legal and the four years after.

22 And in what I was looking at there was, has there
23 been a change in the rates of marriage or of divorce associated
24 with the introduction of civil same-sex marriage?

25 And what's very clear from those data is that there

1 has been no change; that the rates of marriage and divorce are
2 no different after civil marriage was permitted than they were
3 before.

4 **Q.** Dr. Peplau, if I could direct your attention to Exhibit
5 959, in the front section of your binder.

6 **A.** Nine. I'm having trouble finding it.

7 **Q.** I believe -- believe it's the ninth tab from the front.

8 **A.** 959?

9 **Q.** Yes.

10 **A.** I apologize, but I'm not finding it.

11 **THE COURT:** 959?

12 **MR. DUSSEAULT:** Do you have --

13 **THE COURT:** I have it.

14 **MR. DUSSEAULT:** You do?

15 Your Honor, may I approach the witness and show her
16 mine?

17 **THE COURT:** By all means. By all means.

18 **THE WITNESS:** Oh, okay.

19 **BY MR. DUSSEAULT:**

20 **Q.** Dr. Peplau, is Exhibit 959 the study that you're referring
21 to, that you looked at about results, where couples have been
22 permitted to marry, same-sex couples have been permitted to
23 marry?

24 **A.** What I was referring to before were government statistics
25 about rates of marriage and divorce.

1 One of the other things that I would predict would be
2 that if we surveyed individuals who have gotten married in
3 civil same-sex marriages in Massachusetts, that they would
4 report benefiting from that.

5 And there is one study that addresses that issue.
6 This is a study by Ramos and others. They used data that was
7 collected by the Massachusetts Department of Health.

8 The Department of Health was very interested in
9 trying to understand what some of the impact might have been of
10 marriage for same-sex couples in their state.

11 And so, I believe, four years after marriage was
12 permitted, they conducted a survey. It was not a
13 representative sample, but it was a sample that included over
14 500 lesbians and gay men who had been married in Massachusetts.

15 And the survey asked those individuals questions
16 about why they had gotten married; whether they thought that
17 marriage had improved their lives in a variety of ways. And
18 for those individuals who were raising children, they also
19 asked people's beliefs about how the marriage had affected the
20 children.

21 **Q.** And what did that study show as to the effects of access
22 to marriage on same-sex couples?

23 **A.** One of the things the researchers found, I think, is not
24 at all surprising. And that is that after they got married,
25 many of the couples said they felt more committed to each

1 other. I think heterosexual newlyweds might well say the same
2 thing.

3 But there were other things that the couples said
4 that I think are particularly noteworthy. Many of the married
5 lesbians and gay men said that they -- they believed that their
6 families were now more approving of their relationship.

7 Many of the them said that they felt less worried
8 about legal problems.

9 And a third of them said that either they or their
10 spouse now had access to health benefits from an employer, that
11 they had not had before getting married.

12 And so they were reporting a number of benefits.

13 And for those couples who had children -- and, as I
14 think I mentioned, that was about 25 percent of the respondents
15 in this survey -- they overwhelmingly reported that marriage
16 had been beneficial to the children.

17 95 percent of them said that they thought the
18 children had benefited from the fact that they were now
19 married.

20 **MR. DUSSEAULT:** Your Honor, plaintiffs would move
21 into evidence Exhibit 959.

22 **MS. MOSS:** No objection.

23 **THE COURT:** 959 is admitted.

24 (Plaintiffs' Exhibit 959 received in evidence.)
25

1 **BY MR. DUSSEAULT:**

2 **Q.** Dr. Peplau, was it your conclusion that this study of
3 Massachusetts supported the opinions that you drew through your
4 other research as to potential benefits to marriage?

5 **A.** Yes.

6 **Q.** For same-sex couples?

7 **A.** Yes.

8 **Q.** So, then, let's turn from the benefits of marriage for
9 same-sex couples, to the fourth opinion that you said you wish
10 to offer today, which is the question of whether allowing
11 same-sex marriages would harm heterosexual marriages.

12 Do you, Dr. Peplau, have an opinion as to whether
13 allowing gay and lesbian couples to marry would in any way
14 affect the stability of heterosexual marriages?

15 **A.** I do have an opinion. And it is that I think it would
16 have no impact on the stability of heterosexual marriages.

17 **Q.** Why is that?

18 **A.** Uhm, well, we might say that by "stability" we really mean
19 two things. One would be, is it going to affect entry into
20 marriage? So, are fewer heterosexuals going to decide to marry
21 because same-sex couples can marry?

22 And then the other would be exit from marriage. Are
23 we going to see an increase in divorce?

24 **Q.** So let's start with entry.

25 **A.** Okay.

1 Q. Based on your work in this field, in the study of
2 relationships, do you see any basis for an argument that
3 allowing same-sex couples to marry would lead fewer
4 heterosexual couples to enter into marriage?

5 A. No, I don't. I think we have a large literature that
6 tells us some of the many reasons why people get married. Many
7 of them have to do with the fact that they are in love with
8 someone; that they want to establish a life together; that they
9 have been planning to get married since they were young
10 children, and this has been a life goal.

11 These are things about their relationship. They are
12 things about a special other person. And there is nothing,
13 that I am aware of, in the way of data or theory, that would
14 suggest that same-sex civil marriage will lead fewer
15 heterosexuals to marriage.

16 Q. So let's turn to the second part of the equation, as you
17 described it.

18 Is there any basis, in your years of study, for the
19 concept that allowing same-sex couples to marry would lead more
20 married heterosexual couples to exit or divorce from their
21 marriages?

22 A. I can think of no reason. That is, it is very hard for me
23 to imagine that you would have a happily-married couple who
24 would say, "Gertrude, we've been married for 30 years, but I
25 think we have to throw in the towel because Adam and Stuart

1 down the block got married."

2 (Laughter)

3 We know a lot about factors that lead relationships
4 to fall apart. The immediate cause is, usually, that the
5 couples are having conflict; they are arguing; the relationship
6 has gone sour. If they are not arguing, it feels empty. They
7 feel that their needs are not being met in the relationship.
8 They are very personal reasons for getting divorced.

9 We also know that some of the people who are at
10 greater risk of divorce, people with low levels of education,
11 people who are poor, whose relationships are under great stress
12 and may not have the resources to meet those stress, nothing
13 that we know about all of these kinds of factors that lead to
14 divorce has anything to do with civil rights for same-sex
15 couples.

16 **Q.** Now, there's obviously been some argument and evidence
17 around this issue about exposure to marriage.

18 Do you have an understanding of what percentage or
19 even roughly what proportion of married couples in America
20 would be same-sex couples, if same-sex couples were permitted
21 to marry?

22 **A.** My estimate would be that if same-sex couples were
23 permitted to marry, that perhaps 2 percent of couples, 1 to 2
24 to 3 percent, some very small percentage, would be same-sex
25 couples.

1 Q. And to be clear on what you mean, 1 to 3 percent of all
2 married couples?

3 A. Of all married couples. Absolutely.

4 Q. Would be --

5 A. Thank you.

6 Q. Now, also, do you have -- let me make sure I understand.

7 If same-sex couples are permitted to marry then,
8 presumably, there would be more married couples in the country
9 or in California than otherwise, correct?

10 A. That's correct.

11 Q. Now, do you have a view as to whether that would have any
12 impact, one way or another, on marriage?

13 A. Well, you know, usually we see it as a sign of the health
14 of an institution like marriage -- or, really, of any
15 institution -- if more people want to join.

16 One of the things that has worried some people about
17 heterosexual marriage is that fewer people are getting married,
18 and more of them are getting divorced.

19 So the idea that there's a group of American citizens
20 who want to enter this institution, to keep it going, to keep
21 it vibrant and alive, from my perspective, seems like a very
22 good omen for the future of America.

23 Q. Dr. Peplau, have any professional organizations commented
24 on whether keeping marriage as exclusively a man-woman union is
25 essential to avoiding some sort of harm to our society?

1 **A.** Yes. I think -- you know, the group that's best -- the
2 professional group that's best able to comment on that are
3 anthropologists, professionals trained to study varying
4 patterns across time and place in culture.

5 And there's a large group of anthropologists who
6 study kinship, family, and so on. And the professional
7 organization of anthropologists, the American Anthropological
8 Association, has taken a position on this issue.

9 **Q.** Turn, if you would, Dr. Peplau, to the very first exhibit
10 in your binder, which I'm hoping is 754.

11 **A.** Yes.

12 **Q.** Is this the statement of the American Anthropological
13 Association that you just referenced?

14 **A.** Yes, it is.

15 **MR. DUSSEAULT:** Your Honor, plaintiffs would submit
16 Exhibit 754 into evidence.

17 **MS. MOSS:** No objection.

18 **THE COURT:** Very well.

19 (Plaintiffs Exhibit 754 received in evidence.)

20 **BY MR. DUSSEAULT:**

21 **Q.** And as we did with some of the earlier statements, we have
22 culled out some of the language. Can you read that into the
23 record.

24 **A.** Sure.

25 "The results of more than a century of

1 anthropological research on households,
2 kinship relationships, and families, across
3 cultures and through time, provide no support
4 whatsoever for the view that either
5 civilization or viable social orders depend
6 upon marriage as an exclusively heterosexual
7 institution. Rather, anthropological
8 research supports the conclusion that a vast
9 array of family types, including families
10 built upon same-sex partnerships, can
11 contribute to stable and humane societies."

12 **Q.** Now, Dr. Peplau, I may have gotten you into this issue
13 earlier, accidentally.

14 Is there empirical evidence in the United States,
15 that you're aware of, on the issue of whether same-sex
16 marriages have any adverse impact on the lasting stability of
17 heterosexual marriages?

18 **A.** I think it -- I think we talked a bit earlier about data
19 from Massachusetts, about whether permitting -- whether the
20 change permitting same-sex couples to marry in Massachusetts
21 had led either to an increase in the divorce rate or a decrease
22 in the rate of people getting married.

23 And I would see those data, showing no difference
24 before and after same-sex marriage, as very consistent with the
25 argument that we would not expect harm.

1 **MR. DUSSEAULT:** And, Your Honor, plaintiffs would
2 move into evidence the exhibits that are found at tab C of the
3 binder, which is Plaintiffs' Exhibits 1145, 1151 and 1195.

4 **THE COURT:** What was the second one you mentioned?

5 **MR. DUSSEAULT:** 1145, 1151.

6 **THE COURT:** Thank you.

7 **MR. DUSSEAULT:** And 1195.

8 **MS. MOSS:** No objection.

9 **BY MR. DUSSEAULT:**

10 **Q.** And, Dr. Peplau, are those --

11 **THE COURT:** Very well. Those exhibits will be
12 admitted. Proceed.

13 (Plaintiffs' Exhibits 1145, 1151, 1195 received in
14 evidence.)

15 **BY MR. DUSSEAULT:**

16 **Q.** Dr. Peplau, are those documents materials that you have
17 relied on in reaching your view, the fourth opinion you
18 offered, that allowing same-sex marriages would not harm
19 heterosexual marriages?

20 **A.** Yes, they are.

21 **MR. DUSSEAULT:** Thank you very much. I have nothing
22 further.

23 **THE COURT:** Very well. Ms. Moss, you may
24 cross-examine.

25 **MS. MOSS:** May I approach, Your Honor?

THE COURT: You may.

MS. MOSS: Dr. Peplau, for you.

THE WITNESS: Thank you.

CROSS EXAMINATION

BY MS. MOSS:

Q. Good afternoon, Dr. Peplau.

For the record, my name is Nicole Moss.

I'd like to start, first, with one of your first opinion I think you offered, which is that, marriage confers physical and psychological benefits on married individuals.

And when you talk about married individuals in that context you, of course, are referring to heterosexual individuals, correct?

A. That's correct.

Q. And the reason that you're referring to heterosexual individuals is because you don't have data on same-sex individuals, for the most part, in this country; isn't that right?

A. On married same-sex couples, that's correct.

Q. Exactly. And so a part -- and so there have been no empirical studies that have been done, apart from this one survey that you mention in Massachusetts, on whether same-sex marriage would confer the same physical and psychological benefits that you talked about today and in your report?

A. My opinion is based on many things. It's based on

1 research on heterosexual couples, which I believe is relevant.
2 It's based on research on same-sex couples showing similarity.

3 So it's really based both on that evidence, that
4 empirical research, and theories and explanations about why
5 those patterns exist.

6 So it's based on those. And then it's also informed
7 by this one piece of information that you referred to.

8 **Q.** And that is the only empirical study or survey in this
9 case that has been done on whether there are physical or
10 psychological benefits from same-sex marriage, correct?

11 **A.** As far as I know, that's correct.

12 **Q.** And, similarly, as far as you're aware, there have not
13 been any studies, empirical studies, done on domestic --
14 comparing whether there are physical and psychological benefits
15 from domestic partnerships, as compared to same-sex marriage;
16 isn't that right?

17 **A.** Studies comparing individuals in -- in same-sex domestic
18 partnerships and in same-sex marriages.

19 **Q.** To see if there would be a difference between the two. We
20 don't know that either, do we?

21 **A.** I think we have many reasons to estimate what we would
22 find. But, no, there have not been studies of that.

23 **Q.** And you would agree, as a researcher with 35 years of
24 experience, that it would be important for us to study same-sex
25 marriage and whether there are, in fact, the physical and

1 psychological benefits that you hypothesize would exist?

2 **A.** As a researcher, I would always encourage us to do more
3 research on topics that I think are important and interesting.
4 And this is no different.

5 **Q.** Now, domestic partnerships, to some degree or another, or
6 civil unions, do exist in this country; isn't that right?

7 **A.** Correct.

8 **Q.** But, yet, there has been relatively little to no studies
9 done on whether there are physical and psychological health
10 benefits from domestic partnerships; isn't that right?

11 **A.** That's right. And I think the reason for that is that
12 most of the studies on health benefits rely on very large
13 national samples, using government statistics. And we
14 currently do not have government statistics of that sort on
15 registered partners.

16 **Q.** And some of the benefits from marriage that you've seen
17 with heterosexual couples -- and you listed several of them and
18 I won't go over them now -- you can't rank or assess which
19 particular aspect of marriage has caused the observed increase
20 in better physical or psychological health; isn't that right?

21 **A.** I've outlined a number of factors. And I think they often
22 work together and work simultaneously. So I wouldn't be able
23 to answer the question.

24 Is there one that is of greater importance than the
25 other? I think that, in truth, would vary from one couple to

1 another, depending on their life circumstances. And that's not
2 an activity researchers have tried to undertake.

3 **Q.** And some of the -- some of the attributes or aspects of
4 marriage that researchers have opined may have a benefit, may
5 be the cause of the physical benefit of marriage, one of those
6 is access to health insurance through one's spouse; isn't that
7 right?

8 **A.** Yes.

9 **Q.** And so to the extent that access to health insurance would
10 be afforded through domestic partnerships, you would expect to
11 see benefits from domestic partnerships?

12 **A.** Yes. I think there's no question that domestic
13 partnerships have been an improvement for same-sex couples;
14 that they do confer certain benefits.

15 It is my opinion that they are not equivalent to
16 marriage, for a variety of reasons, and that they do not confer
17 all of the benefits of marriage. But I certainly would not
18 dispute the idea that there are certain many good things that
19 go along with registered partnerships.

20 **Q.** And to the extent that, in your view, they don't confer
21 all of the benefits of marriage, you can't say with certainty
22 that those aspects that they don't confer are what is
23 responsible for the increased levels of physical and
24 psychological health that you've observed in married couples;
25 isn't that right?

1 **A.** I have great confidence that some of the things that come
2 from marriage, believing that you are part of the first class
3 kind of relationship in this country, that you are -- that you
4 are in the status of relationships that this society most
5 values, most esteems, considers the most legitimate and the
6 most appropriate, undoubtedly has benefits that are not part of
7 domestic partnerships.

8 **Q.** But, again, you have no empirical studies, that you can
9 point us to, to support that opinion, that measured
10 specifically whether there were benefits conferred by domestic
11 partnerships separately from or different from same-sex
12 marriage; isn't that right?

13 **A.** I really believe that we know a lot about the impact that
14 stigma and being second class have on people and have on
15 relationships.

16 And, it seems to me, that being prevented by the
17 government from being married is no different than other kinds
18 of stigma and discrimination that have been studied, in terms
19 of their impact on relationships.

20 **Q.** Now, you talked about the protective effect of marriage,
21 correct?

22 And in your expert report you testified or you wrote
23 that one of the protective benefits of marriage is the fact
24 that it's a legal contract; isn't that right?

25 **A.** I -- I would certainly agree with that statement.

1 Q. Okay. Okay. And a legal contract that affords sort of a
2 second layer, in that it's an enforceable legal contract; isn't
3 that right? That, in addition to just being a legal contract,
4 it's one that the spouses can enforce in court, if need be?

5 A. I think that isn't exactly what I said.

6 I think I referred to a phrase used by sociologist
7 Andrew Cherlin, who suggested that one of the things that
8 distinguishes marriage is that it is associated with
9 enforceable trust.

10 That in many kinds of relationships, partners can
11 pledge all sorts of things. "I swear I'll be with you forever
12 and forever." And that one of the benefits of marriage is that
13 it enhances the likelihood that that trust or those commitments
14 will, in fact, be acted upon and be enforceable.

15 I don't think the argument is solely about a legal
16 contract. I think it goes beyond that; that people associate
17 with marriage a degree of seriousness and sort of gravitas that
18 leads them to take those obligations seriously.

19 Q. And you have no basis to dispute that many, many
20 individuals who are in registered domestic partnerships view
21 their commitments seriously and with the same level of
22 commitment that you would observe in married couples?

23 A. One of the remarkable things about couples is that they
24 are very resilient, and that people manage to form
25 high-quality, satisfying relationships under a variety of

1 adverse circumstances.

2 And, certainly, many lesbians and gay men without the
3 benefit either of domestic partnerships or of marriage have
4 formed strong, lasting relationships.

5 At the same time, it seems very obvious to me that
6 those relationships might be further enhanced and further
7 stabilized and legitimated and validated by being -- by having
8 access to marriage.

9 **Q.** Now, one of the -- one of the benefits of marriage or one
10 of the attributes of marriage that you, I believe, testified
11 confer the benefits of marriage that you talked about, is
12 the -- I think one of the terms is called barriers to exit.
13 And the fact that it makes it more difficult for the couple to
14 just split up, lends stability to the relationship. Is that
15 accurate?

16 **A.** Yes. There's a lot of literature and theories about the
17 fact that couples stay together not only because they are
18 attracted to each other and want to be together, but also
19 because it might be difficult to get out; that there are
20 various barriers, yes.

21 **Q.** And you would agree that domestic partnerships or civil
22 unions also create barriers to exit in a relationship?

23 **A.** Civil unions, without question, provide some kind of
24 barriers. But they are not equivalent to marriage.

25 Because part of what goes on when you get married is

1 that, all of a sudden, your relatives know about it; your
2 family is involved; people understand you have a new status.
3 Oh, Anne got married.

4 That's different than when you fill out a form and
5 send it in, or however you go about it in your state, to become
6 a registered partner. It's kind of like a private contract.
7 It's not something that is necessarily understood or recognized
8 by other people in your environment.

9 And they are an important part of the barrier
10 concept, your relatives saying, Gee, don't throw in the towel
11 on your marriage. Think twice. Give it another try. And your
12 pastor saying, Let's talk about it. Don't split up.

13 **Q.** Dr. Peplau, have you undertaken any studies to test what
14 the public's perception is of domestic partnerships as compared
15 to marriage?

16 **A.** I have not conducted a study on that. I must say, as I've
17 talked to people about domestic partnership, many of them kind
18 of scratch their heads and say, "I don't really know what that
19 is."

20 But, no, I have not conducted a systematic study.

21 **Q.** And you don't cite to any in your bibliography or
22 materials relied upon, either; isn't that right?

23 (No audible response heard by the court reporter.

24 Reporter interrupts.)

25 **THE COURT:** I believe she answered, "That's right."

1 **THE WITNESS:** I believe that that's -- that's right.

2 **BY MS. MOSS:**

3 **Q.** And one of the studies that you do rely on in your expert
4 report is a study by Kimberly Balsam. Are you familiar with
5 that study?

6 **A.** I haven't reviewed it for today but, yes, I have certainly
7 read that study in the past.

8 **Q.** Dr. Peplau, it's -- if you could turn to tab three of your
9 binder.

10 I'm going to direct your attention to the exhibit
11 that's been marked PX, Plaintiff's Exhibit 1143?

12 **A.** Yes.

13 **Q.** Is that the study by Kim Balsam, that you relied upon in
14 your expert report?

15 **A.** Yes, it's one of the studies I relied upon.

16 **Q.** And in this particular study, the researchers found that
17 same-sex couples not in civil unions were more likely to have
18 ended their relationships than same-sex civil unions or
19 heterosexual married couples; isn't that right?

20 **A.** I believe that's correct, yes.

21 **Q.** And, in fact, the authorities characterize the data as
22 showing a significant difference in the rates of relationship
23 terminations, correct?

24 **A.** You know, as I say, I have not reviewed that. If you
25 wanted to direct me to a place. I think that is probably

1 correct.

2 **Q.** Why don't you turn to page 112, in the study.

3 **A.** Okay.

4 **Q.** Very bottom of the first column.

5 Isn't it correct, then, that they found or stated
6 that the data showed a significant difference in the rates of
7 relationship terminations?

8 **A.** Yes.

9 **Q.** Referring to individuals in these civil unions versus
10 those who were not?

11 **A.** Yes, that's what it says.

12 **MS. MOSS:** Your Honor, I move PX1143 in evidence.

13 **MR. DUSSEAULT:** No objection, Your Honor.

14 **THE COURT:** Very well. 1143 is admitted.

15 (Plaintiffs' Exhibit 1143 received in evidence.)

16 **BY MS. MOSS:**

17 **Q.** Now, Dr. Peplau, you focused quite a bit in your testimony
18 on the ways in which gay and lesbian couples were similar to
19 heterosexual couples. And I want to focus for a bit on ways in
20 which they are different.

21 **A.** Sure.

22 **Q.** I want to focus specifically on gay men, for a moment.

23 Would you agree that the practice of monogamy in gay
24 male relationships is quite different from the practice of
25 monogamy in married heterosexual or lesbian relationships?

1 **A.** What I would say is this: Researchers who study sexual
2 exclusivity or monogamy in relationships often ask about two
3 questions.

4 One is: Do you believe that monogamy is an important
5 thing in your relationship? Or some version of that. And the
6 second is: Have you been monogamous or have you been sexually
7 exclusive in your relationship?

8 And one of the ways in which gay men's relationships
9 differ, on average -- some of them do; not all of them, by any
10 means -- is that a higher percentage of gay men say that they
11 do not value monogamy; it's not important in their
12 relationship. They may have an agreement that their
13 relationship does not need to be sexually exclusive.

14 And, correspondingly, somewhat more gay men than
15 other groups report that they or their partner have had sex
16 with someone else since their relationship began.

17 So it's important to put it in that context, because
18 we sometimes think of non-monogamy in terms of infidelity, a
19 breach of faith. But if a couple has an agreement, an
20 understanding, that sex with other people is acceptable, then
21 acting on that agreement is not a breach of trust.

22 And I think that's why researchers have found that
23 whereas monogamy is correlated with relationship satisfaction
24 for heterosexuals and lesbians -- that is, having monogamy is
25 associated with being in a happy relationship -- for gay men

1 there's no association between sexual exclusivity and the
2 satisfaction of the relationship, because it's not one of the
3 markers or the yardstick by which gay men are measuring their
4 relationship.

5 **THE COURT:** That's not true of most married people,
6 is it?

7 **THE WITNESS:** Uhm, what's not true is, most married
8 people are very unhappy if their partner is unfaithful; and it
9 detracts from quality. And the same is true for lesbian
10 couples, and for a sizable part of gay male couples, as well.
11 Just the proportions are different.

12 **BY MS. MOSS:**

13 **Q.** Dr. Peplau, can you turn to tab 4 in your binder. I want
14 to direct your attention to the exhibit that's been marked for
15 identification as Defendant-Intervenors' Exhibit DIX1233.

16 **A.** Uh-huh.

17 **Q.** Okay. Do you recognize this as a study that you conducted
18 with David Blasband, as written up in the *Archives of Sexual*
19 *Behavior*, entitled "Sexual Exclusivity Versus Openness in Gay
20 Male Couples"?

21 **A.** Yes. It's an oldie from 25 years ago.

22 **Q.** And in that article, on page 396, you write that:

23 "Available research indicates that sexual
24 exclusivity might be the exception rather
25 than the rule in most gay male

1 relationships."

2 Isn't that right?

3 **A.** That's what it says, yes.

4 **Q.** And, then, on page 397 you write that:

5 "For some time, the norms of many segments of
6 the gay community have encouraged sexual
7 openness rather than exclusivity, and have
8 defined casual sexual affairs as a complement
9 to a steady relationship."

10 Do you see that?

11 **A.** Yes.

12 **Q.** Okay. And do you -- you wrote it, so do you agree with
13 that explanation for why gay male relationships that practice
14 monogamy are the exception rather than the rule?

15 **A.** I began this by saying, "This is an oldie." Okay.

16 And I think a number of things are different now than
17 when this article was written, and that we might find different
18 things if we were to redo the study. One is that when this
19 article was written, no one was talking or thinking about
20 same-sex marriage. Gay relationships were much more secretive,
21 much more closeted. It was really a different time.

22 And I think that our understanding about the gay
23 community and about same-sex relationships was -- was less
24 well-developed; that we've learned things over the past 25
25 years.

1 So I'm not in any way retracting what I said. It's
2 an accurate statement in this paper, of what I found at the
3 time. But I wasn't studying gay men in -- who, for example,
4 had chosen to get married.

5 So what we're talking about, really, is what -- is
6 whether statements like this is true of the majority of gay men
7 would still be accurate, for instance, of gay men who chose to
8 get married.

9 **Q.** Well, before I move on to a more recent article from
10 you...

11 **MS. MOSS:** First, Your Honor, I would like to move
12 this exhibit in evidence. DIX1233.

13 **THE COURT:** Hearing no objection, 1233 is admitted.

14 (Defendants' Exhibit 1233 received in evidence.)

15 **BY MS. MOSS:**

16 **Q.** Now, Dr. Peplau, turning to tab 6 in the binder. This is
17 an exhibit that has been marked for identification as DIX1236.

18 Do you recognize this article?

19 **A.** Yes. It's a recent review paper I wrote.

20 **THE COURT:** 1236.

21 **THE WITNESS:** Oh, 1236. Wait. I'm on the wrong
22 paper. It's tab five?

23 **BY MS. MOSS:**

24 **Q.** It's tab six in your binder. It's the "Close
25 Relationships of Lesbians and Gay Men," authored by you and

1 Adam W. Fingerhut.

2 **A.** And I have it as 1245.

3 **THE COURT:** 1245 is what is marked on the exhibit.

4 Is that incorrect?

5 **MS. MOSS:** No. I'm probably -- I think it's the same
6 article, but I probably have a different -- the defendants'
7 sticker, I apologize.

8 **THE WITNESS:** It is that article, yes.

9 **MS. MOSS:** And it's Plaintiffs' 1245.

10 **MR. DUSSEAULT:** No objection to Plaintiffs' 1245.

11 **THE COURT:** 1245 is admitted.

12 (Plaintiffs' Exhibit 1245 received in evidence)

13 **BY MS. MOSS:**

14 **Q.** Now, in this more recent article that you wrote, you did a
15 study of a certain number of gay men who were in relationships,
16 isn't that right?

17 **A.** This paper is not a report of empirical study I conducted.
18 This paper is a literature review. So it's really a summary of
19 the results of other people's research. And I sometimes cite
20 my own research, but it's a review paper.

21 **Q.** I see. My apologies for that.

22 So on page 410 of this literature review you
23 reference a -- I'm looking in the second column about halfway
24 down. You write about a study, and it indicates that:

25 "36 percent of gay men indicated that it was

1 important to be sexually monogamous, compared
2 with 71 percent of lesbians, 85 percent of
3 heterosexual wives and 75 percent of
4 husbands."

5 Do you see that?

6 **A.** I do see that. And that's a correct statement of that
7 study, which was a study conducted in the late 1970's, early
8 80's.

9 **Q.** And would you agree, however, that while we may not know
10 the exact percentages today, that it is still the fact that
11 more -- or I should say less gay men believe that sexual
12 monogamy is important, as compared to lesbian couples and
13 heterosexual -- and wives and husbands in a heterosexual
14 marriage?

15 **A.** Yes. I agree with both parts of your statement, that we
16 may not really know or be able to pin down the specific
17 percentages, but I think as a general statement, that the
18 percentage is higher -- or that the percentage differs is
19 correct.

20 **Q.** Going back to your study that you wrote on "Sexual
21 Exclusivity and Openness in Gay Male Couples," in that
22 particular study you noted that there was, I believe -- and
23 please correct me if I'm wrong -- that there was a difference
24 between valuing or saying that you agreed with -- that gay men
25 agreed with monogamy and then actually carrying through when it

1 came to their behavior; that there was a difference between the
2 two, is that not right?

3 **A.** This was a way in which humans are similar once again;
4 that there are heterosexuals who pledge to be monogamous and
5 who are not, and the same is true of some gay men.

6 **Q.** And, in fact, in that study you found that 74 percent of
7 men whose relationships had always been, quote, unquote, closed
8 had nonetheless had sex with at least one other person; is that
9 not right?

10 **A.** It's been probably two decades since I have reviewed that
11 paper and so if you would like me to look at a specific
12 sentence or something, I would be happy to do that.

13 **Q.** Sure. Page 407.

14 **A.** Okay, wait. Let me get that.

15 (Brief pause.)

16 **A.** Okay. Thank you.

17 **Q.** Would agree that is what you wrote?

18 **A.** Well, I'm not sure where on the page it is. I'm on page
19 407.

20 **Q.** If you look at the very top of the first full paragraph,
21 second sentence, it says:

22 "This is, perhaps, most obvious in our
23 finding that 74 percent of men whose
24 relationships had always been closed had
25 nonetheless had sex with at least one other

1 person."

2 **THE COURT:** I'm sorry. 407?

3 **MS. MOSS:** Page 407, yes, your Honor, in Tab 4.

4 **A.** And what we did in this study was to give participants a
5 definition of a sexually open relationship in which sexual
6 monogamy was not expected and a sexually closed relationship in
7 which it was expected, and then the statement that you are
8 citing is an accurate depiction of what we -- you know, is what
9 we found.

10 **Q.** And by "closed," you meant -- that means that the two
11 partners in the relationship agreed that they would be sexually
12 exclusive to one another, is that right?

13 **A.** We meant that they had -- what I'm a little vague on at
14 that point is just exactly how we asked that question, but...
15 Questionnaire used these terms.

16 I assume that what we are reporting here are men who
17 indicated, yes, according to our definition their relationship
18 was open or, yes, it was closed. And then a question about,
19 presumably, since the beginning of your relationship, have you
20 ever had sex with another person, in what might have been a
21 long relationship or a short relationship.

22 **Q.** And if it helps, on page 399 of that study under
23 "Questionnaire" it says how "closed" was defined.

24 And as I read it, it says:

25 "We define a closed relationship as one in

1 which sexual fidelity is expected of both
2 partners, and an open relationship is one in
3 which both partners are free to engage in
4 sexual encounters with other people."

5 **A.** Right.

6 **Q.** Okay. Now, back on page 407, about three-quarters of the
7 way down, you also write your findings in the study that:

8 "All men in relationships identified as
9 having been closed and lasting three years or
10 longer had engaged in sex with at least one
11 person other than their primary partner."

12 Isn't that right?

13 **A.** That's right. And the context of this, of course, is that
14 this is a study of gay men in Los Angeles and in other times
15 periods, not a representative sample of everybody.

16 So I certainly don't want to deny my findings, but I
17 think it's important to kind of have the context in mind for
18 when and where and how these data were collected.

19 **Q.** Now, Dr. Peplau, turning your attention for a moment to
20 your testimony on the desire of gays and lesbians to marry as
21 compared to -- well, as compared to the heterosexual community,
22 you -- you noted that 74 percent of lesbians and gay men said
23 if they could legally marry someone of the same sex, they would
24 like to do so some day, correct?

25 Okay. Now, I'm going to ask you to turn to tab seven

1 in your binder. Let me explain this exhibit a little bit to
2 you.

3 There's actually included behind this tab two
4 separate exhibits. One is marked DIX-2427, and the other is
5 marked DIX-2427a. And what the "a" is, is these are statistics
6 from an official website, government website in Belgium. The
7 official website is in French, so we had the website translated
8 into English so it would be more readable. And the certified
9 translation is 2427a.

10 **MS. MOSS:** Your Honor, since these are official
11 government records from an official government website, we
12 would move them in evidence as self-authenticating.

13 **MR. DUSSEAULT:** Could I ask one clarification, that
14 if 2427a is disclosed on the exhibit list?

15 **MS. MOSS:** I believe it was disclosed on the exhibit
16 list that was just recently filed.

17 **MR. DUSSEAULT:** Recently within the last couple days?

18 **MS. MOSS:** Last couple days.

19 **MR. DUSSEAULT:** If I could -- conditionally, if we
20 could, your Honor, so I could verify that fact.

21 **THE COURT:** All right. Fine. Then subject to that
22 limitation, 2427 and 2427a are admitted.

23 (Defendants' Exhibits 2427 and 2427a received in
24 evidence)

25

1 **BY MS. MOSS:**

2 **Q.** Dr. Peplau, if you could turn, also, to tab eight in your
3 binder. And I have a similar exhibit, which is DIX-2644, which
4 is another set of statistical charts from Belgium, and then
5 2644a being the certified English translation.

6 **MS. MOSS:** And we would also move both of these
7 exhibits in evidence.

8 **MR. DUSSEAULT:** Subject to the same reservation, we
9 have no objection.

10 **THE COURT:** Very well. Same ruling.

11 (Defendants' Exhibits 2644 and 2644a received in
12 evidence)

13 **BY MS. MOSS:**

14 **Q.** Now, I'm going to have you flip between these two tabs, so
15 if you could keep them both at hand. And let's refer to the
16 English translations, if you would.

17 What I would like you to do is walk with me through
18 determining, based on these statistics, what the relative
19 different percentages were of the population in Belgium, the
20 heterosexual population that gets married versus the same-sex
21 population -- or I should same-sex couples or gay and lesbian
22 population that gets married.

23 **A.** I'm happy to do that, but I do want to emphasize that my
24 research and the scope of my expertise is about relationships
25 in the United States; that I am in no way, shape or form

1 knowledgeable or expert about marriage in Europe or anywhere
2 else in the world.

3 And as a researcher, in order to be able to comment--
4 I can read these statistics, but to be able to comment on them
5 or interpret them plausibly, I would feel unqualified to do
6 that because I don't know anything about the context in
7 Belgium; but I'm happy to go with you and read the numbers.

8 **Q.** Understood. And so in offering your expert testimony
9 today, you did not do any study of the other countries in the
10 world where same-sex marriage has, in fact, been available to
11 individuals for some number of years?

12 **A.** That is correct.

13 **Q.** Now, if you look at tab seven, 2427a, you see at the very
14 top of this chart, the first row has years. Do you see that?
15 1990, 1995, going all the way up to 2008?

16 **A.** Yes.

17 **Q.** Okay. And right under, that there is the line that
18 contains the total population for the country of Belgium?

19 **A.** Yes.

20 **Q.** And so you would agree that what this is representing is
21 that in 2008 the population of the country of Belgium was
22 10,666,866?

23 **A.** Yes.

24 **Q.** Okay. And then it's further broken down by how many
25 individuals in that population were single, married, divorced

1 and widowed; do you see that?

2 **A.** I do see it.

3 **Q.** So the total number of married individuals in 2008 in
4 Belgium is 4,509,478?

5 **A.** Yes.

6 **Q.** Now, Dr. Peplau, there are no statistics that we could
7 find that would -- from the government in Belgium that would
8 indicate how many gay and lesbians there were in the population
9 of that country.

10 Would you agree that a good conservative estimate
11 would be two percent?

12 **A.** I think that would --

13 **MR. DUSSEAULT:** Your Honor, beyond the scope. The
14 witness has testified that she has not studied other countries
15 at all.

16 **THE COURT:** Well, the witness has stated that she
17 doesn't have expertise in marriage outside the United States.
18 Obviously, the numbers are what the numbers are.

19 **MS. MOSS:** Certainly.

20 **THE COURT:** I will let you explore this and we will
21 see where we are going with it.

22 **BY MS. MOSS:**

23 **Q.** Do you have an estimate of what the percentage would be of
24 the population in the United States that's gay and lesbian?

25 **A.** The estimate that I would use would be something like two

1 to three percent who identify as gay or lesbian. So who on a
2 survey if you said, "What's your sexual orientation," would
3 check a box that said "homosexual" or "gay" or "lesbian."

4 **Q.** And from what you know of your study of sexual
5 orientation, is there any reason to believe that there would be
6 remarkably different percentages outside of the United States?

7 **A.** There might well be that is the extent -- people's
8 willingness to disclose -- in this case it looks like in a
9 government document -- their sexual orientation, might well
10 vary from country to country. And so I really don't -- I don't
11 know.

12 **Q.** And so it could be more than two percent?

13 **A.** It could be more, it could be less.

14 **Q.** It could be less. And so if we just take as a
15 conservative estimate for the point of this hypothesis
16 two percent, would that be -- can we work with that? Would you
17 agree that that seems reasonable?

18 **A.** If we assume that the percent is the same in Belgium that
19 it might be in the United States, my guesstimate for the United
20 States would be that, you know, something like two percent.

21 **Q.** And, Dr. Peplau, I'm not offering this as evidence that
22 it's two percent. I don't know either. I'm asking just to
23 assume as an estimate?

24 **THE COURT:** Ms. Moss is asking you to base your
25 testimony on a hypothetical. All right.

1 **BY MS. MOSS:**

2 **Q.** So if two percent of the population in Belgium were gay or
3 lesbian, then as I do the math, two percent would mean that
4 there are 213,337 individuals in that country.

5 And I don't expect you to do the math right here, but
6 I represent to you that I have done it and that that is the
7 number. Does that sound reasonable to you?

8 **A.** Fine.

9 **Q.** Okay. Now, because we don't know from this whether, when
10 the -- they're accounting for married individuals, whether that
11 includes same-sex marriage or not in the total marriage figure.

12 Assuming it does, if we separate out -- if we -- I'm
13 sorry, strike that. I have gotten ahead of myself.

14 I actually need you to turn to DIX-2644.

15 **A.** Yes.

16 **Q.** And this is the chart from the Belgian government website
17 that actually lists the number of heterosexual marriages by
18 individual for each year.

19 **A.** That doesn't correspond to the -- wait, which am I turning
20 to?

21 **Q.** 2644a, behind tab eight.

22 **THE COURT:** The title says "Trend in Homosexual
23 Marriages."

24 **MS. MOSS:** I'm sorry. Did I say heterosexual
25 marriages?

1 **THE COURT:** Yes.

2 **BY MS. MOSS:**

3 **Q.** I apologize. I meant homosexual marriages.

4 **A.** Then I'm with you.

5 **Q.** I apologize for that.

6 As you'll see, it breaks it down by men, women, and
7 then there's a total on the far right-hand side.

8 **A.** Yes.

9 **Q.** And it's broken down by year. So in 2004 it reports there
10 are 2,138 individuals who are in a same-sex marriage; do you
11 see that?

12 **A.** I do. And what I'm not clear about, is that the number of
13 people who got married that year or who reported that they were
14 married?

15 **Q.** I believe it's the number of married individuals as
16 identified by the state as being married, by the government of
17 Belgium as being married.

18 **A.** So there were fewer married homosexual couples in 2008
19 than there were in 2007. So there were 2300 in 2007, but there
20 are only 2100 in 2008?

21 **Q.** It's -- no. It's the total number that -- I'm sorry.
22 It's the total number that year, who got married that year.

23 **A.** But it's individuals as opposed to marriages.

24 **Q.** If you look right above, it says:

25 "The marital status notices do not yet

1 distinguish between homosexual and
2 heterosexual marriages. The national
3 registry, therefore, provides statistics
4 about the number of people married, not the
5 number of marriages."

6 **A.** I see.

7 **Q.** So these are individuals who got married that year.

8 **A.** So that number is twice as large as the number of
9 marriages?

10 **Q.** Yes.

11 **A.** All right.

12 **Q.** And so if you wanted to know how many individuals at the
13 end of 2008 were, in fact, heterosexual -- or homosexuals were
14 married at the tend of 2008, you would have to add up 2004,
15 2005, 2006, 2007 and 2008?

16 **A.** Okay, got it.

17 **Q.** And in doing that -- and in doing that, it comes up with a
18 total number of 10,923. And, again, I don't expect you to do
19 the math in your head, but that would be 10,923 individuals who
20 are married.

21 And this would over estimate potentially the number
22 of marriages because, of course, it's not taking into account
23 deaths or divorce or anything else; wouldn't you agree?

24 If I'm representing to you that it's just the number
25 that reported being married. I'm not asking you to assume that

1 any got divorced or died.

2 **A.** Right.

3 **Q.** And based on those assumptions, it would -- well, it could
4 possibly be an over representation. Okay.

5 Now, if you take the total number of married
6 individuals that are reported in Belgium, which we looked at
7 earlier on DX 2427, and then you subtract out the total number
8 of same-sex married individuals, you would agree that would
9 give us the number of opposite-sex marriages?

10 **A.** I believe so, yes.

11 **Q.** And then would you agree that to determine what percentage
12 of the gay and lesbian population are married, that you would
13 divide the number in the population of gay and lesbian
14 individuals into the number of gays and lesbians who are
15 married to come up with a percentage?

16 **A.** Can I -- I'm just puzzled about one thing here that maybe
17 you can help me with, because, I -- you know, you can do the
18 math better than I can.

19 But I thought we said that on the first table, that
20 in 2008 there were 10 million marriages total. But the table
21 for the same -- for the homosexual marriages is the number per
22 year. Am I right about that?

23 **Q.** Ten million was the population. The total number --

24 **A.** I mean, the number of married people is 45 -- or
25 four-million-five-hundred-whatever and change.

1 Q. Correct.

2 A. And that's the overall, everybody married in Belgium.

3 Q. Correct.

4 A. And then you're suggesting that it's about 10,000 same-sex
5 couples.

6 Q. No. 10,000 individuals.

7 THE COURT: So that would be 5,000 couples?

8 MS. MOSS: Yes.

9 BY MS. MOSS:

10 Q. But if we just want to know on an individual basis what is
11 the percentage of gay and straight individuals in Belgium who
12 are in same-sex marriages, if you divide the number of
13 individuals who are gay and lesbian that report being married
14 into -- so if you basically divide that by the total population
15 of gays and lesbians, you come up with approximately
16 five percent?

17 MR. DUSSEAULT: Your Honor, may I object. Dr. Peplau
18 is not an economist and she is not a demographer and she has
19 not studied Belgium. So I don't know for what purpose or
20 usefulness this is with her.

21 THE COURT: Maybe it would be helpful, Ms. Moss, if
22 you ask the bottom line question.

23 MS. MOSS: Sure.

24 BY MS. MOSS:

25 Q. Assuming my math is correct -- and I understand as you sit

1 there, you are not going to be able to do it all. I'm not able
2 to do it in my head and I assume that you can't do it in your
3 head.

4 But if the bottom line -- if the numbers show that
5 five percent of gay and lesbian individuals have taken
6 advantage of same-sex marriage in Belgium and 43 percent of
7 heterosexuals have taken advantage of marriage in Belgium,
8 there would be a significant difference between those two,
9 would there not?

10 **A.** Absolutely.

11 **Q.** And without taking you through the same -- without taking
12 you through the same process, we also have data for the
13 Netherlands.

14 **A.** But can I -- can I just make sure I'm with you on these
15 data.

16 I mean, you are not saying that only five percent of
17 all the homosexuals in Belgium got married. Rather -- because
18 don't know how many homosexuals there are.

19 Rather, what you are saying is of all married
20 individuals in Belgium, only five percent of them are
21 homosexual?

22 **Q.** No. I'm saying that five percent of homosexuals in
23 Belgium got married.

24 **A.** And how is it that we know the number of homosexuals in
25 Belgium?

1 Q. I asked you to assume a conservative estimate, that
2 two percent of the population were gay and lesbian.

3 A. Oh, I see. I see. Okay. It is more complicated math
4 than...

5 So what you believe the data -- the facts of the data
6 are, are that five percent of homosexuals in Belgium are
7 married?

8 Q. Yes.

9 A. Compared to 47 percent, I believe it was, of --

10 Q. 43 percent.

11 A. 43 percent of heterosexuals. Okay.

12 Q. Now, Dr. Peplau, you would agree that there is a
13 significant difference in the percentage -- assuming --
14 assuming this hypothetical, that these facts are correct and
15 that the math is correct, you would agree that there is a
16 significant difference, then, in the percentage of population
17 that is choosing to take advantage of the institution of
18 marriage in that country?

19 A. Yes. And I would be struck by the fact that those data
20 seem to be so different from analyses of the percent of
21 same-sex couples in Massachusetts who have chosen to get
22 married.

23 And since I don't know anything about Belgium, one
24 thing I might speculate about is that Americans are one of the
25 most pro-family people around. I mean, Americans are

1 enthusiasts of marriage.

2 And so the rates may be lower in Europe, and I don't
3 have any explanation for why or ability to speculate.

4 **Q.** Now, if you would turn to tab nine in your binder.

5 **A.** Sure.

6 **Q.** This is an exhibit that's been marked DIX-2430.

7 **MS. MOSS:** Your Honor, I would represent these are
8 statistics from the government of Netherlands. And Netherlands
9 very nicely puts their statistics up in English, so I did not
10 have to have these translated.

11 I would move these in evidence, again, as a
12 self-authenticating government record.

13 **MR. DUSSEAULT:** No objection to the document, your
14 Honor.

15 **THE COURT:** 2430 is admitted.

16 (Defendants' Exhibit 2430 received in evidence.)

17 **BY MS. MOSS:**

18 **Q.** Tab 10 is some additional statistics from the government
19 of the Netherlands. This has been marked for identification as
20 DIX-1887.

21 These are statistics, again, on the number of
22 marriages, same-sex marriages -- marriages and then same-sex
23 marriages by year broken down in a table through 2008.

24 **A.** Okay.

25 **Q.** And, Dr. Peplau, without taking you through the math

1 again, if we were to go through that same exercise with the
2 same set of assumptions in this hypothetical, that there
3 were -- two percent of the population in the Netherlands were
4 gay and lesbian and doing the math, if in doing that we were to
5 find that eight percent of the population of same -- of gay and
6 lesbian couples in -- or gay and lesbian individuals, I should
7 say, in the Netherlands are married versus 42 percent of
8 heterosexual individuals, again, that would be a significant
9 difference in who is taking advantage of the institution,
10 correct?

11 **A.** It would be a fairly substantial difference, but I would
12 have no way to understand or explain or think about what it's
13 telling us.

14 **Q.** Dr. Peplau, do you agree that one of the purposes of
15 marriage, both historically and today, is to increase the
16 likelihood that children will not be born out of wedlock?

17 **A.** By definition.

18 **Q.** I'm sorry?

19 **A.** Could you repeat -- I mean, I thought you said one of the
20 purposes of marriage was to ensure that children weren't born
21 out of wedlock, meaning outside of marriage.

22 **Q.** Yes. Is that one of the purposes? So that children that
23 are born to -- that are born from sexual relations of men and
24 women are born within the institution of marriage as opposed to
25 outside of it?

1 **MR. DUSSEAULT:** Your Honor, I would object as to
2 beyond the scope as to the purposes of marriage for Dr.
3 Peplau's testimony.

4 **THE COURT:** Where are we going with this, Miss Moss?

5 **MS. MOSS:** Well, she has testified that gay and
6 lesbians are similarly situated to heterosexuals. And I'm
7 simply going to ask her if, in fact, they are similarly
8 situated with respect to accidentally having children or having
9 children out of wedlock unintentionally.

10 **THE COURT:** All right. Why don't you ask that
11 question.

12 **BY MS. MOSS:**

13 **Q.** Would you agree that gay and lesbian couples do not
14 accidentally have children?

15 **A.** I would really just comment two things about that.

16 One is that except in places like Massachusetts, all
17 children born to lesbians or gay men or raised by lesbians or
18 gay men are out of wedlock, because the government doesn't
19 permit their parents to marry.

20 But if your question is, can two lesbians
21 spontaneously accidentally impregnate each other, not to my
22 knowledge.

23 (Laughter.)

24 **Q.** It has to be planned; it has to be an intentional birth,
25 isn't that right?

1 **A.** I believe that's correct.

2 **Q.** And so for that specific purpose or that specific reason,
3 gay and lesbian couples are not fungible with heterosexual
4 couples; wouldn't you agree?

5 **A.** "Fungible" is a funny term to use, but I would agree that
6 same-sex couples do not have accidental pregnancies.

7 **Q.** Dr. Peplau, I'm going to ask you to turn to tab 11 in your
8 binder, if you would. And this is the exhibit marked DIX-1230.

9 **A.** Yes.

10 **Q.** Do you recognize this?

11 **A.** Yes. This is a book review that I wrote of a book by
12 Esther Rothblum, an edited book, yeah.

13 **Q.** A book entitled "Boston Marriages: Romantic but Asexual
14 Relationships Among Contemporary Lesbians," is that right?

15 **A.** That was the title of the book, yes.

16 **Q.** And in your book review, you wrote that:

17 "A growing body of research suggests asexual

18 lesbian relationships are not uncommon."

19 Isn't that right?

20 **A.** I would agree with that. I don't know if I would -- I
21 agree with the statement that we have documented examples of
22 lesbian relationships that are not characterized by what the
23 general public thinks of asexuality; that is, sort of genital
24 sexual activities.

25 And elsewhere I have written about the fact that

1 sometimes we use definitions or criteria for sexuality that are
2 based on male sexuality. Kind of assuming if there isn't a
3 penis involved or genital contact of some sort, that it's not a
4 sexual activity.

5 And one of the things that some lesbians report is
6 that other kinds of activities that might have a sexual
7 component, such as cuddling or kissing, are things that they
8 value, but that genital sex may not necessarily be a part of
9 their relationships.

10 **MS. MOSS:** Your Honor, I would move DIX-1230 into
11 evidence.

12 **MR. DUSSEAULT:** No objection.

13 **THE COURT:** 1230 is in.

14 (Defendants' Exhibit 1230 received in evidence.)

15 **BY MS. MOSS:**

16 **Q.** Dr. Peplau, you are not presenting yourself here today as
17 an expert in the social meaning of marriage, are you?

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

19 **Q.** And --

20 **A.** I think. I'm not exactly sure what you mean by the
21 "social meaning."

22 **Q.** Well, I'm referring to how the public views marriage.

23 **A.** Well, I have cited data, for example, from the Gallup poll
24 saying that a very large number of Americans either are married
25 or tell you that they like -- they are planning to get married

1 at some point. So in that sense, yes.

2 But I'm not a sociologist and I have not, you know,
3 conducted studies in which I have tried to assess the attitudes
4 of Americans about many different aspects of marriage.

5 Although, you know, the more we talk about it, the
6 more -- it really kind of depends. I have done studies on
7 people's attitudes about the division of labor in marriage and
8 things like that.

9 But the -- if by "social meaning," you mean the sorts
10 of things sociologists might do, I'm not, by training, a
11 sociologist.

12 **Q.** And you have offered various opinions on how you think the
13 public views marriage and understands marriage, but you have
14 not conducted any polls or any research into that specific
15 topic, have you?

16 **A.** No. I have relied on other sources of empirical data and
17 theory about it, and the Gallup poll is just one source of
18 things that I relied on.

19 **Q.** We have already established that you have not done and are
20 -- you have not done any research into the relative benefits of
21 domestic partnerships as compared to either same-sex marriage
22 or heterosexual marriage, correct?

23 **A.** I have not done that empirical research, no.

24 **Q.** And the only empirical research study that you have
25 pointed to regarding the beneficial effects of marriage on

1 same-sex couples is the Massachusetts survey that you
2 referenced?

3 **A.** Yes. I have drawn conclusions, of course, based on a much
4 broader set of literatures on same-sex couples and on
5 heterosexual couples and theories and so on.

6 So I'm really drawing on, you know, a great knowledge
7 base, but in terms of studies specifically of the effects of
8 same-sex civil marriage, I have relied on the Ramos, et al
9 paper.

10 **Q.** So let's talk for a little bit about that study.

11 **A.** Sure.

12 **Q.** I believe you said on direct that you recognized that it's
13 not a representative -- it did not come from a representative
14 sample, isn't that right?

15 **A.** That's correct.

16 **Q.** And by that -- what do you mean when you say it's not a
17 representative sample?

18 **A.** A representative sample would mean that it was reflective
19 of the entire population. So if -- so if we wanted to do a
20 representative sample of couples, we would typically try to
21 find some way to access a list of all possible couples in a
22 certain category and then to sample every fifth one or
23 whatever. It would be a representative sample.

24 This was a volunteer sample of people who were
25 contacted and chose to reply. And the researchers themselves

1 acknowledge it and I acknowledge it. So it really is telling
2 us about the opinions of 550, or thereabouts, people who got
3 married in Massachusetts. And there may be different opinions
4 or similar opinions among the rest of the people who did not
5 get informed about the survey or chose not to answer.

6 **Q.** And, in fact, we know a little bit about how they came up
7 with the sample for the survey, correct?

8 I mean, we know, for instance, that this particular
9 survey was recruited through a large gay rights advocacy group
10 in Massachusetts?

11 **A.** Yes. My understanding is that this survey was done
12 online; that it was an internet survey. And they went to a
13 group that had a large email list and they assumed that among
14 that large email list, there would be some individuals or
15 couples who had gotten married. And that was the way the
16 Department of Health of the State of Massachusetts chose to
17 collect information.

18 **Q.** And so it was individuals who responded -- individuals
19 from this email list of this gay rights advocacy group who
20 responded and who self-identified as being in a marriage that
21 were sent the survey, and the data was gathered from those --
22 from their survey responses, correct?

23 **A.** That's correct.

24 **Q.** And we know from the survey responses that these volunteer
25 sample members who responded, that 40 percent of them listed as

1 one of the top three reasons why they got married was having
2 society know about gay and lesbian relationships, correct?

3 **A.** I'm not sure that's the wording. I thought the wording
4 was about legal recognition, but it's been awhile since I've
5 looked amount that specifically. You may be more up on this
6 than I am.

7 **Q.** Well, if you turn to -- if you return to tab 12 in your
8 binder?

9 **A.** Yes.

10 **Q.** And this is the Williams Institute survey. I believe it's
11 already been admitted in evidence on your direct.

12 **A.** Yes.

13 **Q.** If you look at page five?

14 **A.** Yes.

15 **Q.** The authors of the survey say that -- and I'm looking at
16 the second full paragraph in that left-hand column, second
17 sentence. It says:

18 "Four in ten reported wanting to have society
19 know about lesbian or gay relationships."

20 **A.** I see. It's the societal visibility that you are talking
21 about.

22 **Q.** Exactly. And then in the chart next to it, it says it
23 represents 40 percent of societal visibility of gay and lesbian
24 relationships.

25 **A.** Okay.

1 Q. So that was one of the top three reasons for why they got
2 married of 40 percent of the respondents of the survey; you
3 would agree with that, right?

4 A. I would note they were asked multiple reasons, and the
5 first reason that was given by virtually almost everybody,
6 93 percent, was love and commitment. And the second was legal
7 recognition of their relationship. And then they give other
8 answers.

9 And you are quite right, that 40 percent of this
10 unrepresentative sample said that social visibility was one of
11 the reasons for them.

12 Q. And some of the ways in which the sample was not
13 representative is that it was 90 percent white, isn't that
14 right?

15 A. Yes. I don't actually know what the -- what the
16 demographic characteristics of lesbians and gay men in
17 Massachusetts are; that is, I don't know what percentage of
18 lesbians and gay men are, in fact, white or not white in the
19 state. So I --

20 Q. Or in the United States?

21 A. In the United States, it's certainly not -- United States
22 is not 90 percent white.

23 Q. And the average age of the individuals who responded was
24 48 years old, isn't that right?

25 A. Right. And, again, I don't know -- I don't know what to

1 make out of that. I mean, that was what they found, right.

2 **Q.** And that -- that average age is significantly higher than
3 the average age of most same-sex couples in the United States;
4 isn't that right?

5 **A.** I'm trying to -- you know, there may be data from the
6 census about what the average age of same-sex couples is in the
7 United States, but I don't know what those data are.

8 I really don't know how to make the comparisons that
9 you are driving at about, was this sample relatively older than
10 the gay and lesbian population of Massachusetts or not? I
11 don't know the answer to that.

12 **Q.** Now, we also know from the survey results that 85 percent
13 of the respondents had at least a college level education and
14 57 percent of the respondents had a graduate level education;
15 isn't that right?

16 **A.** Right. And those levels are high. Lesbians and gay men
17 on average have higher levels of education than the general
18 public, but I think these are probably higher.

19 **Q.** And we also know that 52 percent of the survey respondents
20 earned a combined household income of more than 110,000, isn't
21 that right?

22 **A.** And, you know, when we say a sample is not representative,
23 part of what we mean is that it differs or it might differ, it
24 has the potential for differing, from a fully representative
25 sample of the state.

1 And that's really why when I talked about these
2 data -- and I hope I was very clear about this -- I was not
3 trying to generalize that these would be the experiences of
4 every lesbian or gay man who got married in Massachusetts, but,
5 rather, that this tells us about the experience of some
6 citizens of Massachusetts who were married.

7 **Q.** I --

8 **A.** I think that's what you can claim based -- I think that's
9 what you can say based on this study.

10 **Q.** And, Dr. Peplau, in terms of how the survey was conducted,
11 it was based on self-reporting by these individuals, correct?

12 **A.** Survey studies are self-report studies.

13 **Q.** By nature?

14 **A.** It means you ask people a question and they answer, and
15 this is no different.

16 **Q.** And like all surveys then, they are open to self-reporting
17 bias, correct?

18 **A.** We trust that people tell us, you know, honest answers
19 and -- but, you know, they are telling us. We are taking their
20 word for it and that's kind of the nature of doing that kind of
21 research.

22 **Q.** And we don't know from the face of this document what, if
23 anything, was done to control for possible self-reporting
24 biases with this survey, do we?

25 **A.** I don't believe they discussed that issue in this report.

1 Q. And so to the extent that it may be more representative of
2 individuals who are happy with their marriage than the average,
3 we have no way to know that, do we?

4 A. No. You know, in general relationship researchers have
5 worried about this question, about if we ask for volunteer
6 samples for a study, are we more likely to get happy couples
7 who want to brag about their relationship or miserable couples
8 who want to complain about their partner?

9 It really seems very plausible that you can get both.
10 And in this case we really don't -- we don't know.

11 Q. But we do know that the recruitment came through a gay
12 advocacy organization, correct?

13 A. Correct.

14 Q. And we do know that 40 percent of the respondents to the
15 survey identified as one of the top three reasons they got
16 married, having their relationship more visible, gay and
17 lesbian relationships be more visible, correct?

18 A. Right. So, you know, so -- the debate about same-sex
19 marriage is something that is widely talked about in this
20 country and in gay communities.

21 And so it wouldn't surprise me that in a state
22 that -- one of the first states to permit same-sex marriage,
23 that it would occur to same-sex couples, particularly those who
24 are more socially engaged or active, that part of what they
25 were doing was participating in a private activity that was

1 going to be known to other people.

2 So it doesn't particularly surprise me that they
3 might have given that answer, given the social climate of the
4 times and the novelty of marriage for same-sex couples in
5 Massachusetts.

6 **Q.** And so that those facts tell us about -- something about
7 the individuals that chose to respond to the survey, or they
8 may tell us something about the individuals that chose to
9 respond to the survey, correct?

10 **A.** They tell us about the experiences reported by the people
11 who took the survey, yeah.

12 **Q.** Now, Dr. Peplau, on direct and in your expert report you
13 have order offered the opinion that in your view allowing
14 same-sex marriage will not harm heterosexual marriage.

15 And you specifically focused on whether it will cause
16 increased divorce rates, isn't that right?

17 **A.** That was one of the things I talked about, yes.

18 **Q.** You have not offered opinions or undertaken an extensive
19 analysis about whether or not it might harm the institution of
20 marriage, separate and apart from individual heterosexual
21 couple's relationships, isn't that right?

22 **A.** The issues I have been centrally interested in are entry
23 into marriage and exiting from marriage through divorce or
24 dissolution.

25 I think those issues speak in very important ways to

1 the institution of marriage and its health and how robust it
2 is, but there are certainly other aspects of the institution of
3 marriage that I do not address in my expert statement, and
4 that's true.

5 **Q.** Now, Dr. Peplau, I want to direct your attention for a
6 moment to the statement you make on page 11 of your expert
7 report. And you can find that behind tab one in your binder.

8 **A.** Okay. It's page 11, did you say?

9 **Q.** In page 11 of your expert report, and it's tab one.

10 **A.** Okay.

11 **Q.** Specifically, I'm looking at the second paragraph under
12 the heading, the "A" heading. About halfway down you write:

13 "Public acceptance of divorce has increased,
14 as has the social acceptability of unmarried
15 cohabitation. Some scholars also suggest
16 that a growing emphasis on individualism and
17 personal fulfillment has eroded an earlier
18 emphasis on the importance of obligation and
19 commitment in marriage."

20 Do you see that?

21 **A.** Yes, I do.

22 **Q.** And another reason you cite that contributes to the
23 current divorce rates is that:

24 "State no-fault divorce laws make it easier
25 for spouses to end their relationships."

1 Correct?

2 **A.** What I was talking about here was analyses that family
3 researchers and historians and sociologists and others have
4 done to try to understand factors that led to an increase in --
5 a dramatic increase in the twentieth century in the divorce
6 rate in the U.S., a divorce rate that peaked in the 80's and
7 has kind of leveled off or decreased since then.

8 So this is really an analysis of factors during -- a
9 reasonably long period that contributed to a fairly high
10 divorce rate in the United States.

11 **Q.** And those factors include a growing emphasis on
12 individualism and personal fulfillment?

13 **A.** That's one of the factors that's been suggested by
14 scholars who have studied this. And part of what they have
15 suggested is that in earlier times when a more important part
16 of marriage might have been marriage as an economic unit in
17 which two people came together as a way, sort of, to meet basic
18 needs for survival, that over time we have come to expect
19 personal fulfillment through marriage; that marriage is not
20 only the place where our laundry is done and someone pays the
21 bills, but marriage is also the place where we develop our
22 personal potential and so on.

23 And it's been suggested that this increasing emphasis
24 among some individuals in what's been called individualism has
25 in some ways set very high expectations for marriage; that now

1 it's not enough for a married partner to treat you well and be
2 kind and thoughtful, but you have to also be able to develop a
3 relationship in which you find your soulmate and which -- so
4 the suggestion has been that shifting American values about
5 individualism may have been one of many factors that
6 contribute.

7 And the reason I talked about these factors was
8 because none of these factors is linked or is due to the gay
9 civil rights moment. That was really the point I was -- one of
10 the points I was trying to make, was that the increase in the
11 divorce rate was independent of the push for marriage equality
12 for same-sex couples.

13 **Q.** Now, looking at -- turning to page 13 of your expert
14 report where you have a chart that, I think, lists or sets
15 forth the divorce statistics in Massachusetts that you were --
16 that you spoke of on direct, you have four years worth of data
17 listed, is that right?

18 **A.** The four years before same-sex marriage and then the four
19 years starting with --

20 **Q.** And the four years after?

21 **A.** Yeah.

22 **Q.** And you would agree that this is not a tremendously large
23 amount of data from which to draw conclusions; isn't that
24 right?

25 **A.** It's a total of eight years of data. You know, I don't

1 know what large or small would mean in this capacity.

2 It's only four years since marriage began because
3 that's -- those are the most recent government statistics
4 available.

5 **Q.** And as we look at them in Massachusetts, we see that in
6 2004 -- of all of the years listed, in 2004 there was the
7 highest marriage rate, correct?

8 **A.** Correct.

9 **Q.** 6.5 percent?

10 **A.** Correct.

11 **Q.** And it went down in 2005 to 6.2 percent?

12 **A.** Yes.

13 **Q.** And it went down to 5.9 percent in 2006. Stayed at 5.9
14 percent for 2007, and we don't know 2008 and 2009 based on the
15 evidence that you have put in; isn't that right?

16 **A.** What I would -- your reading of these numbers is quite
17 correct. What I would comment about is that if you look at
18 these kinds of data -- not just in Massachusetts, but in other
19 states -- what you see is that there are always year-to-year
20 minor fluctuations.

21 And so that's why when I looked at these data, my
22 interpretation of them is really an interpretation of no
23 change, because the fact that the rate goes up two percent --
24 .2 percent one year or down, you know, a small fraction of a
25 percent the next, I think is kind of haphazard variation in the

1 data, and I don't take those as necessarily serious indicators
2 of anything.

3 To me, these -- what stands out to me is aside from
4 what looks like the impact of gay people getting married the
5 first year, increasing that number, the numbers just kind of
6 look the same to me.

7 **Q.** Have you undertaken a comprehensive analysis of the
8 marriage and divorce rates in the neighboring states to
9 Massachusetts?

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

11 **Q.** How about nationally? You have not done a comprehensive
12 analysis of what the divorce rates during this time frame were
13 nationally either, have you?

14 **A.** No. The only point I was trying to make here was that
15 Massachusetts is a state that permits civil same-sex marriage,
16 and that it would be informative to look at in that state what
17 the patterns were leading up to -- prior to same-sex marriage
18 and following. I don't make any claims beyond that about what
19 these data show.

20 **Q.** And looking just for a moment at the divorce rate starting
21 in 2004, the year that same-sex marriage was allowed in
22 Massachusetts, the data, as you present it, 2.2 percent in
23 2004, 2.2 percent in 2005, 2.3 in 2006 and 2.3 in 2007. So
24 going up slightly in 2006 and 2007, correct?

25 **A.** And still winding up lower than they had been in the four

1 years preceding the introduction of same-sex marriage.

2 So, I mean, I -- we can try to make something out of
3 a difference between .3 -- you know, 2.3 and 2.4. But I think
4 given the fact that these numbers bounce around a little bit in
5 all states across years, that I was certainly not claiming that
6 the divorce rate went down as a result of same-sex marriage.

7 But if we want to look at minor variations in
8 divorce, the average divorce rate is lower after same-sex
9 marriage than before, but I interpret it as really the same.

10 **Q.** And, again, I don't know if it shows a pattern or not
11 either. We have four years and you would agree you have got
12 four years, including the year when same-sex marriage was
13 allowed in Massachusetts, and we have that year through 2007
14 and that's the data that we have?

15 **A.** Correct.

16 **Q.** And you would agree that it would be helpful to have
17 several more additional years worth of data to be able to draw
18 conclusions one way or the other, wouldn't you?

19 **A.** I'm sure we will have those data soon.

20 **Q.** I'm sure we will.

21 And just to finish up, Dr. Peplau, as to whether
22 same-sex marriage will have any effect on public attitudes
23 towards individualism or commitments over time, you can only
24 speculate about that issue because you have not actually done
25 any study of it, isn't that right?

1 **A.** Well, the issue is, do I think that -- I'm sorry. It may
2 be late in the day. Could you repeat the question?

3 **Q.** Sure. Whether same-sex marriage will have any effect on
4 public attitudes towards individualism or commitment over time
5 is something you can only speculate about because you have not
6 studied it and know of no studies, isn't that right?

7 **A.** So the question is, do I think that permitting same-sex
8 marriage might over time lead Americans to become more or less
9 individualistic, or do I think it might lead them to value
10 commitment more or less over time? Is that the question?

11 **Q.** Well, really, have you studied that issue so -- where you
12 can offer an expert opinion on it?

13 **A.** My general opinion, my overarching opinion that same-sex
14 marriage will not cause harm, is based on my consideration of a
15 lot of research on marriage, on same-sex couples, our
16 understanding of theories and so on.

17 And all of the evidence and the theories I know and
18 can think of are on the side of saying no harm.

19 And then on the side of what theory might there be
20 about why there would be harm or what data might there be to
21 suggest harm, there is nothing. So it's kind of like this
22 (indicating).

23 And so I have great confidence in that conclusion,
24 but it is the case that that -- that that opinion of mine is
25 not based on my having done an empirical study over time of

1 same-sex marriage will or won't influence the public's
2 attitudes about individualism or commitment.

3 **MS. MOSS:** Thank you. One moment.

4 **THE COURT:** Very well. Any redirect, Mr. Dusseault?

5 **MR. DUSSEAULT:** Yes, your Honor. Very briefly.

6 **REDIRECT EXAMINATION**

7 **BY MR. DUSSEAULT:**

8 **Q.** Dr. Peplau, Ms. Moss asked you some questions at the
9 beginning of cross-examination about enforceable trust and
10 whether there was enforceable trust in a domestic partnership;
11 do you recall that?

12 **A.** Yes, I do.

13 **Q.** Do you have a view as to whether there is a greater degree
14 of enforceable trust in a marriage than a domestic partnership?

15 **A.** I think it would be greater in marriage.

16 **Q.** Ms. Moss also asked you about barriers to exit and whether
17 there were barriers to exit in domestic partnership; do you
18 recall that?

19 **A.** Yes, I do.

20 **Q.** Do you have an opinion as to whether there are greater
21 barriers to exit from marriage than from domestic partnerships?

22 **A.** I believe there are greater barriers in marriage.

23 **Q.** Ms. Moss asked you about a piece of work from 1985 that's
24 at Tab 4 of your binder, Exhibit 1233, talking about
25 exclusivity. Do you recall that?

1 A. Yes.

2 Q. So that's something that was done 25 years ago?

3 A. Yes.

4 Q. And 25 years ago there was no marriage available for
5 same-sex couples, correct?

6 A. Correct. Nor were their domestic partnerships.

7 Q. So any information that you gleaned in that study had
8 nothing to do with the behavior of couples in marriages,
9 correct?

10 A. That's correct.

11 Q. And do you know in California, is there any restriction on
12 the ability of a heterosexual couple that doesn't want to be
13 exclusive to marry?

14 A. No. There is no restriction.

15 Q. I'm a bit reluctant to take you back to Belgium, but I had
16 one question.

17 (Laughter.)

18 Q. Actually maybe two.

19 Why don't we start with the U.S. Why is it that you
20 focused on the U.S. rather than other countries?

21 A. We were talking about possible changes to the law in
22 California and in the United States. And it seems to me that
23 the most directly relevant information is what's happened in
24 another state within our own country.

25 Q. Now, Ms. Moss asked you about -- it was a hypothetical,

1 but there were some figures drawn from data where she was
2 suggesting that 43 percent of heterosexual couples in the
3 country were married and five percent of same-sex couples were
4 married.

5 Do you have any idea in that hypothetical or that
6 data whether the 43 percent of heterosexual couples included
7 all the heterosexual couples that had been married in all the
8 time that heterosexual marriage had been allowed?

9 **A.** My understanding, but I don't trust it, is that it's -- it
10 was really the percent of individuals who are currently
11 married.

12 **Q.** And do you know how long opposite-sex marriage has been
13 lawful in the Netherlands or Belgium?

14 **A.** I assume for a long time.

15 **Q.** Ms. Moss asked you some questions about a growing emphasis
16 on individualism and personal fulfillment, and sometimes that's
17 put in contrast to, let's say, concern for child welfare.

18 Has your study of relationships, Dr. Peplau,
19 suggested in any way that same-sex couples have a greater
20 emphasis on individualism and personal fulfillment than
21 opposite-sex couples?

22 **A.** No.

23 **Q.** Has your work suggested that same-sex couples have any
24 less concern for the well-being of children they may be raising
25 than opposite sex couples?

1 **A.** No.

2 **Q.** Lastly, Ms. Moss asked you some questions about
3 Massachusetts and the need for some more data.

4 Do you feel that you need more data from
5 Massachusetts to form an opinion as to whether allowing
6 same-sex couples to marry would either lead heterosexual
7 couples not to marry or to exit their marriage?

8 **A.** I don't, because my opinion is based on so much more than
9 simply the Massachusetts data.

10 **Q.** Thank you very much. I have no further questions, Dr.
11 Peplau.

12 **THE COURT:** Very well. Ms. Peplau, you may step
13 down. Thank you for your testimony.

14 **A.** Thank you, your Honor.

15 (Witness excused.)

16 **THE COURT:** And we are, I think, ready to adjourn for
17 today. We will recommence at 8:30 in the morning.

18 As you may know, the Supreme Court has given us some
19 guidance with respect to part of the issue. It seems to be a
20 rather limited guidance at the moment.

21 So we may have issues beyond remote access to these
22 proceedings by other courthouses that we'll have to take up at
23 some point.

24 My inclination, without hearing from counsel and
25 getting their advice, is that we put that issue to the side for

1 the time being and proceed with the trial. We seem to be
2 moving along well and I don't want to do anything to alter the
3 progress that we are making in these proceedings, but we may,
4 indeed, have to address those issues at some later time.

5 So we will not have remote access to these
6 proceedings from other courthouses in the Ninth Circuit and
7 elsewhere in the Federal Judiciary, but we'll have to deal with
8 the other issues in due time.

9 Now, Mr. Cooper, I understand from the clerk that you
10 asked about the responses to the proposed -- or the change in
11 the local rule and the responses with reference to broadcasting
12 or webcasting these proceedings.

13 And the ones that we have received are all in the
14 jury room. I believe you or your colleagues have had an
15 opportunity to review them, is that correct?

16 **MR. COOPER:** I do understand that they are in the
17 jury room available for inspection, and I believe that some of
18 my colleagues have -- have taken advantage of that fact. I
19 don't have a report for you in terms of whether -- whether that
20 review is complete.

21 **THE COURT:** Well, there are quite a number. There
22 are quite a number. So I can well imagine that maybe you
23 haven't or your colleagues have not had a chance to review them
24 all.

25 My understanding from the clerk was that you or

1 someone on your team had requested to copy some of them.

2 **MR. COOPER:** You are better informed than I am.

3 **THE COURT:** I see. Well, maybe you should chat with
4 your colleagues.

5 My initial reaction is, I will be guided by whatever
6 you advise. I am inclined to think that we should either copy
7 all or none or make -- make them all part of the record, if
8 that's necessary; but in view of the volume, I just really
9 wonder what value they may have for these proceedings, but --

10 **MR. COOPER:** Well, the Court has put on the record
11 the selection of the comments that the Court has found
12 relevant.

13 **THE COURT:** Those are for organizations. Those are
14 lawyer organizations, and I put all of those on, but none of
15 the individual comments.

16 **MR. COOPER:** Well, I frankly don't know what's in
17 this. I haven't -- I haven't received a report.

18 But if we do conclude that there is something in
19 those comments that we would like to ask the Court to put on
20 the public record, we will try to make that determination
21 promptly.

22 **THE COURT:** All right. That's fine. Anything
23 further at the moment before we adjourn?

24 Ms. Stewart?

25 **MS. STEWART:** Your Honor, if I might. I wanted to

1 make sure that the excerpts from the Tam deposition that we
2 played this morning did get in the record. I know that -- or
3 I'm told that they weren't actually transcribed.

4 And so I know we didn't complete them, but insofar as
5 we got part way through, I would like to make sure those
6 deposition excerpts are part of the record and the documents
7 that were with them.

8 **THE COURT:** Well, it would be helpful if you would
9 supply the page and line reference to those depositions so the
10 reporter could note that in the record.

11 **MS. STEWART:** We will happily do that, your Honor. I
12 will do that first thing in the morning because I need to check
13 how far we got with my colleagues.

14 **THE COURT:** All right. If you could check on that,
15 as Mr. Cooper is checking with his colleagues.

16 Who is our first witness tomorrow?

17 **MS. VAN AKEN:** Your Honor, that would be Ed Egan.

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

19 **MS. VAN AKEN:** Edmund A. Egan.

20 **THE COURT:** Mr. Egan?

21 **MS. VAN AKEN:** Yes.

22 **THE COURT:** All right. And he will be followed by?

23 **MR. DUSSEAULT:** Dr. Ilan Meyer.

24 **THE COURT:** All right. And I suppose we can get
25 through three of these folks tomorrow at least.

1 **MR. BOIES:** We believe we will, your Honor.

2 **THE COURT:** Who is the third one then, Mr. Boies?

3 **MR. BOIES:** The third one will be Ms. Zia. And we
4 also have deposition designations in case we don't have -- we
5 also have deposition designations in case we get through with
6 all three of those people. We actually hope that those three
7 will not take the whole day. We are trying to move as quickly
8 as possible.

9 **THE COURT:** Ms. Zia you mentioned.

10 **MR. BOIES:** Yes.

11 **THE COURT:** Good. Well, that would be good progress.

12 And we are moving along, which is what we all want to do.

13 All right. I will look forward to seeing everybody.

14 (Whereupon at 4:12 p.m. further proceedings

15 in the above-entitled cause was adjourned

16 until Thursday, January 14, 2010 at 8:30 a.m

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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS,
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California, et al.**, were reported by us, certified shorthand
reporters, and were thereafter transcribed under our direction
into typewriting; that the foregoing is a full, complete and
true record of said proceedings at the time of filing.

/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR
U.S. Court Reporter

Wednesday, January 13, 2010