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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. 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, Defendants.	NO. C 09-2292-VRW San Francisco, California Wednesday June 16, 2010

TRANSCRIPT OF PROCEEDINGS

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

APPEARANCES:

For Plaintiffs:

GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
BY: THEODORE B. OLSON, ESQUIRE
AMIR CAMERON TAYRANI, ESQUIRE

GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
BY: THEODORE J. BOUTROUS, JR., ESQUIRE
CHRISTOPHER D. DUSSEAULT, ESQUIRE
THEANE EVANGELIS KAPUR, ESQUIRE

GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, California 94105-2933
BY: ETHAN D. DETTMER, JR., ESQUIRE
ENRIQUE A. MONAGAS, ESQUIRE
SARAH E. PIEPMEIER, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
BY: DAVID BOIES, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
BY: JOSHUA I. SCHILLER, ESQUIRE

BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
Oakland, California 94612
BY: JEREMY MICHAEL GOLDMAN, ESQUIRE

For Plaintiff-Intervenor:

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY
One Drive Carlton B. Goodlett Place
San Francisco, California 94102-4682
BY: DENNIS J. HERRERA, CITY ATTORNEY
THERESE STEWART
DANNY CHOU
CHRISTINE VAN AKEN
RONALD P. FLYNN
MOLLIE M. LEE
DEPUTY CITY ATTORNEYS

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES (CONTINUED):

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

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

For Defendant-Intervenors:
COOPER & KIRK
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
BY: CHARLES J. COOPER, ESQUIRE
DAVID H. THOMPSON, ESQUIRE
HOWARD C. NIELSON, JR., ESQUIRE
NICOLE MOSS, ESQUIRE
PETER PATTERSON, ESQUIRE

ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
BY: BRIAN W. RAUM, SENIOR COUNSEL
JAMES A. CAMPBELL, ESQUIRE
DALE SCHOWENGERDT, ESQUIRE

ALLIANCE DEFENSE FUND
101 Parkshore Drive, Suite 100
Folsom, California 95630
BY: TIMOTHY D. CHANDLER, LEGAL COUNSEL

ALLIANCE DEFENSE FUND
801 G Street NW
Washington, D.C. 20001
BY: AUSTIN R. NIMOCKS, SENIOR COUNSEL

For Defendant Patrick O'Connell:
OFFICE OF ALAMEDA COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, California 94612
BY: CLAUDE F. KOLM, DEPUTY COUNTY COUNSEL
MANUEL MARTINEZ, DEPUTY COUNTY COUNSEL

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES (CONTINUED):

For Dennis Hollingsworth:	**ANDREW PERRY PUGNO ESQUIRE** 101 Parkshore Drive, #100 Folsom, California 95630-4726
For Proposed Intervenor Imperial County, et al.:	ADVOCATES FOR FAITH AND FREEDOM 24910 Las Brisas Road, Suite 110 Murrieta, California 92562 **BY: ROBERT H. TYLER, ESQUIRE** **JENNIFER L. MONK, ESQUIRE**

P R O C E E D I N G S

JUNE 16, 2010 10:03 A.M.

THE CLERK: Calling Civil Case 09-2292, Kristin Perry, et al. versus Arnold Schwarzenegger, et al.

Appearances, Counsel, please.

MR. OLSON: Good morning, Your Honor.

Theodore B. Olson, Gibson, Dunn & Crutcher, on behalf of the plaintiffs.

THE COURT: Good morning.

MR. BOIES: Good morning, Your Honor.

David Boies, of Boies, Schiller & Flexner, on behalf of the plaintiffs.

THE COURT: Good morning.

MR. BOUTROUS: Good morning, Your Honor.

Theodore J. Boutrous, Jr., Gibson, Dunn & Crutcher, also for the plaintiffs.

THE COURT: Good morning.

MR. DUSSEAULT: Good morning, Your Honor.

Christopher Dusseault, of Gibson, Dunn & Crutcher, also for the plaintiffs.

MR. TAYRANI: Good morning, Your Honor.

Amir Tayrani, from Gibson, Dunn & Crutcher, also for the plaintiffs.

MR. GOLDMAN: Good morning, Your Honor.

Jeremy Goldman, from Boies, Schiller & Flexner, on behalf of the plaintiffs.

MS. STEWART: Good morning, Your Honor.

Therese Stewart on behalf of the City and County of San Francisco.

MR. HERRERA: Good morning, Your Honor.

City Attorney Dennis Herrera on behalf of the City and County of San Francisco.

THE COURT: Good morning.

Any other appearances on the plaintiffs' side?

All right. Mr. Cooper.

MR. COOPER: Good morning, Mr. Chief Judge.

Charles Cooper, with Cooper & Kirk, for the defendant-intervenors.

THE COURT: Good morning.

MR. THOMPSON: Good morning, Your Honor.

David Thompson, of Cooper & Kirk, for the defendant-intervenors.

MR. NIELSON: Good morning, Your Honor.

Howard Nielson, with Cooper & Kirk, also for the defendant-intervenors.

THE COURT: Good morning.

MS. MOSS: Good morning, Your Honor.

Nicole Moss for defendant-intervenors.

MR. PATTERSON: Good morning, Your Honor.

Peter Patterson, also for the defendant-intervenors.

THE COURT: Good morning.

MR. RAUM: Good morning, Your Honor.

Brian Raum, with the ADF, for the defendant-intervenors.

MR. CAMPBELL: Good morning, Your Honor.

James Campbell, of the Alliance Defense Fund, on behalf of the defendant-intervenors.

THE COURT: Well, we have some other defendants.

(Laughter)

MR. KOLM: Good morning, Your Honor.

Claude Kolm, Deputy County Counsel, for defendant Alameda County Clerk Recorder.

THE COURT: Good morning.

MR. MARTINEZ: Good morning, Mr. Chief Judge.

Manuel Martinez also for County Clerk Recorder Mr. Patrick O'Connell.

MS. INAN: Good morning, Your Honor.

Michele Inan on behalf of Attorney General Brown.

THE COURT: Good morning.

MR. MEDEIROS: Good morning, Your Honor.

Manuel Medeiros, also on behalf of Attorney General Brown.

MR. STROUD: Good morning, Your Honor.

Andrew Stroud, Mennemeier, Glassman & Stroud, on

behalf of Governor Arnold Schwarzenegger, Mark B. Horton, and Linette Scott, defendants. Thank you.

THE COURT: Good morning.

Any other appearances?

Well, this is an impressive array of legal talent.

(Laughter)

All this legal talent that seems to be focused on one person at the moment.

Welcome back. Delighted to have you back.

Obviously, the hiatus that we've had, the period of time from the presentation of the evidence to the present is not anything that I would have wished or hoped for. I was hoping that we could get this case in before present. But it may be appropriate that the case is coming to closing argument now. June is, after all, the month for weddings.

(Laughter)

So you have received the schedule. We've allotted the day for your presentations, and I would simply propose that we get right to business.

Mr. Olson, are you leading off for the plaintiffs?

MR. OLSON: I am, Your Honor.

Mr. Boutrous has one housekeeping matter we would like to bring to your attention before I start.

THE COURT: All right. That's fine.

MR. BOUTROUS: Good morning, Your Honor.

With the Court's permission today, during closings Mr. Olson will be playing some of the video clips from the trial proceedings. We propose, if this works for the Court, that at the end of the day we would offer the transcript pages for the record, whenever it's convenient for the Court, rather than doing it for the closings. Then we'll have that for the record.

THE COURT: That would seem to make sense. Does it not, Mr. Cooper?

MR. COOPER: I'm sorry, Your Honor. I'm not sure I followed the proposal.

THE COURT: Maybe you can clarify.

MR. BOUTROUS: I can clarify.

We will be playing video clips from the trial proceedings during the closing arguments. At the end of the day, or whenever it is convenient for the Court, we would offer into the record the transcript pages of the clips that we have played in court, marked as exhibits for the record.

MR. COOPER: I understand. And I see no objection to that, Your Honor.

THE COURT: Fine. That will be fine.

MR. BOUTROUS: Thank you.

THE COURT: Any other housekeeping? Good. Mr. Olson.

CLOSING ARGUMENT

MR. OLSON: Thank you, Your Honor. Theodore B. Olson on behalf of the plaintiffs.

May it please the Court. We conclude this trial, Your Honor, where we began. This case is about marriage and equality.

The fundamental constitutional right to marry has been taken away from the plaintiffs and tens of thousands of similarly-situated Californians. Their state has rewritten its constitution in order to place them into a special disfavored category where their most intimate personal relationships are not valid, not recognized, and second rate. Their state has stigmatized them as unworthy of marriage, different and less respected.

Because marriage is at the heart and soul of this case, I want to immediately turn to the subject of marriage and what we have learned during this trial about what it means to be able to marry and then to have the right extinguished.

I will focus on marriage from four perspectives, as seen by the proponents of Proposition 8, the Supreme Court of the United States, the plaintiffs, and the experts who came forward to share their knowledge and experience on the subject of marriage and those subjects during this trial.

First, the proponents. In the words of their lead counsel, "The central and defining purpose of the institution

of marriage, what it has always been, is to promote procreation and to channel narrowly procreative sexual activities between men and women into stable, enduring unions."

He went on to say, "The core need that marriage aims to meet is the child's need to be emotionally, morally, practically and legally affiliated with the woman and man whose sexual union brought the child into the world."

It is quite clear from these statements and other statements made by the proponents during the trial, Your Honor, that the proponents of marriage and the -- I mean, the proponents of Proposition 8 see marriage as an institution of, by and for the state, and to promote procreation and the raising of children by their biological parents. An institution to promote the state's interest.

And proponents' counsel added, in response to your question, Your Honor, that racial restrictions were never a definitional feature of the institution of marriage.

At times during the trial, the proponents predicted grave consequences if same-sex marriage were to be legalized in California.

For example, you asked, "How does permitting same-sex couples to marry in any way diminish the procreative aspect or function of marriage, or denigrate the institution of marriage for heterosexuals?"

Lead counsel responded: "Your Honor, because it will

change the institution. If the institution is deinstitutionalized," he said, "Mr. Blankenhorn will testify that will likely lead to very real social harms, such as lower marriage rates and high rates of divorce and nonmarital cohabitation, with more children raised outside the marriage and separated from at least one of their parents."

It is revealing, it seems to me, that the deinstitutionalization message is quite different from the thrust of the proponents' Yes on 8 election campaign. That, in the words they put into the hands of all California voters, focused heavily on: Protect our children from somehow learning that gay marriage is okay. Protect our children from learning that gay marriage is okay.

Those are the words that the proponents put in the ballot -- in the voter information guide that was given to every voter.

That was not a very subtle theme that there is something wrong, sinister or unusual about gays, that gays and their relationship are not okay, and decidedly not suitable for children, but that children might think it was okay if they learned about gays getting married like normal people.

For obvious reasons, the "gays are not okay" message was largely abandoned during the trial in favor of the procreation and deinstitutionalization themes.

And after promising proof that people might stop

marrying and cease procreating if Proposition 8 were overturned, the proponents switched course from that platform, as well, and affirmatively argued that they actually had no idea and certainly no evidence that any of their prognostications would come to pass if Proposition 8 were to be enacted.

Their counsel asserted, in his words, "The reality is that you will hear nothing but predictions in this trial about what the long-term effects of adopting same-sex marriage will be on the institution of marriage. It is not possible," he said, "to render reliable and certain judgments on these things."

THE COURT: But it is the plaintiffs, after all, who bear the burden of proof. Do they not, Mr. Olson?

MR. OLSON: Yes. And I want to juxtapose the burden of proof with respect to -- yes, we have a burden of proof up to a certain of point, depending upon the standard of review.

But I thought it was very important to juxtapose --

THE COURT: And that standard of review being rational basis?

MR. OLSON: No. We believe -- we believe, as we've articulated during the course of the trial and memoranda that we submitted just yesterday, that strict scrutiny is required here because this is a discrimination, the taking away of a fundamental right as articulated by the Supreme Court.

It's a putting the plaintiffs and others like them in a suspect classification based upon sex and sexual orientation. Those two things, under the Equal Protection Clause and Due Process Clause justify strict scrutiny.

THE COURT: Now, are you focusing on the facts pertaining to the California initiative, or facts pertinent generally and throughout the country with respect to marriage?

MR. OLSON: Both of those. And when I -- what I was going to do, with Your Honor's indulgence, is juxtapose what the plaintiffs have said their position is about what marriage is all about and what Proposition 8 would do with these other four perspectives, the Supreme Court, the plaintiffs themselves, and the expert witnesses.

But I wanted to complete that one point, that the proponents have shifted from "protect our children" to "procreation" and "deinstitutionalization."

THE COURT: Does that make any difference?

MR. OLSON: I think it does make a difference because I think it suggests the vacuum that exists in connection with the attempt by the proponents to provide a basis for what Californians did in November when it passed Proposition 8.

Proponents' counsel -- excuse me.

THE COURT: The Supreme Court's decision in the Clover Leaf -- the *Minnesota vs. Clover Leaf* case, what the Supreme Court told us there -- that was an Equal Protection

case, of course -- is that any debatable proposition will support the enactment. And while one challenging on Equal Protection grounds can certainly introduce evidence that the classification is irrational, if there is any debatable proposition in support of the classification it passes muster.

MR. OLSON: Well, it has to be a debatable proposition, not that there's debate about a proposition.

THE COURT: Ah. What's that difference?

MR. OLSON: Well, the difference is, as the Supreme Court said in the *Romer* case, there has to be a rational objective that the government is seeking to sustain, and that the measure itself will advance that rational proposition.

Now, the Supreme Court looks at this issue in various different ways depending upon whether we are talking about strict scrutiny, or intermediate scrutiny as it did in the *VMI* case in the gender discrimination context, or in the rational basis case.

But what the Supreme Court did say in the City of Cleburne case, that mere negative attitudes, fear or unsubstantiated factors or assertions won't be sufficiently cognizable. And that's an irrational basis case involving retarded persons and housing.

And proponents' counsel said -- it came down to this -- "Same-sex marriage is simply too novel an experiment to allow for any firm conclusions about its long-term effect on

societal interests. They just don't know."

That is the essence of the case as it comes to the end of the trial and to the closing arguments. They just don't know whether same-sex marriage will harm the institution of heterosexual marriage.

And I submit that the overwhelming evidence in this case proves that we do know. And the fact is that allowing persons to marry someone of the same-sex will not, in the slightest, deter heterosexuals from marrying, from staying married, or from having babies.

In fact, the evidence was from the experts that eliminating invidious restrictions on marriage strengthens the institution of marriage for both heterosexual and homosexual persons and their children.

In the face of all of this evidence going in one direction, proponents' argument of last resort, that the absence of evidence or logic as a justification -- is a justification of their various positions, but is nothing but a fig leaf for the fact that after a three-week trial and an opportunity to present any expert witness they wished, the very best case that the proponents could measure -- arrange for us or put forth for you is to argue that Proposition 8 is constitutional because California voters don't know whether allowing gays and lesbians to marry would discourage heterosexuals from procreative marriage, procreative conduct.

Well, that is what the proponents say about marriage and the threat to their concept of the institution of marriage from allowing marriage by persons of the same-sex.

THE COURT: Well, they have identified a difference between opposite-sex and same-sex couples in that opposite-sex couples can procreate without the intervention of some third party.

That is a difference. And why is that difference not one that the legislature -- in this case the voters -- could rationally take into account in setting the marriage laws in the State of California?

MR. OLSON: As I said, they have to identify something that ties in with the subject matter of the legislation or constitutional provision that they're advancing.

Yes, heterosexual people are able independently to procreate. Homosexual people may have that same capacity, but in their relationships that is not something that occurs.

But we're talking about, because of that, taking away the right of an intimate relationship that the Supreme Court has called the right of privacy, the right of liberty.

And you'd have to explain or make some statement that allowing these other individuals that we represent here today to engage in the institution of marriage will somehow stop that procreation or stop people from getting married or cause them to get divorced.

That's one of the positions they took. And then they said they don't know.

THE COURT: Doesn't California accommodate gays and lesbians by providing domestic partnership rights which are essentially all the rights associated with marriage? Why isn't that sufficient accommodation?

MR. OLSON: Well, as the experts pointed out and as the plaintiffs -- and I'm going to in a moment or two, with your permission, play some excerpts from the testimony of both the plaintiffs and the expert witnesses on that very subject: What marriage means versus something called domestic partnership, which means something completely different.

But what I first wanted to do was recite, briefly, the second perspective on marriage.

Now, we've heard the proponents' perspective on marriage, and you've alluded to that in your questions to me.

I think it's really important to set forth the prism through which this case must be viewed by the judiciary. And that is the perspective on marriage, the same subject that we're talking about, by the United States Supreme Court. The Supreme Court -- the freedom to marry, the freedom to make the choice to marry.

The Supreme Court has said in -- I counted 14 cases going back to 1888, 122 years. And these are the words of all of those Supreme Court decisions about what marriage is. And I

set forth this distinction between what the plaintiffs have called it and what the Supreme Court has called it.

The Supreme Court has said that: Marriage is the most important relation in life. Now that's being withheld from the plaintiffs. It is the foundation of society. It is essential to the orderly pursuit of happiness. It's a right of privacy older than the Bill of Rights and older than our political parties. One of the liberties protected by the Due Process Clause. A right of intimacy to the degree of being sacred. And a liberty right equally available to a person in a homosexual relationship as to heterosexual persons. That's the *Lawrence vs. Texas* case.

Marriage, the Supreme Court has said again and again, is a component of liberty, privacy, association, spirituality and autonomy. It is a right possessed by persons of different races, by persons in prison, and by individuals who are delinquent in paying child support.

It is the right of individuals, not an indulgence dispensed by the State of California, or any state, to favored classes of citizens which could easily be withdrawn if the state were to change its mind about procreation. In other words, it is a right belonging to Californians, to persons. It is not a right belonging to the State of California.

And the right to marry, to choose to marry, has never been conditioned on or tied to procreation. It hardly could be

rooted in the state's interest in procreation, since the right to marry, in Supreme Court cases, has been invoked sustaining the right to contraceptives, to divorce, and just a few years ago in that *Lawrence* case, to homosexuals.

THE COURT: Well, if the right belongs to Californians individually, why cannot Californians collectively establish the parameters of that right?

MR. OLSON: Well, they can unless they are taking away a fundamental right to marry under the Constitution, with a compelling governmental interest and a proposition that --

THE COURT: Would this case be different if the California Supreme Court, in marriage cases, had invalidated the 18,000 or so marriages that were performed from, I believe it was, June or May --

MR. OLSON: It was June.

THE COURT: -- 2008, until November?

MR. OLSON: Yes.

THE COURT: Would this case be different?

MR. OLSON: It would be different.

THE COURT: In what way?

MR. OLSON: It would be much worse.

THE COURT: In what way?

MR. OLSON: It's worse in this way. Right now, California has 18,000 same-sex marriages, if we can call it that for a moment.

Heterosexual persons who can marry the person in their choice. If they are a child molester, if they are a wife beater, if they are in prison for 15 murders, they can marry the person of their choice if they are heterosexual.

Individuals, such as the plaintiffs in this case and those who are similarly situated, may not marry the person of their choice. We have a Three Strikes law in California. You can go to prison for life. But if you are homosexual, you can't get married. There's that category. The people that can get married. The people that can't get married.

There's 18,000 people that were married during that period that you described, and who are legally married. But if they get divorced or if they are widowed, they can't remarry. And they can't even remarry the same person, in the case of a divorce, because the Constitution wouldn't recognize it.

THE COURT: No, but wouldn't the marriage regime in California be more rational if, in fact, the California Supreme Court had invalidated those 18,000 marriages?

MR. OLSON: It would be less irrational, that's -- I don't think it would be rational at all, because the distinction that's being made -- and, by the way, there's a fourth category: People that got married in other states, when during a certain period of time or after a certain date and who come to California, now they are living in California in a same-sex relationship and their marriage is recognized.

So there's four different categories. If you reduced it to three, yes, it would be less capricious and less arbitrary. But it wouldn't make it constitutional.

THE COURT: And why not?

MR. OLSON: It would not make it constitutional because there is not a compelling governmental interest to put the plaintiffs in a class like this and take away what the Supreme Court has called a fundamental right, a right of liberty, privacy, association, intimacy and autonomy. You are taking away, the state is, that fundamental right.

And even if we did -- and if it was intermediate scrutiny, you can't rely -- in the *VMI* case, for example, *United States vs. Virginia*, the Supreme Court said, you can't make this up after the fact. The post-talk rationalizations won't work.

One of the reasons I explained to you the shift in position is to show you that the rationalizations that were being offered at the end of the trial were different than the motives that were in the ballot proposition and the advertising.

These have become post hoc rationalizations because the proponents don't want to come in here and say we passed -- or the people passed Proposition 8 because they don't -- they think gays are unusual. They don't want our children to know about them.

That sounds awful lot like animus. So the rationalization now is procreation and something called the deinstitutionalization of marriage. Whatever in the world that is.

I think it's really important, given what the Supreme Court has said about marriage and what the proponents said about marriage, to hear what the plaintiffs have said about marriage and what it means to them, in their own words.

They have said that marriage means -- and this means not a domestic partnership. This means marriage, the social institution of marriage that is so valuable that the Supreme Court says it's the most important relation in life.

The plaintiffs have said that marriage means to them freedom, pride. These are their words. Dignity. Belonging. Respect. Equality. Permanence. Acceptance. Security. Honor. Dedication. And a public commitment to the world.

One of the plaintiffs said, "It's the most important decision you make as an adult." Who could disagree with that?

I would like, with Your Honor's permission now, to play a couple of excerpts from the testimony by the four plaintiffs, starting with Plaintiffs Katami and Zarrillo, explaining why they want to marry, because they can say it better than I can.

This is, first of all, Plaintiff Katami, followed by Plaintiff Zarrillo.

What do we have to do? Okay. Thank you.

(Video played in open court.)

MR. OLSON: And now Plaintiff Kristin Perry.

(Video played in open court.)

MR. OLSON: And Plaintiff Sandra Stier.

(Video played in open court.)

MR. OLSON: If we had the time, Your Honor, I could not present a more compelling closing argument than simply replaying the testimony in its entirety than the four plaintiffs and Helen Zia.

They have described from their hearts what marriage means to them, what it does to them and says about them to be denied that right. If we did nothing else in this trial, that would be enough.

And the two plaintiffs, Perry and Stier, are in a domestic partnership relationship, you will recall during the trial. It isn't the same thing.

But we have so much more. There were eight experts, persons who have studied and written about American history, marriage, psychology, sociology, economics and political science throughout their entire professional lives.

I have the time to discuss just a segment of what they had to say, but their evidence was remarkably powerful, persuasive, and very consistent.

Professor Cott, for example, explained that contrary

to proponents' assertion, marriage is not primarily a vehicle by which the state promotes procreation.

She's an expert in marriage. She testified that its core social meaning, marriage, is a couple's choice to live with one another, to remain committed to one another, and to form a household based on feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life.

She said it is an aspect of liberty, basic civil right. The ability to marry is the expression of one's freedom. Those are the same things coming from the expert on marriage that the Supreme Court has been saying for 122 years.

And contrary to proponents' assertions, racial restrictions have, indeed, been a definitional feature of marriage. For example, as we learned from her, slaves were not permitted to marry until the Emancipation Proclamation.

And she testified -- and I would like to play that excerpt, if we can do the same mechanical things, to have her testify what it meant to the slaves.

(Video played in open court.)

MR. OLSON: What a powerful statement that slave made. "The marriage covenant is the foundation of all of our rights. It exemplified freedom." He could say "I do" to his partner.

Then Professor Cott explained the meaning and

definition of marriage. Now, she is just about the leading expert. Certainly, the finest expert we could find to talk about the history of marriage and its definition in American society and American culture, and what it means to individuals in this society to be able to be married and to have the choice of the person to whom one would marry.

Another video clip.

(Video played in open court.)

MR. OLSON: So we learned, also during the trial, that racial restrictions on the right to marry were finally eliminated for good in *Loving vs. Virginia* in 1967, ending laws like Proposition 8 which prohibited certain marriage choices for citizens that had once existed in 41 states.

Proposition 8 is very, very much like those restrictions, Dr. Cott explained, because it prevents a complete choice as to marriage and designates gays and lesbians as less worthy and entitled to less honor, less status and fewer benefits.

Marriage is special, the experts tell us. Domestic partnerships and civil unions are pale comparisons. As Dr. Cott put it, there is nothing that is like marriage except marriage. And the state's approval lends prestige and acceptance to the institution.

As Dr. Peplau testified, married couples are healthier, live longer, are emotionally more stable, and better

off on every measure of health.

Domestic partnership is a harmful, structural stigma. That's what Dr. Ilan Meyer said. Moreover, removing the stigma imposed by Proposition 8 would produce powerful collateral benefits.

Here is Dr. Meyer, one of the world's leading experts on stigma and discrimination.

(Video played in open court.)

MR. OLSON: I was struck, Your Honor, by that same word appearing again and again. That word "okay."

Sandra Stier just wanted her children to feel okay about who they were and who they were living with, their parents. They just wanted to feel okay. It was okay to be gay.

The proponents in their voter information guide, they told every voting citizen that we must protect our children from teaching that gay marriage is okay.

And Dr. Meyer testified that the stigma propagated by Proposition 8 is that it's not okay to be gay; that it's abnormal, unusual, certainly not okay, and is a basis for rejection of the individual.

The experts testified not only that same-sex marriage would not harm the institution of marriage or diminish heterosexual interest in marriage, they explained, as well, that the elimination of discriminatory barriers to marriage and

harmful stigmas would, as it has in the past, strengthen the institution of marriage and strengthen our country.

We are not talking, just talking, about the couples who wish to get married. We are talking about their children.

In 2005, there were 37,000 of California's children living in households headed by same-sex couples. The evidence was uncontradicted during this trial and overwhelming that the lives of these children would be better if they were living in a marital household.

Even Mr. Blankenhorn, the proponents' witness, proponents' principal witness, agreed with that proposition. And here we have another excerpt from the testimony. Mr. Blankenhorn.

(Video played in open court.)

MR. OLSON: That is the plaintiffs' [sic] principal expert witness, that approving same-sex marriage would be likely to improve the well-being of gay and lesbian households and their children.

I was stricken by Mr. Blankenhorn's testimony about the other societal benefits that would arise from permitting gays and lesbians to marry.

Mr. Blankenhorn admitted on the witness stand that same-sex marriage would yield numerous social benefits. I don't have time to do all of this, but I want to play two excerpts. Here's one.

(Video played in open court.)

MR. OLSON: He testified that it would decrease the number of those in society who would be viewed wearily as "other." In other words, not okay. And the elimination of that stigma and that discrimination, according to Mr. Blankenhorn, would be a victory for the American idea.

He went on to say something somewhat along the same line. But it's important to recall it.

(Video played in open court.)

MR. OLSON: So the plaintiffs, he's -- the proponents' principal witness believes that gay and lesbian individuals would be better off, their children would be better off, we would be closer to the American ideal or the American idea in applying, he said, the principle of equal human dignity upon which this country was founded. "We will be more American the day we permit same-sex marriages." That is the proponents' principal witness.

And that, Your Honor, is the four perspectives that we saw in this case about marriage.

On the one hand, we have the proponents' argument that it's all about procreation and institutionalizing -- deinstitutionalizing marriage, but was not supported by credible evidence. I couldn't find it. That's the one hand.

On the other stands the combined weight of 14 Supreme Court opinions about marriage and the liberty and the privacy

of marriage. The testimony of the plaintiffs, about their life and how they are affected by Proposition 8, and the combined expertise of the leading experts in the world, as far as we were able to find. It is no contest.

So, Your Honor, it's important to emphasize, the plaintiffs have no interest in changing marriage or deinstitutionalizing marriage.

They desire to marry because they cherish the institution. They merely wish for themselves the status the State of California accords to their neighbors, to their friends, their coworkers, and their relatives.

The plaintiffs are in the same position as Mildred Jeter and Richard Loving, who in 1967 had no interest in diluting the institution of marriage. They only wanted to marry the person they loved, the person of their choice, who happened to be a person of a different race.

That's all the plaintiffs desire, the right to marry the person they love, the person of their choice, who happens to be of the same sex.

THE COURT: Mr. Olson, at the beginning of the case Mr. Cooper said, Judge, this case involves legislative facts. We just heard much of the testimony. Would you agree with that characterization?

MR. OLSON: I felt at the beginning, Your Honor -- and we made this point at the motion for a preliminary

injunction -- that Proposition 8, on its face, discriminates against a class of individuals.

It does the same thing -- and I was going to mention this in a moment, and I probably will emphasize it in a moment. It does the same thing that the *Romer* decision, by taking away a class of rights from an individual, a group of individuals, a classification of individuals, to take away their rights based upon their sexual orientation. That's exactly what this case does, Proposition 8 does.

And harking back to *Lawrence vs. Texas*, the Supreme Court of the United States said that the conduct which characterizes sexual orientation in this case is a protected constitutional right.

So Proposition 8 takes away the fundamental right to marry from a class of persons based upon their practice of something that's been decided to be a fundamental constitutional right of liberty, privacy, association.

And I believed then --

THE COURT: Is there a yes or no in all of this?

(Laughter)

MR. OLSON: Yes. Well, yes and no.

(Laughter)

Yes, I believe this case could be decided on whatever Mr. Cooper means by legislative facts, but facts that are apparent from the proposition itself, from what we know and

don't need a trial to prove, that these people are being selected out on the basis of their sexual orientation, and what the Supreme Court says, has said consistently, again and again, about the fundamental rights involved here.

I think you could have made that decision. You decided that we should have a trial to examine the facts. Marriage. The classification of individuals. What marriage means. What it's like to be taken away. What is the effect of discrimination. What is the history of discrimination.

And I now think that that was an exceedingly wise decision because, whatever you decide, we now have not just the Supreme Court decisions and not just what we know about discrimination on the basis of sexual orientation, but now we have heard what it really matters like in real life. We know what it's like from the experts. And we've had an opportunity to explore these things. This has been a great education. I think not just to the people in this room, but the people who read this record.

THE COURT: Well --

MR. OLSON: And I might add, this is the kind of record that was created as an antecedent to the Supreme Court's decision in *Brown vs. Board of Education*. It's the kind of record that was created in the *VMI* case and other cases of discrimination.

And so the legislative facts, what -- I really don't,

honest to heavens, know exactly what legislative facts are, or I wouldn't try to distinguish them. But the facts that we do know, as a result of the Constitution, what we know about people, what we know the classification, those support a finding that this is unconstitutional.

THE COURT: Well, I assume that the term "legislative facts" refers to facts that it is appropriate for the judiciary to decide or not to decide. And that is the distinction which Mr. Cooper is attempting to draw.

So when is it appropriate for the judiciary to weigh in on legal and constitutional questions that may touch on sensitive social issues?

What are the criteria that a court should look at in deciding whether or not it should render a decision that a certain right or lack of right implicates constitutional considerations?

When does it become ripe for the Court to weigh in on these issues?

MR. OLSON: Well, I think that it undoubtedly depends upon what the state is trying to do, how that state's action is going to affect citizens. And, if we turn to the Fourteenth Amendment, not just citizens but persons. And I think the cases are going to be different depending on those things and certain other related facts.

But if I read the cases going back to 1888, on the

due process part of the marriage right, and if I read the cases going back to *Yick Wo* decision in 1886, where the Supreme Court struck down the right of a Chinese person in this city to operate a laundry, I look back at those decisions and I think what the Court is doing is making an appropriate judgment as to whether or not it needs more information about what is -- what the state is trying to accomplish, whether its objective is being served in a narrow basis so that it's not over-inclusive or under-inclusive.

Those kind of facts that we learned during the course of this trial, I think aid the decision that you're being expected to make, and will aid the record that that decision will have before it, with it, when it's reviewed in the Court of Appeals. And aid in the understanding by the American people what the rights are that we're talking about.

I think, at the end of the day -- as I said, I thought we didn't need the trial. But, at the end of the day, I think it's an enormously enriching and important undertaking.

THE COURT: Well, now, the Supreme Court in the *Baker vs. Nelson* case, decided that the issue which we are confronted with here was not ripe for the Supreme Court to weigh in on. That was 1972. What's happened in the 38 years since 1972?

MR. OLSON: Well, a great deal has happened.

Among the things that have happened is the *Romer* case. Among the things that have happened is the *Lawrence vs.*

Texas case. You know what those cases involve.

A lot of other things have happened. Changes in the ballot propositions. California has adopted something completely different than the state -- I guess it was Minnesota or Michigan, involved in that case. So there are a lot of factual situations that are different. This case is very different.

And, by the way, the Supreme Court rejected the opportunity to take a miscegenation case. Now, I think it was -- Dr. Cott testified to this. I think it was 1955. And then they took the case, the *Loving* case, in 1967.

The same issue was before the Court, I think, also, in the *Zablocki* case, where there was a summary affirmance of an earlier case. I take that back. It was *Turner* vs. *Safley*, the case involving a fundamental right to marriage for prisoners. *Turner vs. Safley*.

The Supreme Court, in that --

THE COURT: What year was that?

MR. OLSON: Pardon?

THE COURT: What year was that?

MR. OLSON: Uhm --

THE COURT: Well, one of your colleagues will get that.

MR. OLSON: I have that very close by. But I will --

THE COURT: In any event...

MR. OLSON: At any rate, I thought that was interesting. We talked about it somewhat at the -- it was 1987. But it talked about the fact that the Court was urged to not -- said the Court had already decided that case because it was an earlier summary affirmance in that case. And the Court went on to take the case. It pointed out, like that *Mandel* case that's cited with respect to summary affirmance cases, the facts were different, the time was different, a lot of things happened since then. And the court, the lower courts and Supreme Court were not bound by that prior summary affirmance.

We have learned so much in the years since that case or that summary affirmance. But we have also learned a lot from the Supreme Court.

Remember, the Supreme Court in *Lawrence vs. Texas* reversed *Bowers vs. Hardwick*, which was only 20 years earlier. That's a big difference.

And what the Supreme Court -- the opinion for the Supreme Court in *Lawrence vs. Texas* quotes and makes a part of its holding justice Stevens's dissent in *Bowers vs. Hardwick*. There couldn't be a more complete shift in point of view in that period of time.

THE COURT: Well, it's apparently changed a point of view by Justice O'Connor.

MR. OLSON: No, *Lawrence vs. Texas* was a 6-to-3 decision. She wrote a concurring opinion on Equal Protection

grounds. But the majority of the opinion was signed by five -- Justice Kennedy and four other justices decided that case on the basis of due process.

And the *Romer* case, which involved sexual orientation in Colorado, not very many years ago, the late '90s, I think, decided to reject a class discrimination on the basis of sexual orientation. Those Supreme Court decisions inform our decision.

THE COURT: How important in that case was the fact that the initiative measure in *Romer* took away from the voters of the municipalities of Colorado the opportunity to pass anti-discrimination ordinances as opposed to simply a blanket prohibition against the enactment of those initiatives in the first place?

MR. OLSON: Well, the Court said it was significant that there was a taking away of rights. I don't know what I would have decided if that had been the blanket prohibition of the granting of those rights.

We have had cases like *Romer*, though, going back to *Reitman v. Mulkey*, in 1964, where the citizens of Colorado decided to rewrite its constitution -- California, to rewrite its constitution was Proposition 14.

THE COURT: Is that housing?

MR. OLSON: Fair housing. That was the fair housing issue. And the voters of California said, We're going to amend

our constitution and we're going to repeal all the fair housing statutes and affirmatively give a right to any citizen to sell his or her house to whoever they wanted, irrespective of race.

That went to the United States Supreme Court. The Supreme Court said, We can discern, speaking of legislative facts, we can discern that the motives involved in that were taking away rights of individuals that existed in that case on the basis of race.

Then comes the *Romer* decision. There's an intervening case involving busing from the State of Washington, that goes to the Supreme Court, where the voters again did something to their constitution to change issues with respect to civil rights.

Similarity here is that in *Romer*, individuals were protected by state laws from discrimination on the basis of sexual orientation.

In California, individuals lost the right to marry on the basis of sexual orientation. And the Supreme Court said you've taken away the rights of these individuals for redress. The only way they can seek redress is to go to their fellow citizens and amend the Colorado constitution.

And the plaintiffs here, the only thing they can do to restore their rights is go to the citizens and seek to amend the constitution.

So in each case rights are being taken away because

of sexual orientation and the barrier is placed in the Constitution.

THE COURT: Let me see if I can get an answer this time.

(Laughter)

Would this case be different if California had never permitted same-sex marriage?

MR. OLSON: It would be different, but would still be unconstitutional, because it is a stronger case because there were four categories of citizens. It's a stronger case because the California Supreme Court said in the California Constitution there is a right of an individual to marry someone of the same sex. And the citizens of --

THE COURT: So, the facts here are stronger simply because there was a period of time, albeit six months, in which the State of California permitted same-sex marriage.

MR. OLSON: I submit that is correct, Your Honor. And the political scientists that were here talked about the initiative referendum process by which minority rights are particularly vulnerable, because they don't have any room to negotiate. Their rights are being put up for --

THE COURT: What kind of a constitutional system is it that because of a California Supreme Court decision, which had a shelf life of six months, that that creates a greater entitlement than if that right had never existed in the first

place?

MR. OLSON: Well, the California Supreme Court, I think, would say that, We didn't invent that right. We determined, when it was brought before us, that the California Constitution, which we are not changing, we are interpreting, contains that right.

Now -- and that has happened again and again where courts recognize the discrimination that it's imposing upon citizens.

We could say the same about the separate school in Texas, the law school, *Sweatt vs. Texas -- Painter vs. Sweatt*. Can't remember exactly the name of the case, where Texas set up a separate school system, a separate law school for African-Americans.

We could say the same thing about Virginia, in setting up a male only Virginia military institute.

We could say the same thing about *Plessy vs. Ferguson*. Where in the world, in 1954, did the Supreme Court come up with this right that didn't exist right before then?

So I think that it is a more forceful fact because of the *Romer* case and because of the taking away of rights. But I hasten to say that if this was -- we were writing on a clean slate, which we might be if we're litigating the same issue in the next door state, I would be making the same arguments.

You are -- the citizens of XYZ state are selecting

out people on the basis of sexual orientation, a practice which the Supreme Court says is a constitutionally protected right, and you're putting them in a separate category with respect to another fundamental right, the right to marry.

THE COURT: The statute in *Lawrence* was a criminal statute.

MR. OLSON: Yes.

THE COURT: The denial of the right to marriage of same-sex couples doesn't have any criminal sanction. There isn't any sanction that attaches to it. It's simply a denial of access to the estate of marriage. That's not a criminal penalty.

MR. OLSON: I submit it doesn't make any difference. If we're talking about -- once *Lawrence vs. Texas* recognized the constitutional right to -- what the Court repeatedly talked about in *Lawrence vs. Texas* is the right of individuals, the constitutional right of individuals -- this is on page 574 of the *Lawrence* opinion.

"Our laws and our tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationship, child rearing, and education." That's not a complete list.

And then the Court goes on to say, "Persons in a homosexual relationship may seek autonomy for these purposes just as heterosexual persons do."

The Court was talking about the private, intimate behavior. If the Court had said, "Instead, you can go to jail for five days because we caught you doing those things, we will take away your right to drive on highways, we will take away your right to marry because you do those things or you engage in that conduct," that seems to me that that is just as unconstitutional, especially if the thing which is taken away is also a fundamental constitutional right.

In other words, because you engage in something that's protected by our Constitution, we're going to take away -- because we don't like it, we're going to take away a right to do another thing that's protected by our Constitution.

That can't be constitutional. And so I don't think that there is any distinction. I submit that there can't be any distinction. And the language of the decision talks about the individual right to engage in that activity. That can't be a precondition for engaging in the right to marry.

THE COURT: Should the review here be different with respect to your Due Process claim and your Equal Protection claim?

MR. OLSON: No. We submit that strict scrutiny is required in either case, for different reasons.

Due process, as I've explained and the Supreme Court over and over again has affirmed, provides a fundamental constitutional right rooted in privacy, liberty, association

and so forth, to engage in the institution of marriage. Not a false institution of marriage. Not a something that is not citizenship but it's called something else.

It is the fundamental right of marriage which has all of the significance we learned here. Taking that away, that requires strict scrutiny. Because our fundamental rights can't be taken away unless the state has a very, very fundamental, strong, compelling reason to do so, and it acts with surgical precision so that it takes no more than the compelling reason justifies.

In the Equal Protection context, we are talking about a group of individuals who meet every one of the standards for suspect classification.

They are a minority. They have been -- there wasn't any dispute about that. It's an immutable characteristic. The witnesses said that. The plaintiffs said that. The expert witnesses said that. The Ninth Circuit has said that in the *Hernandez* case.

They have been victims of discrimination. They are classified according to that basis. There's been an issue -- I will concede that there has been some argument about whether or not they have sufficient -- they have political power.

But there has been a change, of course, because the -- I will mention the *Frontiero* case, which is a sex discrimination case where there have been improvements. The

legislature had enacted pieces of legislation protecting women from sexual discrimination. And the Supreme Court said that sort of proves what we're saying, that these individuals, because of their sex, have been discriminated against, and the legislature has recognized that by having to pass these laws to protect them from bad treatment, from harassment or whatever.

There has been an increase in sensitivity in this state and other places. But Professor Segura from Stanford, said, "I weigh all of these." And by the way, the political power issue is not a fundamental predicate for suspect classification anyway. But I'm saying that he testified that, indeed, these individuals are lacking in political power to get their positions advanced and accepted by the population.

And, if we had to go no further than the *Romer* case, the *Romer* case starts with the language, "We do not make in this country classifications among our citizens." And that is a classification that the Supreme Court dealt with based upon sexual orientation. And that is impermissible.

But if you didn't have strict scrutiny, you would have discrimination on the basis of sex and sexual orientation.

The individuals that are before you today do not have a choice for the person they wish to marry because the person is the wrong sex. They can choose anybody they want, except the state's decided that it has to be a person of a certain sex. So their choice is foreclosed on the basis of sex, the

sex of the person they wish to marry, and sexual orientation. And the cases support a high level of scrutiny in that case.

Your Honor pointed out at the conclusion of the summary judgment hearing, this issue is not about same-sex marriage. Just as in 1967, it wasn't about interracial marriage. It was the right, in 1967, in the *Loving* case, the right to marry without limitation based on race.

Here, the issue is the right to marry without limitation based upon sex. That's another reason why this requires heightened scrutiny.

The evidence was overwhelming that this is a stigma. It's a government-imposed stigma. It's a government-imposed stigma placed in the constitution of the State of California.

What could be a stronger signal to other citizens and to other people that they are not okay, these people are not normal?

THE COURT: If Proposition 8 is unconstitutional, where does that leave the domestic partnership laws?

MR. OLSON: The way they were on the day before Proposition 8 was enacted.

If people want to have a business partnership, they can enter into something called a domestic partnership. Maybe lots of people don't want to get married, despite everything we've been saying about how wonderful it is.

(Laughter)

That is a choice, the Supreme Court has said. And Dr. Cott specifically said not everybody wants to get married. But it is important. And she said it's -- we don't even understand it if we can do it. It is the people that don't have the right that understand how harmful it is and how much it hurts.

But if you wish to have a -- the State of California can have all kinds of relationships between persons. As you heard on the stand from the plaintiffs and the witnesses, the expert witnesses, that's a business deal.

No one aspires as a child -- I think it was Dr. Meyer who said this. No one aspires as a child to grow up and enter into a domestic partnership. But they do aspire as children to grow up and be married.

The other witnesses, the witnesses also told us you don't have a celebration when you have a domestic partnership. You do have a celebration when you get married. It means -- there's so much that was said during the course of the trial, about the meaning and significance of marriage.

And the Supreme Court in *Zablocki* said that the right to marry is of fundamental importance to all individuals.

It comes down to, just with respect to the due process part, the -- whether you are applying strict scrutiny, which is a very exhaustive examination of the objectives of the state, or heightened scrutiny, which is a very serious

examination, and to meet the needs and to fit the -- the state's interest versus what it's done to advance those interests, or whether it's called rational basis, on all of those bases the -- whatever the objective that the proponents want -- wanted to accomplish for the State of California -- and we don't know because it keeps changing -- it isn't being accomplished.

The latest words from the proponents, Counsel for the proponents is, "We don't know. We don't know whether there is going to be any harm."

And I would submit that, "We've always done it that way," that "It's a traditional definition of marriage," which is something that "We've always done it that way," is the same -- is the corollary to the "Because I say so."

It's not a reason. You can't have continued discrimination in public schools because you have always done it that way. You can't have continued discrimination between races on the basis of marriage because you have always done it that way. That line of reasoning would have prevented the *Loving* marriage. It would have justified racially segregated schools and maintaining subordinate status for married women. We heard a great deal about that relationship from Dr. Cott.

So the constitutional right to marry is fundamental. The constitutional right to be able to be in a relationship with a person of the same sex is a fundamental constitutional

right. And in a sense, the State of California is burdening both of those -- burdening in a very severe way that hurts individuals and it doesn't do any good to prevent those persons from getting married, because the evidence was also overwhelming in this regard.

Heterosexual people are not going to stop getting married. They are not going to abandon their marriage and they are not going to stop having children because their next door neighbor has a marriage that's a person of the same sex. That is not going to happen. The evidence said that wasn't going to happen.

Although there was some talk about how the -- it may have happened in the Netherlands. That evidence folded and disappeared before our eyes when he was cross examined. Dr. Cott -- I think it was Dr. Cott, or maybe it was Dr. Peplau, said the four years before in Massachusetts and the four years after, the statistics were the same. Marriage, the same. Divorce is the same and that sort of thing. And the statistics from the Netherlands didn't establish that proposition either.

In fact, the evidence was that the so-called deinstitutionalization of marriage has been coming about to the extent there's a weakening of the bonds of marriage in our society, because of no-fault divorce and because of -- one of our expert witnesses said from 1970 to 1985 all over the world

marriage rates fell off, divorce rates went up and things like that. Those were heterosexual people. That wasn't because of a same-sex marriage or a threat of a same-sex marriage or the danger of a same-sex marriage or someone being taught about a same-sex marriage. That was a false premise.

So with respect to the Equal Protection clause, I go back to the *Yick Wo* case where the Supreme Court said the right to the equal protection of the laws is the protection of equal laws and in that case, this is 1886, because of a Chinese person not being able to run a laundry in this city, the Court stated that:

> "The very idea that a person would be denied a material right essential to the enjoyment of life" -- that's marriage -- "seems to be intolerable in any country where freedom prevails as being the very essence of slavery."

Well, we know that taking away the right to marry was, indeed, the very essence of slavery. Yet, that very freedom once denied to slaves and denied to interracial couples throughout this country is now being denied to the plaintiffs; not because they are Chinese in this case, not because of their race, but because of their sexual orientation.

How can it be wrong in those areas and right in this area under the Equal Protection Clause? That does not square

with any of the language that the Supreme Court has used in deciding Equal Protection cases.

And that has been used, that same language has been used to strike down classes among citizens. That's the language of *Romer*. That principle has been extended from race, to nationality, to ancestry, to sex, to legitimacy, to the favoring of the husband in matters of marital property, and in 1996 in the *Romer* case to sexual orientation.

So proposition -- to wrap this up, because I want to be sensitive to the time constraints. Proposition 8 discriminates on the basis of sex in the same way that the Virginia law struck down in *Loving* discriminated on the basis of race. They could marry whoever they want, unless that person was the wrong race.

The plaintiffs in this state can marry someone, whoever they want, except because of their sex or their sexual orientation.

Sexual orientation, as I said, is the same -- the sexual orientation discrimination is the same thing here as it was in Colorado.

And the classification, we did it because we don't know, that's the reason. We don't know what's going to be the outcome. We did it because we don't know is the same as saying we don't know why we did it.

THE COURT: Well, can't voters, you know, rely on

their common everyday experience and the impressions that they have, as the New York Court held, make a decision even if it doesn't withstand scientific scrutiny?

MR. OLSON: Well, it depends upon the decision and it depends upon the scrutiny because every ordinary citizen, of course, has great responsibility in this country. But as Mr. Blankenhorn said, we would be closer to the American ideal if we eliminated this kind of discrimination.

What is that voter common sense or ordinary citizen -- I hate the term "ordinary citizen" because I think that every citizen is special. But, yes, citizens can use their common sense. But what was their common sense in this case to take way the right of these individuals to marry? We don't know -- I don't think I know as a result of this case that's gone on for a year and the evidence in this case.

I don't believe that it's because statements protect procreation among heterosexual persons or the institution of marriage that much of that procreation takes place in -- a lot of it doesn't -- but that's not what it is, because there is no evidence that one couple or one pair of individuals in this state or in this country will decide, I'm not getting married because those people are getting married. There is no evidence of that.

And there is no evidence that there will be a diminished procreative instinct, God forbid, because people are

allowed in the privacy of their homes to enter into an intimate relationship because they want a family like someone else.

So if you have an analysis of the common sense of people, and even without all these experts, what were they thinking? I think the clearest evidence of that is, protect our children from learning or being taught that gay marriage is okay, and that means that gay people's marriage is not okay and that means that gay people are not okay.

Now, if there is a reason for why Proposition 8 serves a legitimate -- that's what it says. The Court says we have got to inquire as to what the reason is. We have got to inquire. And we have got to inquire whether the enactment advances that reason.

So what is the legitimate reason and how does Proposition 8 advance it? I submit that we don't know what that reason is. Whatever that reason is, it can't be a post hoc rationalization --

THE COURT: Do I have to find that it is a discriminatory motive?

MR. OLSON: Pardon me?

THE COURT: Do I have to find that it is a discriminatory motive on the part of the voters; that this is an effort to establish some private morality through the initiative process?

MR. OLSON: Well, the *Lawrence* case talks about the

private morality and that -- as an improper basis.

Is it discriminatory? It has to be found that it's discriminatory. It says --

THE COURT: Unlawfully discriminatory.

MR. OLSON: Pardon me?

THE COURT: Unlawfully discriminatory. Many discriminations are perfectly lawful and perfectly constitutional.

MR. OLSON: That's right. And I'm saying that and I'm saying that it is, irrespective of the motive of a particular person in the voting booth. Nice people voted for Proposition 8 and people that didn't have nice motives voted in favor of Proposition 8. We heard all kinds of evidence during the course of the trial of some awful stuff that was being told to people about gay people.

But I submit and I'm willing to acknowledge that. I mean, there's plenty of good Californians that voted for Proposition 8 because they are uncomfortable with gay people. They are uncomfortable with gay people entering into marriage, and they are uncomfortable with the very idea that gay people are just like us.

They didn't hear, and too bad they couldn't have seen the evidence in this trial of what the psychologists said and the sociologists said and the psychiatrists said about this is a characteristic between individuals that is normal, and it's

acceptable, and it's not someone who is engaged in bad conduct.

Now, you can have a religious view that this is not acceptable. You can have a religious view -- it was true in the *Loving* case. The argument was made that it's God's will that people of different races not be married. It's in the briefs and it was in the testimony in this trial; that people honestly felt that it was wrong to mix the races; that it would dilute the value of the race and do all of these terrible things.

People honestly felt that way, but they were -- they were permitted under the Constitution to think that, but they are not permitted under the Constitution to put that law -- that view into the law and to put that view into the Constitution of their state in order to discriminate against individuals.

I think, your Honor, that this law is discriminatory. The evidence is overwhelming that it imposes great social harm on individuals who are our equals. They are members of our society. They pay their taxes. They want to form a household. They want to raise their children in happiness and in the same way that their neighbors do.

We are imposing great damage on them by the institution of the State of California saying they are different and they cannot have the happiness, they cannot have the privacy, they cannot have the liberty, they cannot have the

intimate association in the context of a marriage that the rest of our citizens do. We have demonstrated during this trial that that causes grave and permanent, irreparable and totally unnecessary harm, because we are withholding from them a part of the institution of marriage that we hold -- one of the language of one of those Supreme Court decisions is on the point -- intimacy to the point of being sacred; that right of marriage in the context of the intimate relationship. We are withheld holding that from them, hurting them and we are doing no good. If we had a reason, a really good reason for inflicting all of that harm, that might be another matter, but there is no reason that I heard.

Preserving the institution of marriage. We've improved the institution of marriage when we allowed interracial couples to get married. We have improved the institution of marriage when we allowed women to be equal partners in the marital relationship. We have improved the institution of marriage when we didn't put artificial barriers based upon race. And we will improve the institution of marriage and we will be more American, according to Mr. Blankenhorn, when we eliminate this terrible stigma.

There is 14 Supreme Court decisions that talk about the right to marriage. There is the *Romer* case, and you know what that holds, and the *Lawrence versus Texas* case and the testimony of all of these expert witnesses and the testimony of

the plaintiffs. That erects an insurmountable barrier to the proponents of this proposition.

It will not hurt Californians. It will benefit Californians. But as long as it doesn't hurt Californians to get rid of harmful stigma in their Constitution that's labeling people into classes, then it's unconstitutional.

Thank you, your Honor.

THE COURT: Very well. Thank you, Mr. Olson.

City and County of San Francisco, Ms. Stewart.

CLOSING ARGUMENT

MS. STEWART: Good morning, your Honor. Appreciate the opportunity to address the Court today. Although Mr. Olson, like Mr. Boies, is a hard act to follow, but I will give it my best and very brief shot.

I want to focus my comments on two questions that the Court posed to the plaintiffs about the evidence that we presented that state and local governments benefit economically if same-sex couples are permitted to marry, or stated otherwise, that denying same-sex couples the right to marry deprives the government of revenue and costs the government money.

And question eight asks about the relevance of that data, that evidence. And I want to just start by acknowledging that the fact that legislation costs the government money is neither necessary nor sufficient to prove a constitutional

violation, but here the evidence of the cost to the government is relevant to whether Proposition 8 is rational or satisfies any other level of scrutiny.

Here the costs to the government are symptomatic of serious harms, many of which my colleague, Mr. Olson, referred to, that Proposition 8 visits on a segment of society. And the harms that gay men and lesbians suffer as a result of Proposition 8 are also visited on society as a whole because government, and taxpayers in part, pay for the costs of that discrimination.

Now, I want to point to a Supreme Court case in which the Court did consider the harms, both to individuals and to society, that were caused by legislation in evaluating the constitutionality of the law challenged, and that's the case of *Plyler versus Doe* in which the Court struck down a Texas statute that prevented undocumented children from attending public schools.

And the Court in that case stated, I'm going to quote:

"In determining the rationality of the statute, we may appropriately take into account its costs to the nation and to the innocent children who are its victims."

And the Court in striking the law down in that case considered the following evidence. It considered, with respect

to the children, the stigma of illiteracy that would mark them for the rest of their lives. It considered the toll that the legislation would take on their social, intellectual, economic and psychological well-being; but it also considered, on the side of society, social science data showing how important the public schools are in inculcating fundamental values that are necessary to maintaining our democratic system.

It also considered the fact that education provides basic tools by which individuals can be economically productive in their lives to the benefit of society as a whole.

So like -- as in *Plyler* the serious harms this Proposition 8 imposes on lesbians and gay men and their children, and on government and society at large, undercut the contention that Proposition 8 is rational.

They also, I think, support the inference that Proposition 8 was born of animus because, as *Romer* teaches us, laws that can't be understood or explained by any kind of rational thinking give rise to an inference that they are based on prejudice.

Now, I would like to turn to the Court's question seven and address evidence that supports a finding of permanent, as opposed to merely transitory, benefits to government of allowing --

THE COURT: And add to that evidence in the record that establishes that the City and County of San Francisco

would suffer some unique injury, particularized injury, as opposed to the general injury that you might claim for the entire state.

MS. STEWART: Yes, your Honor.

And I do think the evidence showed harms both to the state as a whole and local governments in particular.

THE COURT: How about San Francisco?

MS. STEWART: And San Francisco even more particularly.

THE COURT: Why is that?

MS. STEWART: Well, San Francisco in particular, I think -- the one thing that stood out is that San Francisco -- well, there are two things really, your Honor.

One is that San Francisco is a place where people of all sexual orientations come for tourist reasons, but often to enter into marriage. And so the city loses revenue because of the lack of -- the fewer number of couples who can marry.

And that harm, I would say, is not transitory in the sense that it won't continue as long as Prop 8 remains, although the witnesses, Dr. Badgett and Dr. Egan testified that it would not remain at the sort of spiked level after a year or two, but people will continue to come to San Francisco to marry for --

THE COURT: Because it's a marriage destination?

MS. STEWART: Because it's long been the city of

love, the city where people leave their hearts. It's factor of our culture in San Francisco.

THE COURT: Cool, gray city of love.

MS. STEWART: But I would actually really, your Honor, like to turn to some of the more serious harms to government because I think that's the least of them, to be honest with you.

I want to point to a few, and I won't have time to talk about all of them, but the first one that I wanted to mention to the Court is that the costs to the public healthcare system from having to diagnose and treat higher levels of mental health disorders that are induced by stigma from laws that treat lesbians and gay men differently.

My colleague, Mr. Olson, referred to Dr. Meyer and actually played a clip of his testimony, and he talked about the stigma that laws like Proposition 8 imposed.

He also testified about the higher incident of mental health disorders, like anxiety and depression. And he particularly focused on the fact that lesbians and gay men, unlike other minorities, often suffer harm and prejudice at the hands of their own family members.

And he talked about how youth, in particular, also, are affected in a terrible way. They can't aspire to become married and have families when they're young and they realize that they are gay and as a consequence of the impact on them,

the rates of suicide or suicide attempts are higher among lesbian and gay youth.

And Dr. Egan testified about the costs that those higher incidents of mental health disorders cost to the public health system, and he testified about some of the programs that San Francisco has developed to try to address specifically those kinds of stigmatic harms.

But I think the most compelling testimony on that subject was the testimony of Ryan Kendall, who showed two things. He talked about and showed the impact of that kind of discrimination on him as an individual, and he also testified about some of the effects on society at large, some of the ways in which that harm to him caused the public to incur costs.

And just to lay that out quickly, he testified that when his parents found out that he was gay, they were horrified; that they believed that being gay is a terrible thing, and that they told him so, and they told him in pretty awful terms; that they wished he had never been born, that they wish they had aborted him, that they would have rather had a child with a disability than a gay child and that he would burn in hell, and et cetera.

And they forced him to try to convert into himself, as a 16-year-old child --

THE COURT: He testified that he didn't really try to convert.

MS. STEWART: He did. He testified that he didn't believe that he could; that he felt his being gay was as clear as his being a person of Latino descent.

But he -- he was affected dramatically and he testified about the sense of loss of family and that he suffered --

THE COURT: Let me ask, if the decision goes against the plaintiffs here, does the City and County of San Francisco have standing to pursue an appeal?

MS. STEWART: Your Honor, we believe that we do, but I have never worried, quite frankly, that we would need that standing because I think the plaintiffs will most certainly appeal if we --

THE COURT: Let's assume the plaintiffs decided not to appeal.

MS. STEWART: Your Honor, I believe we do have standing and I think we have standing in the same way that the cities of Boulder and Denver and, I believe, Aspen had in the *Romer* case. They were the plaintiffs in that case.

THE COURT: Then presumably Imperial County would have standing, would it not?

MS. STEWART: I think it's a little different to -- I mean, I'm not sure that Imperial County can come in here and show the Court any harm that it suffers to its public health system by denying -- if they were have to allow same-sex

couples to marry.

So I guess the Court would have to address that issue more specifically. I think we have showed concrete harm.

I think that, you know --

THE COURT: Then let's go back to the particularized injury or harm that the City and County of San Francisco claims.

MS. STEWART: Dr. Egan testified that our public healthcare system is a cost to the city of about $350 million a year, and that in his opinion if the --

THE COURT: Cost of?

MS. STEWART: The public healthcare system. In other words --

THE COURT: In total?

MS. STEWART: In total.

And the public healthcare system, as he testified, is the provider of last resort for many of San Francisco's residents, and that includes many gay and lesbian residents. And that if the stigma that is propounded by Proposition 8 were to be eliminated, if it were no longer embedded in our Constitution, that that would reduce the higher incidents of mental health disorder.

That was backed up by the testimony of Dr. Meyer, who very carefully laid that out.

Now, again, going back to Ryan Kendall, his example,

while it wasn't in San Francisco, is somewhat what we face; and that is, when he was being abused and was so horribly at a loss, he went to the Denver Department of Human Resources -- or Department of Health and Human Services, I'm sorry, to their juvenile dependency system and sought their refuge there and basically became a ward of the state. So they removed him from the parents who were abusing him.

He also relied on the public healthcare system for emergency medical care. Why? Because he was 16, 17, 18 years old. Couldn't hold a job. Wasn't in school. Didn't have the resources to cover his own medical care.

And he also testified that the stigmatic harm -- he didn't call it that, but the way he felt, he thought he would kill himself if he didn't get help. So he went to get counseling. From where? A public school's, a public institution's counseling services that were supported by government, local government, because he didn't, again, have the money to support himself. Those are examples of the kinds of costs that the public incurs because of discrimination.

I want to touch on a couple of other ones, your Honor, and they include -- and there was evidence of the increased law enforcement costs that are required to investigate and prosecute hate crimes and other kinds of discrimination that, again, flow from the stigma and that society sends the message.

And I want to start with Mayor Sanders, who testified that:

"When city leadership talks in disparaging terms" -- and I'm using his words -- "or denies people rights that everyone else has, fundamental rights, then I think some people in the community feel empowered to take action in hate crimes and other ways."

And he --

THE COURT: Isn't the problem with that argument that a judicial decision, even a judicial decision by the Supreme Court of the United States wiping out Proposition 8 or similar laws, wouldn't eliminate the kinds of motives that give rise to the harms that you have just described? Those are going to exist anyway. They depend upon motives that the law really can't change.

MS. STEWART: Well, actually, your Honor, I don't know that it would end them all together. I think that's a fair statement, your Honor, but the testimony of Dr. Meyer and Dr. Herek and of Mayor Sanders, who has been mayor and before that police chief, was that when you have structural stigma that's endorsed by the leadership of government and by laws, and particularly laws embedded in the Constitution, it does send the message and the message translates into things like hate crimes.

And we saw that in California hate crimes based on sexual orientation in the statistics we offered to the Court in the state's reports is the second highest category and has been of hate crimes since 1995.

There was also evidence about bullying and bullying, in particular, in California schools and the fact that over 200,000 incidents of such bullying based on sexual orientation occur year in, year out. And, furthermore, that the state local school district, like ours, lose revenue from absenteeism because of bullying in a significant amount; that approximately 50,000 absences a year can be attributed to that. And the local school districts are -- receive money based on attendance and so they lose that. But the state also loses and the cities lose the productive work of the students who are not there, who engage in substance abuse and have other harms that are associated with bullying.

Your Honor, I have little time left and I would be remiss if I did not make one more point and make it briefly, and that is this.

The city, your Honor, is acutely aware that when Professor Chauncey testified about the history of governments demonizing and criminalizing and persecuting gay people, he was talking about our city's history as well. And San Francisco once used its police power to harass and shame its own citizens and to force them into the closet and drive gay people and gay

life underground.

In knowing that we, as a city, played a role in creating the stigma that continues to afflict our gay citizens and harm our whole community, San Francisco wants nothing more than to treat its citizens all equally. But Proposition 8 forces us, instead, to perpetuate the stigma we once helped create by again denying marriage to same-sex couples and gay men and lesbians and sending the message that they are inferior.

The evidence that we presented at trial and that plaintiffs presented at trial demonstrates just how hurtful, how deeply hurtful and costly that is, that message is, and how irrational and how invidious is the law forces San Francisco to send that message.

So for that reason we join in the plaintiffs' request that the Court hold Proposition 8 unconstitutional.

Thank you, your Honor.

THE COURT: Very well. Thank you, Ms. Stewart. Shipment.

Let me turn to counsel for the Governor and the Attorney General.

Ah, the governor's counsel.

MR. STROUD: Andy Stroud on behalf of the Governor, your Honor. The Governor waives his right to make closing argument and thanks your Honor for his time.

THE COURT: All right. I'm delighted that you are here.

(Laughter.)

THE COURT: Yes.

MS. INAN: Michele Inan on behalf of the Attorney General. The Attorney General waives his time as well.

THE COURT: Well, I have questions for -- I'm not sure whether it's better directed to the Governor, the Attorney General or maybe the counsel representing the registrars; and that is -- ah, yes.

MR. KOLM: Claude Kolm representing the Alameda County Clerk Recorder.

THE COURT: All right. Let me ask you. In Alameda County when one goes in to apply for a domestic partnership, do you ask the parties to identify their genders?

MR. KOLM: I don't know for a fact, but I don't believe so, your Honor.

THE COURT: How about for marriage licenses?

MR. KOLM: I believe there may be a box that has been reinstated on the marriage license now.

THE COURT: We didn't check Alameda County, but just this morning checked San Francisco, Orange County and Imperial County. It appears on applications for marriage licenses that in San Francisco there is a box for groom, there is a box for bride and that's labeled optional.

And in Orange County (sic) there is a bullet point for groom, a bullet point for bride, and one labeled none.

(Laughter.)

And I think the same is true in Orange County (sic).

And my understanding, although I personally didn't go through the exercise, in the Orange County application, which you can apply for a marriage license online, if you fill out, say, groom and then fill out the data and then punch next, which would call up the other party, you can put in groom again. It doesn't give you an error message.

So what do I make of this? I suppose I can take judicial notice of all these things, can I not?

MR. KOLM: I would suppose so, your Honor. I don't know what to make of it.

I would presume that although you can apply for marriage with both applicants being of the same sex, that doesn't mean that the registrar will actually perform the marriage or will recognize the marriage, and it may be a way of sorting out applications for marriage that are not currently legal in California from those that would be legal.

THE COURT: By that you mean what, sir?

MR. KOLM: Marriages between -- the Alameda County Clerk Recorder was forced to deny applications for marriage from same-sex --

THE COURT: Including the plaintiffs here.

MR. KOLM: Including the plaintiffs.

(Continuing) ...from same-sex applicants after Proposition 8 passed.

THE COURT: And how was the determination made that these individuals should not receive a license to marry?

MR. KOLM: In the case -- I suppose it may be on the application, if we have an application similar to those. I believe that they are actually state prescribed applications.

Do they look similar?

THE COURT: No, they don't look similar at all.

MR. KOLM: Then I'm mistaken.

THE COURT: They may call for exactly the same information.

MR. KOLM: Yes.

THE COURT: But the forms are quite different in their appearance.

MR. KOLM: In one case that I'm familiar with, which is not the plaintiffs in this case, but some people came in and did tape record -- or videotape their request for an application for marriage, and my client called me and asked me what to do. I don't think there was any question that they were of the same sex and that, in fact, they made clear that they were of the same sex and were applying after the effective date of Proposition 8.

THE COURT: And your advice was not to issue the

license, I gather?

MR. KOLM: That is correct, your Honor. We have said here that we would follow whatever the holdings of the Court are. We have taken oaths to uphold the laws and Constitution of the United States and the State of California.

THE COURT: So the determination whether or not this particular couple that is coming before a registrar is of the -- is a couple of the same sex or is a couple of opposite sex is simply made on the spot by whoever is at the desk at the time, I gather?

MR. KOLM: I don't see much alternative, your Honor. Would we ask for medical certification or -- we have to take people at their word.

If it turns out that there has been some deception, there are provisions in the law for recognizing mistake of fact.

THE COURT: What's the situation if they were to lie? Say, you were to have two people who appeared to be men and one said, "I'm the groom" and the other said, "I'm the bride"?

MR. KOLM: Well, I think in that case if -- I see two possible situations; one where the registrar would -- or the clerk would -- it would not look to him as though they were of different sexes and he might then have a discussion with them and ask them.

I don't know whether we would take them at their word

because the marriage, I think, would be null because it was based on misrepresentation of fact.

THE COURT: Now, what's the situation in the domestic partnership context in which an opposite-sex couple cannot become domestic partners unless one of them is older than age 62?

MR. KOLM: That's for California. I believe in San Francisco they can at less than age 62.

THE COURT: I thought that was a product of state law.

MR. KOLM: Well, there is a state law and there is a San Francisco law.

THE COURT: Well, I have heard of that.

(Laughter.)

MR. KOLM: I know that, your Honor, because I drafted the San Francisco ordinance.

THE COURT: Beg your pardon?

MR. KOLM: I said I know that, your Honor, because about 20 years ago I drafted the San Francisco ordinance, or co-drafted it.

THE COURT: Well, all right. But do I understand that under state law -- am I correct in understanding under state law that only opposite-sex couples can become domestic partners if one of them, one of the individuals, is older than age 62 or 62 or older?

MR. KOLM: That's my understanding, your Honor.

THE COURT: All right. Well, what do you do to enforce that limitation in Alameda County?

MR. KOLM: I don't know that we get many cases like that. I suppose it's rather like somebody going into a bar and if you have any suspicion, you may ask for identification.

I imagine the wedding ceremony that you performed that you referred to in the beginning of the trial where, I believe, one member was 90 and the other was 85 or something such as that. Had there been an age limitation of 62, I imagine you would not have been asking for evidence in that case.

THE COURT: I don't think that was necessary. In any event, thank you very much.

MR. KOLM: Thank you, your Honor.

THE COURT: Well, we have come to lunch time and, Mr. Cooper, you are up at 1:00 and I look forward to hearing from you at that time.

Let's adjourn until 1:00 o'clock. Does the clerk have an announcement?

THE CLERK: We would like to make an announcement.

THE COURT: All right. The clerk wishes to make an announcement.

THE CLERK: Before you leave the courtroom, can you please stay and listen?

If you intend to return to this courtroom -- first of all, there is a second overflow that has been opened. So there is -- if you intend to return this afternoon, we suggest you leave a personal item to reserve the same seat. If you already have received a court-issued pass for the proceedings, you must use that pass to return to your designated courtroom.

Non-pass holders seated in the main courtroom have been provided with an orange double ticket which must be shown to resume a seat after lunch. All other non-pass holders seated in the overflow courtrooms must obtain a colored sticker before leaving for lunch.

Court personnel will be at the overflow courtroom doors to provide the stickers before you exit the courtrooms. You must be seated before the afternoon session begins or your seat may be reassigned.

Thank you.

THE COURT: See you at 1:00 o'clock.

(Whereupon at 11:57 a.m. proceedings were adjourned for noon recess.)

P R O C E E D I N G S

JUNE 16, 2010 **1:03 p.m.**

(Whereupon, proceedings were resumed after noon recess.)

THE COURT: Mr. Cooper, good afternoon.

CLOSING ARGUMENT

MR. COOPER: Good afternoon, your Honor, and may it please the Court.

The New York Court of Appeals, your Honor, observed in 2006 that until quite recently it was an accepted truth for almost everyone who ever lived in any society in which marriage existed that there could be marriages only between participants of different sex.

Indeed, when the Massachusetts Supreme Judicial Court made Massachusetts the first state to legalize same-sex marriage in 2004, it acknowledged that its ruling, and I'm quoting:

"Changed the definition of marriage as it had been inherited from the common law and understood by many societies for centuries."

The traditional definition of marriage has, likewise, prevailed in California where, according to the California Supreme Court in the marriage cases, from the beginning of statehood marriage has been understood to refer to the

relationship of a man and a woman.

So the first question, your Honor, that has to be asked is: Why has marriage been so universally defined by virtually all societies at all times in human history as an exclusively opposite-sex institution? It is because marriage serves a societal purpose that is equally ubiquitous. Indeed, a purpose that makes marriage, in the often repeated formulation of the Supreme Court of the United States, fundamental to the very existence and survival of the human race.

The Court said that in *Loving*. It said it in *Zablocki* and several other places, *Skinner*.

And the historical record leaves no doubt, your Honor, none whatever, that the central purpose of marriage in virtually all societies and at all times has been to channel potentially procreative sexual relationships into enduring stable unions to increase the likelihood that any offspring will be raised by the man and woman who brought them into the world.

Mr. Olson often quotes, as he did earlier this morning, the Supreme Court's statement that, "Marriage creates the most important relation in life." That quote comes from the *Maynard* case, *Maynard against Hill* in 1888.

And in the very same sentence, your Honor, the Court went on to say that, "Marriage has more to do with the morals

of a people than any other relation."

Now, the Court's specific holding in the *Maynard* case was that the contract clause of the Constitution does not apply to a state's regulation of the marriage contract because marriage alone, among virtually all contractual relationships, in the Court's words, partakes more of the character of an institution regulated and controlled by public authority for the benefit of the community.

And the *Maynard* Court explained why the institution of marriage is uniquely imbued with the public interest --

THE COURT: Do people get married to benefit the community?

MR. COOPER: Your Honor --

THE COURT: When one enters into a marriage, you don't say, Oh, boy, I'm going to be able to benefit society by getting married.

What you think of is, I'm going to get a life partner --

MR. COOPER: Yes, your Honor.

THE COURT: (Continuing) -- somebody that I can share my life with, maybe have children, but all sorts of things come out of a marriage.

MR. COOPER: But if you --

THE COURT: But is the purpose of marriage for individuals to benefit society?

MR. COOPER: From the standpoint of the state and the state's interests and society's interests, your Honor -- and this is exactly what the *Maynard* case was saying and what many, many cases have said in addition -- it is that this is an institution imbued with social meaning and social policy and the interests of the community. That's why the state has an interest in it.

It may well be that individuals who get married aren't doing it in order to benefit the community, although that is the ultimate result of it. But the question has to be: Well, why does the government regulate this relationship? Why is it different from a friendship --

THE COURT: That's a good question. Why does the state regulate it? Why doesn't it leave it entirely up to private contract?

MR. COOPER: Your Honor, again, because the marital relationship is fundamental to the existence and survival of the race. Without the marital relationship, your Honor, society would come to an end.

But beyond that, there are important societal values at stake. Irresponsible procreation, for example --

THE COURT: Why couldn't the state simply say, Look, marriage is entirely a matter of private contract. We are not going to issue licenses for marriage. We are not going to set down a body of law that regulates the rights and responsibility

of married parties. We are simply going to say, You enter into a contract and if you do, we will enforce those contracts if it comes to it, just like the state will enforce any other form of private contract.

But why is it that marriage has such a large public role? What is the purpose?

MR. COOPER: Your Honor, I think the state could do what you said, but the question becomes: Why hasn't virtually any society done what you say? Why is it that every state in this country and every country, insofar as I'm aware, in the world does, indeed, regulate this relationship?

It's because this relationship is crucial to the public interest. It's crucial to the public interest because, your Honor, the procreative sexual relations both is an enormous benefit to society and it represents a very real threat to society's interests.

THE COURT: A threat?

MR. COOPER: Yes, your Honor. A threat in the sense that to whatever extent children are born into the world without this stable, enduring marital union, raised and responsibility taken for the offspring by both of the parents that brought them into the world, then a host of very important and very negative social implications arise and potential social consequences arise.

Again, we know from all of the authorities, the

purpose of marriage is to provide society's approval to that sexual relationship and to the actual production of children.

As Justice Stevens said in his dissenting opinion in the *Bowers* case, marriage is a license to cohabit and to produce legitimate children.

THE COURT: But the state doesn't withhold the right to marriage to people who are unable to produce children of their own.

MR. COOPER: That's true, your Honor, it does not. It does not insist --

THE COURT: Are you suggesting that the state should, to fulfill the purpose of marriage that you have described?

MR. COOPER: No, sir, your Honor. It is by no means a necessary -- a necessary condition or a necessary requirement to fulfilling the state's interests in naturally potentially procreative sexual relationships.

THE COURT: Well, then, the state must have some interest wholly apart from procreation.

MR. COOPER: It doesn't necessarily follow that that is true.

It rationally furthers the state's interests to extend -- to attempt to channel into the marital union all potentially procreative relationships, as well as all male-female relationships.

It furthers the state's interests, your Honor, and it

isn't a necessary requirement that the state actually insist that as a condition of marriage, that individuals who get married have children or be able to have children.

And, your Honor, case after case has agreed that the simple fact that all societies and all states haven't required procreation of marital couples in no way eliminates the procreative purpose of marriage, or doesn't detract from it.

One of the most important reasons is how would a society that wanted to insist on procreation, how would it -- how would it go about administering such a requirement? Well, the first thing it would have to do presumably -- and, again, your Honor, on this case after case has made this point.

The first thing it would have to do is have some kind of premarital fertility testing. Presumably it would have to have some kind of premarital pledge in which the couple found to be fertile, in some intrusive process, also pledged to actually have children.

There, presumably, would have to be some type of post marital requirement to enforce the actual begetting and raising of children, because on what basis could a state -- if it wanted to insist on procreation as a condition of the marriage contract, on what basis could it require premaritally some type of pledge to have children and some kind of proof of fertility and then not -- and then allow people who weren't having children to remain married?

Presumably there would have to be some kind of mandatory annulment process for marital couples who didn't actually fulfill their obligation to society to actually have children, your Honor. Those kinds of Orwellian, Orwellian tactics.

THE COURT: It is Orwellian, but isn't that the logic that flows from the premise that marriage is about procreation?

If that is the premise for marriage, then the steps that you just outlined would be reasonable and rational steps for the state to take, would they not?

MR. COOPER: Well, the question is: Would they be required steps? Is a state's regulation of the marital relationship, regulation of procreative sexual relationships irrational unless it insists on procreation?

And, your Honor, by no means is it. It is enough if the state or the society seeks to attempt to ensure and to increase the likelihood -- really, that's what it boils down to, increase the likelihood -- that naturally procreative sexual relationships will take place in an enduring and stable family environment for the sake of raising the children so that essentially the society itself, your Honor, doesn't have to step in and take upon its own shoulders the obligations to help in the raising of those children.

And so society doesn't run the risk of all the negative social consequences that come from, say, unwed mothers

raising children by themselves, and such as that.

THE COURT: If the purpose of these marriage laws is regulation of the sexual conduct of the individuals involved, there are certainly far more narrow and tailored ways for the state to regulate those kinds of relationships, but instead marriage regulation extends far beyond regulation of sexual conduct of the parties.

There are support obligations and there are a host of other obligations that flow from a marriage that have nothing to do with the sexual conduct of the parties to the marriage.

MR. COOPER: Well, your Honor, that is true, but a core element of that regulation goes to the procreative aspect and the expectation in the normal course that children will be born of a marriage and the relationships and rights that there are -- that are created within the context of that, of that procreative family.

THE COURT: Parental responsibilities don't depend upon how the child came into the world. Parental responsibilities extend to adoptive parents who had nothing to do with the creation of the child physically. They extend to in-laws and grandparents and a host of other people who are not involved in any way in the -- at least directly, in the creation of this child as a human being.

MR. COOPER: Well, your Honor, with respect to adoptive children, yes, the state does make arrangements and it

does create in law a relationship that is in all respects, virtually all respects, identical to a natural and biological relationship. It does that, again, for the sake of children, for the sake of the upbringing of children, and creates with respect to those children rights and responsibilities in their adoptive parents that are the natural -- result of natural procreation.

THE COURT: And vis-a-vis the state's interest in the well-being of children, isn't the state indifferent with respect to how the child was conceived, whether the child was conceived in a marriage or outside of a marriage or in some other fashion?

Once the child exists as a human being, the state has some interest in the well-being of that child, wholly apart from whether the child was born in a marriage or out of a marriage or in some other fashion.

MR. COOPER: Yes, your Honor, it does. And that really is the point. That really is the point.

The state has an interest in that child. It cannot ignore the society's larger and the community's interest in that child.

And the state's concern is that if that child is born in a context other than a committed relationship, a marital relationship between the man and woman who created that child and brought it to life and who have taken responsibility

themselves, as marriage as a social institution is designed to encourage and to promote, that when a child is not born in that situation, yes, the state still has an interest in that child, the community does. And the state must step forward often times and, again, take responsibility itself for the upbringing and the support and the education of that child, whether it's through extraordinary measures, such as when the child has neither its own mother nor its father and the state has to take full responsibility effectively for the child, or if the child still has -- and in the vast bulk of the situations where this actually arises, the child still has a relationship with its natural mother, but the mother -- or the single parent, mother or father -- doesn't have the same ability and support as a marital union to raise that child and, certainly, not to provide that child with two parents to look after it, let alone two parents that are composed of both a paternal and a maternal parental role model.

So it is -- you have put your finger on the key. The state still has an interest in that child. In fact, it has an interest in all children and that's why the state and every state and every society for the millennia, your Honor, has attempted to channel naturally procreative sexual conduct between men and women into an enduring union, an enduring stable, union for the sake primarily of those children.

THE COURT: Let's move from the millennia to the

three weeks in January when we had the trial.

What does the evidence show? What does the evidence in this case show with respect to this?

MR. COOPER: Thank you, your Honor.

I believe the evidence shows overwhelmingly that this procreative -- this interest in what many call, and the United States Congress calls, responsible procreation is really at the heart of society's interest in regulating marriage.

THE COURT: Okay.

MR. COOPER: Because, for example, what the evidence shows is that imminent -- I'm sorry.

THE COURT: I'm just --

MR. COOPER: Thank you.

THE COURT: What was the witness who offered the testimony? What was it and so forth?

MR. COOPER: Yes, your Honor.

The evidence before you shows that sociologist Kingsley Davis, in his words, has described the universal societal interest in marriage and definition as social recognition and approval of a couple engaging in sexual intercourse and marrying and rearing offspring.

Blackstone, your Honor, said that there are two great relations in private life. First, that of husband and wife, which is founded in nature, but modified by civil society, with nature directing man to continue and multiple his species and

civil society, the social, society's interests, prescribing the manner in which that natural impulse must be confined and regulated.

And the second great relationship, according to Blackstone, that of parent and child, which is consequential to that of marriage, being its principle end and design. It is by virtue of this relation that infants are protected, maintained and educated.

Your Honor, I mentioned earlier another great lawyer, Justice Stevens, who, himself, in his dissent in *Bowers* said that marriage is a license to cohabit and to produce legitimate children. That's what it has been -- what it has always been.

This understanding of marriage, your Honor, is before you from imminent authority after imminent authority in a range of --

THE COURT: I don't mean to be flip, but Blackstone didn't testify. Kingsley Davis didn't testify. What testimony in this case supports the proposition?

MR. COOPER: Your Honor, these materials are before you. They are evidence before you.

But Mr. Blankenhorn brought forward, brought forward these authorities and that's -- and that's these social scientists and anthropologists and sociologists and the others.

But, your Honor, you don't have to have evidence for this from these authorities. This is in the cases themselves.

The cases recognize this one after another.

THE COURT: I don't have to have evidence?

MR. COOPER: You don't have to have evidence of this point if one court after another has recognized -- let me turn to the California cases on this.

The first purpose of matrimony by the laws of nature and society is procreation. The California Supreme Court said that shortly after statehood.

A century later, the California Supreme Court re-emphasized that the institution of marriage serves the public interest because it channels biological drives -- channels biological drives -- that might otherwise become socially destructive and it ensures the care and education of children in a stable environment.

That's the California Supreme Court, your Honor. That's the purpose of marriage in this state, according to the California Supreme Court in *DeBerg against DeBerg*.

Two years ago, less than two years ago, the California Court of Appeals held that the sexual procreative and child rearing aspects of marriage go to the very essence of the marriage relation.

Your Honor, Congress in passing DOMA said the core purpose of marriage is this:

"At bottom, civil society has an interest in maintaining and protecting the institution of

heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child rearing. Simply put, government has an interest in marriage because it has an interest in children."

Your Honor, most courts, most of the courts, quite a substantial majority of the courts that have looked at the issue that is before you now have upheld the constitutionality of the traditional definition of marriage because -- and these are the Eighth Circuit's words -- in upholding a provision enacted by the people of Nebraska that is word for word identical to the one before you.

It upheld it because -- this is the Eighth Circuit Court of Appeals in 2006.

"The state's interest in steering procreation into marriage justifies conferring the inducements of marital recognition and benefits on opposite-sex couples who can otherwise produce children by accident, but not on same-sex couples who cannot."

At least two-thirds, your Honor, or just approximately, anyway, two-thirds of all the judges who have looked at the issue that is before you now have upheld the traditional, or would have -- some of them are in dissenting

opinions, or would have upheld the traditional definition of marriage on this rationale, this rationale.

The majority of Congress enacted DOMA, as I just mentioned, on this rationale.

And the plaintiffs, the plaintiffs say, there is no way to understand, understand why anyone would support Proposition 8, why anyone would support the traditional definition of marriage except through some irrational and dark motivation, some animus, some kind of bigotry, your Honor.

And that is not just a slur on 7 million Californians who supported Proposition 8. It's a slur on 70 of 108 judges who have upheld as constitutional and rational the decision of voters and legislatures to preserve the traditional definition of marriage. It denies the good faith of Congress -- not just these judges, of Congress -- of state legislature after state legislature and electorate after electorate.

THE COURT: Let me ask: If you have got 7 million Californians who took this position, 70 judges, as you pointed out, and this long history that you have described, why in this case did you present but one witness on this subject? One witness. You had a lot to choose from if you had that many people behind you. Why only one witness? And I think it fair to say that his testimony was equivocal in some respects.

MR. COOPER: Certainly not on this one, your Honor. And his testimony was utterly unnecessary for this proposition,

utterly unnecessary for this proposition.

THE COURT: This goes back to the *you don't need any evidence* point.

MR. COOPER: Well, your Honor, it goes to, again these are legislative facts. You need -- you need only go back to your chambers, your Honor, and pull down any dictionary, pull down any book that discusses marriage and you will find this procreative purpose at its heart wherever you go. Unless, unless, your Honor, that book was written by one of their experts or has been written over the course of the last 30 years. Then you will find, yes, that procreation, what has that got to do with marriage? What?

And the pages of history, your Honor, are filled with nothing, nothing but this understanding of marriage. You will not find anywhere in the pages of history, nowhere, any suggestion that the traditional definition of marriage ubiquitous in history, across cultures, across time had anything whatever to do with homosexuality. Had nothing to do with it.

In fact, the issue of people's values with respect to homosexual conduct was never in the marriage conversation until the movement for same-sex marriage.

Your Honor, at the heart, at the very heart --

THE COURT: What should I conclude from that?

MR. COOPER: That, your Honor, at least an important

purpose of marriage always has been and still is to channel naturally procreative sexual conduct of men and women into enduring, stable family units through marriage so that the children of that union will be raised by the man and woman who brought them in, to improve the likelihood that that will happen.

THE COURT: What has changed in the last 30 years that has so dramatically altered the landscape that you have just described?

MR. COOPER: Your Honor, I think my point is the changes in the last 30 years haven't eliminated that legitimate and important purpose of marriage.

THE COURT: But you pointed out that there is this body of opinion, point of view, that you have described that now views marriage as an option for homosexuals. Okay. That is something that has developed in the last 30 years.

What is it and what does the evidence show has prompted that change? Why? Why do we have this? If it has never been a debatable proposition before, why is it now debatable?

MR. COOPER: Well, it has become a claim, and an understandable claim, which, your Honor, we respect and credit. Credit certainly the sincerity and the passion behind the desire of same-sex couples to get married.

And that movement has developed, and it has made

this, this issue a very important controversial issue of public policy. And it's one that is, as you know, not just taking place here in California. It's taking place elsewhere in the country and voters and legislators have come to some different conclusions. It's taking place throughout the world.

But, your Honor, the issue is --

THE COURT: If it is taking place throughout the country and throughout the world in this fashion, then doesn't that indicate a changed perspective with respect to the role and function of marriage in society?

MR. COOPER: In the minds of many, yes, your Honor. In the minds of many.

THE COURT: And doesn't that affect, then, the responsibility and the extent of appropriate authority and regulation by the state of the institution of marriage?

MR. COOPER: Your Honor, I think states are examining their responsibilities with respect to this issue currently, and have been over a number of years now, and that in the political process, which given that this issue goes more to the morals of a people than any other relation -- as, again, we know from the *Maynard* case -- that this issue is being debated in the political process and it has brought forward additional considerations and issues for the legislative process to grapple with.

But the real question, your Honor, for you is this:

Has something happened with respect to the nature of marriage, the legitimate purposes of marriage to make the historic, consistent and ubiquitous core procreative purpose of marriage no longer constitutionally legitimate?

Are the considerations -- are the competing considerations which the political process is grappling with on a daily basis here, are those competing considerations so overwhelming that it's no longer legitimate for the people of California or the legislatures of this country or the Congress or court after court to conclude that there is a legitimate function and purpose of marriage that does bring forward a distinguishing characteristic relevant to interests the state is able to implement?

Those words, your Honor, are I think verbatim, the words of case after case regarding when it is appropriate for the society, for the state to draw distinctions whether or not there is a distinguishing characteristic relevant. And there is a distinguishing characteristic relevant to this core procreative purpose, your Honor, that justifies and explains the rationality of a preference by legislators or a preference by voters to -- and a rational basis for maintaining the historic traditional definition of marriage.

THE COURT: Let me ask you. You heard Mr. Olson this morning recount the experience of, and the background of the *Loving* decision by the Supreme Court in 1964, I think it was --

'67. And up to that time numerous states had laws on the books which prohibited interracial marriage.

At some point there came exactly the same kind of social change that you have just described with respect to homosexuality, and at some point, 1967, that matured into a constitutional -- recognition of a constitutional right; that the limitation against interracial marriage violated a fundamental individual right under our Constitution.

Why are we not at that same tipping point here with respect to same-sex marriage?

MR. COOPER: Your Honor, several reasons. Among the most important, perhaps the most important, is this.

What legitimate purpose of marriage, recognized historically or anywhere else, justified, provided a rational basis for the State of Virginia, or any other, to say that an interracial couple could not get married?

Well, it certainly wasn't this core procreative purpose that I'm mentioning because, your Honor, that purpose was frustrated by those policies. That purpose actually was at war with the overriding ubiquitous core procreative purpose of marriage, because it required people who had -- interracial couples to --

THE COURT: Let me -- excuse me for interrupting, but you recall a number of the decisions which upheld those laws, and the rationale that was used by the Courts in some of those

cases was that the mixing of the races was going to be destructive, would have serious corrosive effects on society.

MR. COOPER: Your Honor, those racist, racist sentiments and policies had no foundation in the historical purpose of marriage and, in fact, again, they were at war with it.

Racial restrictions on marriage were not part of the common law. As we have maintained from the beginning, the opposite-sex nature of marriage is itself definitional, definitional because of the -- as, again, the Supreme Court has often recognized, because this relationship is fundamental to the existence and survival of the human race. So this -- the opposite-sex nature of marriage has always been definitional.

The common law didn't place racial restrictions on marriage. Many states did not place racial restrictions on marriage. Only 16 states at the time of *Loving* still had racial restrictions on marriage. They grew out of this very particular racist white supremacist theory, your Honor, that was at war with all the purposes of -- all the legitimate purposes of marriage.

They actually made people have illegitimate children, illegitimate natural children, which, again, was -- the purpose of marriage, as Justice Stevens says, is to license cohabitation and produce legitimate children. That was the purpose of it. Well, this racial restriction was at war with

its very definition, it's very nature.

Second point I want to make is that these restrictions weren't --

THE COURT: Why isn't the limitation on marriage for gay couples and lesbian couples similarly at war with their desires to raise children, raise their own children in the context of a marriage partnership?

MR. COOPER: Your Honor, again, this is the -- this is the distinction that the Eighth Circuit recognized and that case after case has recognized. There are distinguishing characteristics relevant to the interests that the state is pursuing here.

As the Eighth Circuit said, your Honor, only opposite-sex couples can procreate naturally and, therefore, it is only opposite-sex couples who uniquely, uniquely address this fundamental historic purpose and who present, most importantly, uniquely, the threat to the society's interests that marriage is designed to minimize, the threat of irresponsible procreation, the threat -- the reality that when procreative sexual relationships between men and women are not channeled into marriage and these stable unions with these binding vows, then much more frequently the society has to -- has to itself cope with the adverse social ramifications and consequences of that kind of irresponsible procreation.

THE COURT: But you don't draw any distinction

between the state's interest with respect to a marriage and children of that marriage where the parents have been able to conceive on their own and the situation where an opposite-sex couple have had to require some form of intervention, medical intervention or otherwise, in order to produce children, an increasingly common situation. And the rights and responsibilities of the parents are exactly the same for the children of the latter couple, and the state's interest is exactly the same, is it not?

MR. COOPER: Your Honor, not -- they are not quite the same, no.

THE COURT: Well, then, what's the difference? You mean, where you had to have an egg donor or a sperm donor or some procedure of that kind in order to produce a child, the state's interest is different in that child and in that marriage?

MR. COOPER: Your Honor, the first point I want to make is to refer back to earlier colloquy and discussion with respect to the interests that are served by permitting all opposite-sex couples to marry without attempting to use some kind of intrusive inquiries and what-have-you into questions of fertility, questions of, you know, desire to have children and what-have-you.

I didn't at that time also mention that the society's interests are also furthered whenever opposite-sex couples are

married in order to engage in sexual relationships, because that strengthens the social norms that, really, the legal institution of marriage relies upon most heavily in order for this channeling function to be performed.

It would be -- whenever couples, opposite-sex couples are in cohabiting relationships, as they -- you know, as it certainly happens now that they are more often than in previous times in history, that in and of itself weakens those social norms that seek to encourage and to channel those types of procreative relationships into marriage.

But to come back specifically to your point, your Honor, I really think the state's main concern or certainly among the state's main concern in regulating marriage, in seeking to channel naturally procreative sexual conduct into stable and enduring unions is to minimize what I would call irresponsible procreation. It's not a good term, but I can't think of a more serviceable one. And that is, procreation that is -- that isn't bound by the kinds of obligations and social norms that the marital relationship is and that often leads to children being raised by one parent or the other or sometimes neither parent.

That is a phenomenon that is uniquely centered on naturally procreative sexual relationships between men and women. It is -- it is not a phenomenon that the state has to be concerned about with respect to same-sex couples.

For a same-sex couple to procreate it, by definition, has to be responsible. It can't be by accident. That's the key point.

And that's a point that the Eighth Circuit itself stressed in the *Bruning* case that I quoted from earlier. By definition, same-sex couples do not naturally procreate and when they procreate --

THE COURT: And my point was that there are a number of heterosexual couples who do not naturally procreate, who require the intervention of some third party or some medical assistance of some kind.

MR. COOPER: Yes, your Honor. And it is not those opposite-sex couples either that the state is concerned about in terms of -- in terms of the threats to society and the natural concerns that society has from irresponsible procreation.

THE COURT: What's the threat to society of people choosing to have medical assistance in order to conceive children?

MR. COOPER: There isn't one there, your Honor. I mean, it's -- it is the -- again, it's irresponsible procreation. The procreation that comes about casually.

And often again, as the Eighth Circuit put it, often by accident, unintentionally, unintentionally. The opposite-sex couple where one of the partners is infertile, for

example, or the same-sex couple can't unintentionally procreate, but for reasons that we discussed earlier with respect to the opposite sex but infertile couple, allowing them to marry isn't something that is inconsistent with the purposes of -- the core procreative purposes of marriage and, in fact, in certain respects it advances those purposes and it would just not be possible or realistic, as case after case has said, for the state to try to implement its policy on a more narrow or fitted basis.

And, your Honor, with respect to -- and you asked a question about this in your written questions. Even with respect to the opposite-sex couple where one of the partners is infertile, encouraging that couple to get married, trying to channel that couple into marriage furthers the procreative purposes and policies underlying the traditional definition of marriage in the sense that if that couple gets married, then it -- then all of the social norms that come with marriage to encourage that couple to stay together and to be faithful to one another operate to society's benefit in the sense that the fertile member of that couple will be less likely to engage in sexual relationships with third parties and raise anew a threat of some type of unintentional or what I have been referring to previously as irresponsible procreation.

THE COURT: Why don't those same values, which are values to society that you have described, apply to lesbian

couples and gay couples? Coming together, supporting one another, taking care of one another, looking out for one another, being an economic unit, being a social unit, providing love, comfort and support for one another, why don't all of those considerations apply just as much to the plaintiffs here as they apply to John and Jane Doe, to use the names that Reverend Tam used.

MR. COOPER: Those purposes, your Honor, are -- we haven't suggested there is a distinction among gay and opposite-sex couples with respect to those considerations.

There is a distinction, however, with respect to the fundamental procreative purpose, responsible procreative purpose of marriage; and that is that the gay couple, unlike the opposite-sex couple where one of the partners may be infertile, doesn't represent -- neither partner in the -- with respect to the same-sex couple is -- again, assuming homosexual sexual orientation -- represents a concern about irresponsible procreation with a third party.

But, your Honor, the considerations that you have identified are considerations that the state and its voters have taken account of and they -- and they have respected and they have credited and they have honored by creating the parallel institution of domestic partnership.

THE COURT: What does the evidence show that the procreative function of marriage was a rationale of the voters

in enacting Proposition 8? What's the evidence on that, the evidence in this record?

MR. COOPER: Your Honor, there is substantial evidence in this record.

First, your Honor, is the ballot arguments themselves and the official voter information guide. The Yes On 8 position favoring Proposition 8 specifically said:

"Proposition 8 protects marriage as an essential institution of society. While death, divorce or other circumstances may prevent the ideal, the best situation for a child is to be raised by a mother and father, a married mother and father."

So, your Honor, the central thrust of the responsible procreation purpose of marriage was put forward in the voter information guide itself, but the campaign, also, the Yes On 8, the ProtectMarriage.com, Yes On 8 campaign, spoke to this.

It is not accurate to say that there was no discussion of this concern or this interest in connection with a campaign, in connection with the formal Yes On 8 or ProtectMarriage.com campaign because there were advocacy pieces after advocacy piece that spoke specifically to this issue. One was a video ad, which said --

THE COURT: Is this in the record?

MR. COOPER: Yes, your Honor.

THE COURT: What is it? What exhibit?

MR. COOPER: PX-97.

"Marriage involves a complex web of social, legal and spiritual commitments that bind men and women for one overriding societal purpose, to create a loving environment for the raising up of children."

In a range of written advocacy pieces, your Honor, printed materials, the ProtectMarriage.com said things like this.

And this is actually from PX-27 that I'm going to be reading from.

"The marriage of a man and a woman has been at the heart of society since the beginning of time. It promotes the ideal opportunity for children to be raised by a mother and father and a family held together by the legal, communal and spiritual bonds of marriage. And while divorce and death do frequently disrupt the ideal, as a society we should put the best interests of children first, and that is traditional marriage."

Your Honor, there were a number of -- and there are before you a number of those -- of those things from the ProtectMarriage.com campaign itself.

But beyond that, quite beyond that, this was a frequent theme within the religious community that was, as you know, quite active in the debate, in the political process over Proposition 8.

The campaign wasn't just by any stretch what ProtectMarriage.com had to say to the people. The debate was a cacophony of ideas and of arguments and of debates ranging from the fairly ubiquitous television ads throughout that -- or at least towards the November 4th itself that appeared on television to conversations at the office water cooler.

Your Honor, people got their -- debated this issue in every venue and every forum, in civic centers. It was a cacophony of issues and, certainly, one doesn't have to pinpoint a particular argument from a particular source to conclude that any -- virtually any argument that would have supported one side or the other was being advanced by these very passionate debates.

Your Honor, the other point I want to make about this, and it goes to the issue of -- it goes to the issue of standard to review that the Court will be applying in this case, is this. We submit, of course, as you know, the rational basis test applies. There has not been a case in the so-called marriage equality cases that has applied the federal Constitution, that has applied any other standard of review.

And, in fact, beyond that, your Honor, there has not

been a case in the federal judicial area or, as far as we can tell, the state judiciary, applying -- looking at the sexual orientation classification that has applied anything other than rational basis review, with four exceptions. Those are -- there are four district court cases that have applied some form of heightened scrutiny.

The Ninth Circuit, we submit to you, has binding controlling authority on this question, from the *High Tech Gays case*. Ten other circuit courts of appeals, six of those cases -- with six decisions coming after *Lawrence* have held to the same effect. No Court of Appeals case has ever applied anything other than rational basis review to a sexual orientation classification. And out of 40, 40 some-odd district court cases, only four have done so and all four have been reversed.

Supporting the plaintiffs on the question of standard of review is nothing, and there is a judicial tsunami that they are asking you to sail into on this question.

So we believe that rational basis applies and that if we are right and rational basis applies, the state, or we -- as we attempt to step into the shoes of the state -- don't have to submit evidence to the Court in support of the claims of purpose and justification.

To the contrary, the plaintiffs have to negate every conceivable rational basis, every conceivable rational basis

that might explain the policy at issue, the classification at issue.

And, your Honor, what that means is they have to negative every conceivable state of facts that could provide a rational basis for the classification. This is stated in case after rational basis case, your Honor, from *Garrett* and *Heller* and *FCC against Beach*, as the Court knows from its own questions.

And if the state of facts that would support -- if it was -- any conceivable state of facts that would support the classification is even arguable or debatable, as you asked Mr. Olson, then the state's policy must be upheld. It must be a non-debatable proposition.

So if you conclude -- and here is the, perhaps, I guess, kind of the most important point for this purpose. Event you conclude that, in fact, by a preponderance of the evidence they are right on any of their claims, that doesn't matter. You still must rule for the state unless you also conclude that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true. *Vance against Bradley*.

It's not that who is right or who is wrong. It's that no rational person could conceive that the legislative fact relevant to the issue could possibly be true.

THE COURT: The standard of review in *Romer* was

rational basis?

MR. COOPER: Yes, your Honor.

And *Romer*, your Honor, applying that standard concluded there was not any explanation for the sweeping disabling punitive statute discriminating against gays and lesbians in that case, not any explanation that could provide any rational basis for the rule there.

So the only conclusion that could be arrived at was that it flowed from animus. It flowed from animus. That was the only thing that could explain this sweeping disabling statute that effectively, in the Court's words, made gays and lesbians strangers to the law. Made them strangers to the law. Placed them effectively outside of the law's protections effectively permanently or at least until the electorate amended the Constitution.

THE COURT: Mr. Olson contends that Proposition 8 makes gays and lesbians strangers to the institution of marriage in California.

Let me direct you to the *Minnesota versus Clover Leaf,* and just one sentence by Justice Brennan on this rational basis review standard that we have been discussing.

"Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by

tendering evidence in court that the legislature was mistaken."

So where was the -- the evidence here, as I understand your argument, was this evidence with respect to the natural procreative capability of heterosexual couples or opposite-sex couples as opposed to the non-natural procreative ability of same-sex couples? That is the evidence that was before the voters here that you are relying upon as providing the rational basis, am I correct?

MR. COOPER: Forgive me, your Honor. I'm not sure I follow what --

THE COURT: Well, perhaps -- I'm sure it's not stated very well.

But the point that Justice Brennan, I think, was making is that in that Minnesota case there was evidence before the legislature. It was identified. It wasn't simply some rationale pulled out of the thin air. There was evidence before the legislature to warrant the classification that was made in that case. This was a classification, if I remember correctly, between paperboard milk cartons and plastic milk cartons.

Well, the evidence supporting the classification here that you are contending exists is this natural procreative ability of opposite-sex couples, which distinguishes them from same-sex couples. That's the evidence, am I correct?

MR. COOPER: That's certainly a premise, yes, your Honor.

THE COURT: That's it?

MR. COOPER: It's a premise of the responsible procreation rationale.

THE COURT: Let me ask you, while we have a pause in our discussion -- unless you want to move on to something else that follows immediately -- about one of the answers that you provided in the response to the written questions, and that was actually the last question.

The question was:

"If the Court finds Proposition 8 to be unconstitutional, what remedy would yield the constitutional expression of the people of California's will?"

And your response --

MR. COOPER: I'm sorry. Which question was that?

THE COURT: The last question, number 15.

MR. COOPER: Oh, this is the common --

THE COURT: Exactly, the common questions to both the plaintiffs and the proponents.

And I'm reading from Pages 45 to 46 of your response, okay?

And your response was:

"If, as plaintiffs maintain, Proposition 8

cannot be reconciled with its own non-retrospective application as interpreted by the California Supreme Court, or with any other feature of California law, the remedy that would yield to the constitutional expression of the people of California's will is sustaining Proposition 8 by giving it retrospective effect or invalidating the conflicting feature of California law."

Do I understand that what you are saying here is that not only am I required to rule against the plaintiffs, but to invalidate the 18,000 marriages, same-sex marriages that occurred between June and November of 2008?

MR. COOPER: No, your Honor. That is not our position at all.

THE COURT: But that's what these words say, do they not?

MR. COOPER: Well, no, no. Only if there is only some irreconcilable conflict between those two things, as Mr. Olson maintains, but we dispute that there is an irreconcilable conflict.

This goes to, at least, what we perceived the Court's question to be going to. Is the plaintiffs' argument with respect to the so-called crazy quilt that has been created by Proposition 8 and the interpretation of Proposition 8, in

particular, in the marriage cases that interpreted Proposition 8 to be prospective only and not to invalidate the 18,000 or so same-sex marriages that took place during that interim period after the decision and before Proposition 8 was passed.

Our position, we disagree with Mr. Olson. We don't believe that that has created a conflict that requires Proposition 8 to be invalidated. That's what he is arguing, that it -- that it is irrational, he thinks, to have valid same-sex marriages in the face of Proposition 8's prohibition on same-sex marriages going forward, at least under the marriage cases interpretation of its prospective only effect.

Our answer is the Court of -- California Supreme Court simply engaged in an analysis that is quite routine and standard when statutes or constitutional amendments are enacted that would affect rights -- at least on their face would appear to affect rights and interests that have been created under the preexisting state of the law. This preexisting state of the law being the not quite five-month period when same-sex marriage was legal and same-sex marriages were entered into.

The Court -- the California Supreme Court simply said these reliance interests that have been created as a result of that Court's previous decision. And here I'm referring to the *Strauss* case where Proposition 8 was at issue and it was interpreted as prospective only. That those reliance interests

were, the Court thought, powerful and legitimate and that it was effectively loathe to interpret Proposition 8 as upsetting those interests, so Proposition 8 would be given only that prospective effect.

It is not at all uncommon when Courts are faced with that kind of situation and not all that uncommon, really, when legislatures are and they decide to cut back on something, to grandfather the individuals, as it is commonly called, to grandfather those interests and protect them from the application which would, in that circumstance, be especially harsh in consideration of the reliance interests that have been created under the previous regime.

We don't think that's irrational. We don't think those two realities create some irrational and unconstitutional crazy quilt, and neither did the California Supreme Court.

But all we are saying in our answer is this. If that were to be the case --

THE COURT: If what were to be the case?

MR. COOPER: If it were to be the case that Mr. Olson is right and the prospective effect and the 18,000 marriages that took place before the passage of Proposition 8, and Proposition 8's own prospective effect can't be reconciled and one or the other has to fall, our submission is the overriding constitutional judgment of the people is not what should fall here.

Proposition 8 should not be invalidated because of some notion that there is an irreconcilable conflict between it, as a prospective statute, and the existence of reliance interests that compelled the California Supreme Court not to apply Proposition 8 retrospectively.

Obviously, it was before the Court to apply, and it could have, and there were certainly, you know, legitimate arguments that Proposition 8 had a retrospective effect as well.

Just as, your Honor, the California Supreme Court held in a previous case that marriages that had taken place under what was ultimately determined to be a void act of -- ordinance or whatever in San Francisco, that all of those marriages were void. Well, that was -- that was a decision that the California Supreme Court could have rendered. It decided not to.

We think these things can lie down comfortably along one another. There is not any rational conflict. So it is not our position.

We urge you not to conclude that you -- that one or the other of these, of these elements must fall. We don't think that is necessary.

THE COURT: One or the other of what elements?

MR. COOPER: Proposition 8 as a prospective prohibition on same-sex marriage, on the one hand, and

California Supreme Court's interpretation of it allowing the 18,000 same-sex marriages that had taken place before its enactment to remain valid.

We think that grandfathering, effectively, of those marriages is perfectly rational. It's perfectly common and perfectly constitutional.

Your Honor, I want to effectively conclude this piece of my argument by calling the Court's attention to a case from the 11th Circuit called *Lofton*. It was a case in which the 11th Circuit upheld Florida statute that prohibited gay adoptions.

At the heart of that case was this consideration that we have been discussing; that is, effectively the core procreative element or purpose of marriage and the -- and the idea that -- which it was displayed again, as I mentioned earlier, in the official ballot initiative argument; that it is -- and that many, many people believe that it is best for a child to be raised by the child's own mother and father.

What the Court there concluded -- and I might add that the expert for the plaintiffs in that case was Dr. Lamb. Ultimately the Court concluded that, in fact, the evidence submitted there by Dr. Lamb was not adequate to render irrational the common sense belief that children do best when they are raised by their own mother and father, which in one of your questions, your Honor, you'll recall quoting from the New

York Court of Appeals in *Hernandez against Robles*. That common sense proposition. And this is what -- this is what, ultimately, the Eleventh Circuit was persuaded by.

Taking all of this available information into account, the legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimum social structure in which to bear children; and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child, and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child-rearing that has not yet proved itself, beyond reasonable scientific dispute, to be as optimal as the biologically-based marriage norm.

Your Honor, this, again, brings forward the -- the point that the standard here is whether or not the evidence produced by the plaintiffs is -- is more than just opinion evidence, but it actually rises to the level of non-debatable scientific facts.

And, ultimately, the Eleventh Circuit concluded that that was not -- in that case, anyway, that simply couldn't be said with respect to the common sense belief that -- that many, many, many people hold, and many researchers hold, that the optimal child-rearing parental structure is the traditional intact family.

Your Honor, I want to move, if I may, to an area that the plaintiffs have emphasized. They have gone to great lengths to underscore the religious beliefs of many of the people who campaigned and supported Proposition 8.

It's hardly -- it's hardly remarkable, in our country, that religious beliefs are and religious people are involved in the political process. It's part of our Constitutional tradition, from the American Revolution to the Abolitionist Movement, to the civil rights -- to the Civil Rights Movement.

And there are issues, many of them, that confront the legislatures, that confront the body politic, that are bound up and inextricably -- inextricably involve moral values and moral judgments, from the death penalty, gambling, obscenity, prostitution. And an issue that was before the Supreme Court not -- not that long ago, in the Glucksberg case, the issue of assisted suicide. The court there rejected a substantive due process challenge to a state statute that prohibited physician-assisted suicide.

And the Court noted that, "Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide." And the Court held that the Constitution permits this debate to continue, as it should in a democratic society.

And, Your Honor, the Court was very careful to -- to

make clear that when a court is presented with a claim of a -- asking the Court to define some new fundamental right, that the Court must very carefully analyze that claim and must insist that it be rooted, deeply rooted, in the country's history and traditions, in order not -- in order to protect against the judiciary unnecessarily taking important issues off the table of the democratic process.

This is true, also, of marriage, we would submit. Again --

THE COURT: You concede that there are times when it is appropriate for the courts to do exactly that?

MR. COOPER: Yes, of course.

THE COURT: We've talked about the *Loving* decision. We've talked about the *Brown* decision and various others.

MR. COOPER: Yes.

THE COURT: What are the criteria that a court should use in making that determination?

MR. COOPER: Your Honor, I think -- I think the criteria is what -- is what the -- is what the Supreme Court itself has articulated, that the right claimed must be deeply rooted in the history, traditions, and practices of the --

THE COURT: And in this case, marriage is a deeply rooted and fundamental right.

MR. COOPER: Yes, Your Honor.

THE COURT: No doubt about that.

MR. COOPER: Yes.

THE COURT: Okay.

MR. COOPER: Your Honor --

THE COURT: And that, as Mr. Olson described this morning, is a right which extends essentially to all persons, whether they are capable of producing children, whether they are incarcerated, whether they are behind in their child support payments. There really is no limitation except, as Mr. Olson pointed out, a gender limitation.

MR. COOPER: Well, Your Honor, and that -- and that gender limitation is, is a definitional feature of the right to marry. A definitional feature.

That is clear from the Court's repeated statement that the reason marriage is fundamental is that it is fundamental to the existence and survival of the human race. It is procreative --

THE COURT: Because it is a gender-specific right?

MR. COOPER: The right --

THE COURT: That's what you're saying?

MR. COOPER: Yes, I am. The right is --

THE COURT: Gender specific?

MR. COOPER: The right to marry is bound up with and proceeds from the fundamental nature and its fundamental purpose relating to procreation and the existence and survival of -- of the human race.

So it is itself, by definition, the right of a man to marry a woman, and vice versa. That is -- that is the right.

And, Your Honor --

THE COURT: All right, then. Let me ask you about something that you said in one of the other responses to the written questions. This is number 9. And I believe that was a question posed to both parties.

On page 21 of their response --

MR. COOPER: I don't have the same pagination you do. I'm sorry, Your Honor. Is it number 9 to both parties?

THE COURT: It's -- I beg your pardon. It's number 10. Number 10. And, if it helps, the ribbon is document 687, page 25 of 50.

And you say, with respect to sexual orientation, "As a socially-constructed category, sexual orientation clearly fails the requirement." And the requirement posited is "Social constructivism suggests that there is nothing real about sexual orientation except society's construction of it. Not surprisingly, social constructionists generally reject the possibility of biological factors in sexual orientation."

What that leads me to ask you is, aren't these distinctions that we're drawing sexual orientation distinctions, gender distinctions, from a legal point of view are they not all socially constructed?

MR. COOPER: No, Your Honor. I think there would be

a fundamental difference, at least if I understand the thrust of this inquiry, between, for example, a gender distinction and a distinction drawn along the lines of sexual orientation.

Because I -- we took this and the notion of social construction, to go to the -- to go to what we think are the very difficult issues surrounding sexual orientation and its amorphous, effectively indefinable, at least consistently, nature, and the simple fact that it is not immutable.

Our submission, obviously, is that sexual orientation is not an immutable trait, that is an accident of -- an accident of birth, which --

THE COURT: An accident of birth?

MR. COOPER: Yes, Your Honor. Sex -- your gender -- talking here about the --

THE COURT: It can be changed before birth, but not after birth? What do you mean it's an accident of birth?

MR. COOPER: Accident of birth in the sense that that term has been used consistently by the Supreme Court to identify the kinds of immutable characteristics that -- that go into the calculus on whether heightened scrutiny should apply. Political powerlessness, immutability, and history of discrimination. Essentially, the three principal issues.

THE COURT: And religious discrimination, of course, is prohibited as one of these fundamental rights and subject to strict scrutiny, if the state imposes some limitation or

classification based on religion. And religion is certainly not an immutable characteristic.

MR. COOPER: That's true, Your Honor. But we would submit that the heightened and strict scrutiny that is accorded to religious classifications springs not from the Equal Protection Clause but from the First Amendment. And we think that *Davey against Locke* supports that proposition.

We don't -- we believe that the -- the areas that the Supreme Court, at least thus far, has identified as -- as qualifying for heightened scrutiny have been race, of course, the central concern of the Fourteenth Amendment, which, by the way, I forgot to mention when we were discussing *Loving*. But that, too, was a key point and one that the Court repeated -- the *Loving* court repeatedly made, was that the central concern of the Fourteenth Amendment was to eliminate all invidious racial discrimination. And, obviously, here that is -- that is not -- that is not the case.

But to come back to the immutability issue, the Ninth Circuit in the *High Tech Gays* case said, unequivocally, "Sexual orientation is not an immutable characteristic." I think that's -- that's a quote.

And, Your Honor, measured against the Supreme Court's decisions, we submit that is plainly right. And, again, we are aware of no case that has held heightened scrutiny, under the Equal Protection Clause or anything else, applies to a sexual

orientation classification. Every case holds to the contrary.

And specifically on the immutability issue, the record before you is really quite -- quite overwhelming, that the -- the characteristics of immutability simply do not apply with respect to sexual orientation.

Not only is it difficult to define, as almost all of the plaintiffs' experts testified to -- and there are at least three definitions, the behavioral-based definition, the attraction-based definition, and the self-identity-based definition, that depending on which one you use, there's a wide variety of the people who are within that class.

Beyond that, Your Honor, and not just its amorphous and difficult definitional situation, is the fact that the plaintiffs' witnesses were quite candid and unequivocal and uniform that sexual orientation does change. It does change over time. And it apparently changes especially in -- in women.

There were -- there was testimony from Dr. Peplau about the astonishing plasticity of sexual orientation in women, and that men and women experience a change in their sexual orientation several times over the course of a lifetime.

But perhaps the most -- perhaps the most, I would think, vivid evidence was an APA study which indicated that over a 10-year period, for women who identified -- who identified themselves as homosexuals, some two-thirds of them

had changed their sexual orientation, essentially, had experienced, themselves, a change in their sexual orientation at least once over the course of their lifetime, and a third more than once.

And this does go directly to the Supreme Court's test of immutability. Is it an accident of birth?

Here's what Justice Ruth Bader Ginsburg said about this test. "The immutable characteristic notion, as it appears in Supreme Court decisions, is tightly cabined. It is a trait determined solely by the accident of birth."

And here, Your Honor, the traits or the characteristics that have been determined to be immutable and to qualify for heightened scrutiny by the Supreme Court have been things like race, which is obviously determined at birth. It's, quote, an accident of birth. Gender. And illegitimacy.

And as Judge Ginsburg also said, it doesn't mean it's something that can't be changed. But it is something that is --

THE COURT: Isn't national origin also one of those?

MR. COOPER: Yes, Your Honor. Yes, Your Honor.

THE COURT: And people -- I don't know whether they change their national origin, but on St. Patrick's Day everybody is Irish.

(Laughter)

MR. COOPER: I've experienced that change myself.

(Laughter)

THE COURT: And people can look to one ancestor and suddenly become that. And on another occasion pick another ancestor. And maybe even invent an ancestor.

So these immutability characteristics, they really are not the important factor, are they, in deciding what the level of scrutiny is?

MR. COOPER: Well, Your Honor, yes. With respect, it is a critical -- it is a critical element. But it isn't -- it isn't more or different -- differently critical than, say, political power.

And, Your Honor, under the Supreme Court's test for political powerlessness, we would submit to you, again, that the evidence is overwhelming that gays and lesbians are not politically powerless; notwithstanding Dr. Segura's testimony, which we believe advanced to the Court a test for judging political powerlessness that is -- that just simply has no basis in the legal principles that this Court is bound to apply.

The legal test from the Supreme Court was stated clearly in the Cleburne case as, does the group, there the mentally disabled, does the group have the ability to attract the attention of the lawmakers, of the decision-makers, attract the attention?

In *High Tech Gays*, in the Ninth Circuit the court

said that gays and lesbians -- 20 years ago, gays and lesbians are not politically powerless because they clearly have the ability to attract the attention of the lawmakers. And that was -- that was 20 years ago, Your Honor.

And since that time, as I think all of the plaintiffs' witnesses acknowledged, there's been just an extraordinary evolution -- I think Dr. Chauncey used the word "sea change" -- in the attitudes and the acceptance of gays and lesbians, and in their political power. Especially as reflected in the extraordinary difference in the legal landscape between today and 20 years ago with respect to protections.

THE COURT: Isn't that the most important factor? That is, this historical context?

In that women are hardly politically powerless. They are a majority of the population. Probably a majority of the voters. They have considerable political power. And yet a law which classifies women in some fashion differently from men is subject to strict scrutiny.

African Americans are hardly politically powerless, and they have had enormous political gains in the last fifty years or so. And yet laws that single them out from others would be subject to strict scrutiny.

Isn't it that it's the historical context that determines whether or not strict scrutiny is appropriate for a

particular classification, more than the political power factor or the immutability factor or these other factors? Isn't that really what decides the issue?

MR. COOPER: Your Honor, I think it is a -- it is an interesting, different and perhaps in some ways difficult question whether or not, for example, women, whose -- whose political power and whose positions of political -- and positions holding and exercising political power has changed so dramatically since *Reed against Reed* in 1971, and *Frontiero* in 1973, when the Court first concluded that gender is a quasi-suspect classification requiring an intermediate level of scrutiny.

At that time, when the Court had before it this question and whether or not political powerlessness of the group suggested that they needed extraordinary protection from the majoritarian political process that only the courts could provide, at that time, Your Honor, women were still effectively 50 percent of the population. But they held like 2 percent, 2 percent of the elected offices in this country, as the *Frontiero* court said. It was a minuscule percentage. I'm not sure it was 2.

THE COURT: Legislative facts, I assume.

MR. COOPER: Yes. Yes, Your Honor. Absolutely. That is not the case, certainly not in California, with respect to gays and lesbians.

So I do believe that the time that --

THE COURT: Isn't Proposition 8, and these other propositions in other states that limit marriage to opposite-sex couples, the DOMA statute that has been mentioned, the exclusion of gays and lesbians from military service for a long period of time, aren't all of those simply indicia of a long history of discrimination?

MR. COOPER: Your Honor, we would -- I want to be clear on this. We have never disputed and we have offered to stipulate that gays and lesbians have been the victims of a long and shameful history of discrimination.

We -- we have been bound to note that, thankfully, the situation today, in 2010, is not what it was even yesterday, let alone in 1990, when *High Tech Gays* was decided. Thankfully.

But -- but it isn't adequate -- the fact of a history of discrimination is not by itself sufficient to warrant heightened judicial scrutiny. The Court has always insisted, as well, on immutability of the characteristic and political powerlessness at the time that the issue comes forward to the Court.

The question of political powerlessness, yes, it would have been very different 20 -- it was very different 20 years ago, in *High Tech Gays*. Very different. But the Ninth Circuit, nonetheless, believed that gays and lesbians could

attract the attention of lawmakers even then. It's -- if that was true, it follows undebatably that it must be true today.

And the Court in the Cleburne case held that even though the mentally retarded had suffered a history of discrimination in many respects, and even though mental disability is immutable, the mentally disabled, nonetheless, couldn't qualify for heightened scrutiny, and only rational basis review applied on classifications drawn there, because the mentally disabled had political power. They could attract the attention of lawmakers.

And, obviously, they had to rely, to attract the attention of lawmakers, on allies, not on their own resources, their own -- their own political muscle and their own numbers, but had to rely upon -- upon others who allied with their interests to create that political power.

And, Your Honor, if they weren't politically powerless -- and that case was decided, I think, in 1987 or so, just a couple or two or three years before *High Tech Gays* was decided. So, Your Honor, if they didn't qualify, it was not a close call, I would submit to you, in the Ninth Circuit in *High Tech Gays*, and it is certainly not a close call today.

So our submission, Your Honor, is that with respect to heightened scrutiny under the Equal Protection Clause the courts that have uniformly decided this case against the application of heightened scrutiny have been correct.

THE COURT: I want to ask you about something, but go ahead.

MR. COOPER: Well, I'm trying mentally here to assess where we've been and what I have in front of me. But I'm here to try to respond as best I can to your questions, Your Honor.

THE COURT: Fair enough.

Mr. Blankenhorn. Why should Mr. Blankenhorn's testimony be admitted? Does he meet the Daubert standards?

MR. COOPER: Your Honor, I submit to you that he does.

By the way, I didn't understand your earlier ruling to be -- your ruling accepting him as an expert to have been provisional. But the Court has, I think in its questions, clarified that.

But I really don't have anything to add to the -- to the submission we made when the motion in limine was before you, or the -- or the voir dire took place, and the motion in limine.

I would say, Your Honor, that under the Ninth Circuit standard for the qualification of an expert, Mr. Blankenhorn is amply qualified. I believe amply qualified, I submit to you.

His professional life for 20 years has been devoted to the study of one subject, the subject of marriage, the subject of the potential -- and parenting structures, and the potential for harm to marriage from a variety of social

phenomenon, including, now, same-sex marriage.

He's written two books on this subject matter, which have been the product of deep study and wide study. Those books have been received with respect by recognized experts, including Dr. Lamb.

THE COURT: Were they peer reviewed?

MR. COOPER: The book?

THE COURT: Yes.

MR. COOPER: No, Your Honor. No.

THE COURT: In fact, am I correct that the only peer-review writing of Mr. Blankenhorn was not on the subject of this litigation?

MR. COOPER: Your Honor, as I stand here right now, I can't answer that.

THE COURT: All right. Fair enough.

MR. COOPER: I can't. But, Your Honor, I think the Ninth Circuit's standards for qualifying an expert are particularly liberal. And I don't think they require -- they certainly don't insist upon that an expert's publications have been peer reviewed. That's an element, but it's not -- it's not a mandatory one.

So, Your Honor, again, I didn't really come --

THE COURT: All right.

MR. COOPER: -- here prepared to particularly reargue that, but I do believe that the transcript provides all that I

had to say with respect that issue.

THE COURT: All right. Well, if in the cool light of the morning you want to submit anything further on that, I'll be happy to give you the opportunity.

MR. COOPER: Thank you. Appreciate that. Thank you very much.

Would the Court entertain -- well --

THE COURT: A break?

MR. COOPER: Maybe five minutes?

THE COURT: Sure. Of course. Why don't we take a little more than that, and resume at 10 minutes after the hour. And we'll finish Mr. Cooper for, oh, maybe 20 minutes, and then --

MR. COOPER: At most, Your Honor. At most. If I can hone in.

THE COURT: And whoever is going to rebut for the plaintiffs. Mr. Olson.

(Recess taken from 2:55 to 3:10 p.m.)

THE COURT: All right. Mr. Cooper, carry on.

MR. COOPER: I appreciate the Court's indulgence.

THE COURT: Well, it was a good idea.

MR. COOPER: Your Honor, I hope I have sharpened my thoughts a little bit here as my closing argument comes to a close.

I want to address an issue that the Court took up

with Mr. Olson, and that is the question whether or not this case would have been different if the California Supreme Court had not rendered its ruling when it did, and -- or maybe even stayed the application of its ruling in anticipation of the people's judgment on Proposition 8, as it was asked to do and as some other state supreme courts have done in a similar circumstance.

This is something on which I agree with Mr. Olson, if I understood his answer correctly.

I don't believe that that would make a difference. I don't believe that the fact that the California Supreme Court rendered its ruling and then it was effectively overturned by the vote of the people should make a difference, either, in the analysis of this case.

The Court, I think, asked Mr. Olson what kind of regime would we have if the constitutionality of California law prescribing the traditional definition of marriage would be -- would turn on whether or not the issue came to a federal court before or after the state court had decided the issue.

And, Your Honor, the United States Supreme Court has addressed precisely that circumstance, in a case called *Crawford v. Board of Education*. I want to share a passage from that case. It was from 1982. It upheld a California Constitutional amendment that reduced the remedial tools that were available to state courts in the school desegregation

area. It cut back on those remedial tools. And, in that case, the Court stated as follows:

"We reject the contention that once a state chooses to do more than the Fourteenth Amendment requires, it may never recede."

They "reject an interpretation of the Fourteenth Amendment so destructive of a state's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this court."

And, Your Honor, the Court went on and it was as though, I would submit to you, it had this case in mind when it further said:

"We would not interpret the Fourteenth Amendment to require the people of a state to adhere to a judicial construction of their state constitution when that constitution itself vests final authority in the people. In short, having gone beyond the requirements of the Federal Constitution, the state was free to return in part to the standard prevailing generally throughout the United States."

Your Honor, one of the points that the *Crawford* court makes --

THE COURT: What do we makes of that in this context, in this case?

MR. COOPER: That the -- essentially, the California Supreme Court's interpretation, which we would submit goes

beyond the Fourteenth Amendment, was something that the people of the state were empowered, essentially, to reverse. And that is especially true, that's especially true given the fact in California -- and *Crawford* came from the State of California -- the people of the state reserve into their own hands, as essentially the ultimate appellate tribunal in this state, the authority to review the decisions effectively of the California Supreme Court.

So, in a very real sense, the California Supreme Court's decision, particularly given that Proposition 8 was then effectively pending before the people, the California Supreme Court's decision was, in that context, no more final in the state of California than the California Court of Appeals decision was before that, which had upheld Proposition 8 by a closely-divided court.

It was reviewed by the ultimate judicial tribunal in this state. And the -- and the judgment of the Supreme Court in the *Crawford* case, it seems to me, is on the point here.

Your Honor, I want to address, I think finally here, the issue of whether or not there's a legitimate basis for people of this state, or anyone, to be concerned that redefining marriage, redefining the traditional understanding of marriage to include same-sex couples presents any basis for concern about the harm to marriage that may result, and to the interests that the institution of marriage has historically

been designed to advance.

Many people believe, Your Honor, that that harm will -- that such harm is threatened. But before analyzing this, I think we have to begin with two propositions. The first one is that redefining the institution will change the institution.

I think Mr. Blankenhorn really summed it up quite well. "If you change the definition of a thing, it's hard to imagine how it could have no impact on the thing itself."

The plaintiffs' experts acknowledged -- excuse me, the plaintiffs' expert and others who have thought and are expert in this field, have acknowledged that change will result.

Indeed, when same-sex marriage was legalized in Massachusetts, Professor Cott commented, "One could point to earlier watersheds, but perhaps none quite so explicit as this particular turning point."

Professor William Eskridge of Yale Law School, and a leading advocate for same-sex marriage, has said that, "Enlarging the concept of marriage to embrace same-sex couples would necessarily transform it into something new."

Joseph Raz, who is a professor at both Oxford University and Columbia Law School, and a same-sex marriage advocate, stated this:

"There can be no doubt that the recognition of gay

marriage will affect as great a transformation of the nature of marriage as that from polygamists to monogamists, or from arranged to unarranged marriage."

Same-sex activist, E.J. Graff, of the Brandeis University wrote:

"If same-sex marriage becomes legal, that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers."

That really goes to the heart of the concern of many people, that redefining it will -- will effectively divorce the institution of marriage from its historic core procreative purposes.

The second point, Your Honor, in addition that redefining it would inevitably change it, is that it is not possible to predict with certainty and confidence what that change will beget. It seems simply undeniable that a change that is as profound as this one, I would submit undeniably would be, would have some consequences.

But -- and the plaintiffs think that the consequences dominantly will be good consequences. And, again, we respect that point of view, but it's not something that they can possibly prove. And their own expert agrees. Professor Cott, again, said this:

"The consequences of same-sex marriage are impossible to know because no one predicts the future that accurately."

Andrew Cherlin, who's a sociologist at Johns Hopkins and a supporter of same-sex marriage, has written -- and you will remember his name from the trial, I'm sure. He was the subject of a lot of discussion when Mr. Blankenhorn was on the stand. He's written that:

"Predicting the future of marriage is risky business."

And he remarked about the unimpressive record of social science researchers in predicting cultural phenomenon. He says:

"Often and perhaps even most of the time, they get it right. But sometimes they are spectacularly wrong," as he said.

"For example, in the 1930s, every demographic expert in the United States" -- every demographic expert -- "confidently predicted a continuation of low birth rates of the Depression. No one forecast the baby boom that overtook them after World War I. Similarly, not a single 1950s or 1960s sociologist predicted the rise of cohabitation."

Two extraordinary sociological phenomenon, Your Honor, that no one had a clue was coming.

In this circumstance, and we would submit to you -- and I would add this because I have heard this and read this more than any three things, three words that I have ever spoken, "I don't know." I don't know how many times, Your

Honor, I had wished I could have those words back.

(Laughter)

THE COURT: Well --

MR. COOPER: Because, Your Honor, whatever your question is, I damn sure know, whatever it is.

(Laughter)

THE COURT: What do you make of Mr. Blankenhorn's statement that when same-sex marriage is legalized that America will be more American or will be closer to the American idea? That was your own expert.

MR. COOPER: Yes. Yes, Your Honor. Yes, it was.

And I think Mr. Blankenhorn was giving voice to a sentiment. And Mr. Blankenhorn shares that sentiment with many of my friends for the plaintiffs. And I think -- I think he shares that sentiment with many of my fellow Americans.

But he still believes that the threat of harm to a central and vital social institution, marriage, and to the interests that he believes that it serves, is too daunting to run the risks of gratifying what would otherwise, for Mr. Blankenhorn, favor, no doubt, as he has said, that, the -- the advent of same-sex marriage.

And, Your Honor, I believe that there are many who went in the polling place with that sentiment. That's my speculation. That's all it can be.

But as Rabbi Michael Learner has said, a well-known

person and certainly an advocate of same-sex marriage, there are millions of Americans who believe fervently in equality for gays and lesbians, but who draw the line at marriage. Their hearts are, as I would submit to you, pure, as pure as defined by the plaintiffs. But they still believe this is profound. This could be profound. It could -- it could portend some social consequences that would not be good ones.

And, Your Honor, that reality, the reality that I didn't know, because no one can know, Professor Cott doesn't know, Blankenhorn agreed, it's impossible to be completely sure about a prediction of future events. There has never been anyone who knows what tomorrow will bring. But if there's a legitimate and rational basis to be concerned about that, it couldn't be more rational for the people of California to say, We aren't going to run that risk, however we assess it. There's a risk. And we are going to wait. We want to see what happens in Massachusetts. We want to see what happens right here and elsewhere.

And in the -- and perhaps Mr. Olson and his clients whose sentiments, you know, are powerful will be able to convince their fellow Californians that, in fact, they're right and this is -- this should happen.

THE COURT: A disability, a classification, has been put on marriage which disables people who wish to marry others of the same-sex.

In order to disable certain citizens, do you not have to show a correlative benefit to others or to society?

And the "I don't know" or "We don't know where its going to lead" answer, is that enough to impose upon some citizens a restriction that others do not suffer from?

MR. COOPER: Your Honor, it is if there is a -- if there is a rational basis for that distinction, yes. I really think that really ends up being the bottom line on it.

If there is no -- in looking at whatever society's purposes are for marriage, and interests are for regulating and caring about marriage, if there's no basis on which to draw a distinction between one group and another, then the distinction can't stand.

But if there is a distinguishing characteristic that is relevant to one of those purposes, then the distinction can stand. And so this -- so, you know, as we have been -- has been our position from the beginning, we don't have to prove that including same-sex marriage within the definition or redefining marriage to include same-sex marriage would visit harm upon the institution and the interests that it serves.

We submit to you that is not something that is our burden. And I think that's what your correlative benefit question goes to.

Rather, we only have to prove that including same-sex couples would not serve those interests, either at all or not

to the same extent.

And we believe that, you know, the Supreme Court's case, in particular *Johnson against Robison*, is particularly specifically on the point of that, and says as much, essentially, in those terms.

Your Honor --

THE COURT: I'll let you wrap up.

MR. COOPER: Yes.

The California Court of Appeals, in the *Marriage Cases*, as I mentioned earlier and as the Court well knows, actually upheld the traditional definition of marriage in that case. And one of the -- one of the points it made, Your Honor, I think, really goes to the heart of the matter, and certainly to the heart of our submission, in that:

"It is the proper role of the legislature, not the Court, to fashion laws that serve competing public policies. The legislative process involves setting priorities, making difficult decisions, making imperfect decisions, and approaching problems incrementally."

That process is what is at work in this state. And it's at work elsewhere in this country.

And, as the court in Glucksberg said, there is a debate about the morals, the practicalities, and the wisdom of this issue that really goes to the nature of our culture. And the Constitution should allow that debate to go forward among

the people.

Thank you.

THE COURT: Thank you, Mr. Cooper.

Mr. Olson, why don't we just begin at that point that Mr. Cooper just left off with. And that is, in a sense, isn't the danger, perhaps not to you and perhaps not to your clients, but the danger to the position that you are taking is not that you're going to lose this case, either here or at the Court of Appeals or at the Supreme Court, but that you might win it?

And, as in other areas where the Supreme Court has ultimately constitutionalized something that touches upon highly-sensitive social issues, and taken that issue out of the political realm, that all that has happened is that the forces, the political forces that otherwise have been frustrated, have been generated and built up this pressure, and have, as in a subject matter that I'm sure you're familiar with, plagued our politics for 30 years, isn't the same danger here with this issue?

REBUTTAL ARGUMENT

MR. OLSON: I think the case that you're referring to has to do with abortion.

THE COURT: It does, indeed.

MR. OLSON: And the cases upon which we rely, in which the courts have responded to the needs of the civil rights of our citizens, have been entirely different cases.

They have relied on, as we do, fundamental, established constitutional law. Because the argument that Mr. Cooper makes is, essentially, the same argument that was made to the *Loving* court.

Which, by the way, the *Loving* court unanimously decided to strike down 14 or 15 miscegenation statutes. California had been the first, 20 years before that. When it got to the Supreme Court in *Loving*, it became unanimous.

And we stand here today thinking, how could that have been? In 1967, that's only 40 years ago, we would not -- we would have punished as a felony in the state of Virginia the President's mother and father if they had tried to travel there and be married.

The same argument was made to Martin Luther King, and to Thurgood Marshall, and to Ruth Bader Ginsburg. We're talking about fundamental constitutional rights. We are talking about treating people equally. That's not breaking new ground. We're talking about allowing people the same freedom to marry the person that they love, as we have the rest of our society.

Now, Mr. Cooper's argument is -- and I know he would like to take back these words, and I know why he would like to take back these words -- "We don't know. We don't have to prove anything. We don't have any evidence." Yet, he relies on persons -- he was reading from articles written by various

persons, just a few moments ago from this podium, who did not come into this courtroom and testify under oath and subject themselves to cross-examination by my colleague, Mr. Boies. Some of them didn't come into court because they had been cross-examined by Mr. Boies in their deposition.

(Laughter)

But you do have to know. You can't take away the rights of tens of thousands persons. Those rights were recognized and did exist in California. I submit that they should have existed before the California Supreme Court decision and before Proposition 8.

But you can't come in here and say, "I don't know, and I don't have to prove anything, and I don't need any evidence except for some people writing in books who won't come into court and subject themselves to the judicial process."

You asked a very good question. I was about to start with it. We talked about -- Mr. Cooper talks about procreation as the fundamental basis for marriage.

And you made the very good point. Well, don't you have to prove that Proposition 8 does something to protect procreation? The channeling, what Mr. Cooper calls the channeling function. Which is a new term for me today. That the State of California is in the marriage business in order to channel us. Or those who are unfortunate enough to live in California get to be channeled.

(Laughter)

But he does have to prove -- the *Romer* court specifically says this:

"Under the lowest standard of review, you have to prove that you have a legitimate interest and that the object," Proposition 8 in this case, "advances that legitimate interest."

So how does preventing same-sex couples from getting married advance the interest or protect the interest of procreation? They are not a threat to us.

What one single bit of evidence that they are a threat to the channeling function? If you accept that California has the right to do that in the first place. And I do not.

This is an individual constitutional right. And every Supreme Court decision says that it's a right of persons. Not the right of California to channel those of us who live in California into certain activities or in a certain way.

What you do have to do, what you do have to say that Proposition 8 somehow protects this thing that's going to happen.

Mr. Cooper finished up by saying, "Well, you have to admit my definition of traditional definition of marriage" -- which was not the definition in 14 Supreme Court decisions. It wasn't the definition of Dr. Cott. It wasn't the definition of

Dr. Peplau.

It -- we had expert witnesses that talked about the history of marriage going far back. Not 30 years, but far back into history what marriage has always been. The Supreme Court said older than the Bill of Rights, older than our political parties. That's not something new. It's marriage. It's not single-sex marriage or interracial marriage or anything like that.

Mr. Cooper says you have to accept the fact that -- "First of all, you have to accept my definition. It has to be between a man and a woman. Then, if you have a marriage between a man and a man or a woman and a woman, it will change the marriage."

Well, of course it will, because you started by defining the term that you wanted to define.

What we're talking about here is allowing individuals who have the same impulses, the same drives, the same desires as all of the rest of us, to have a relationship in harmony, stability, and to form a family and a neighborhood, all of those things that the Supreme Court talked about.

And, now, tell me how it helps the rest of the citizens of California to keep them out of the club. It doesn't.

Now, this so-called deinstitutionalization that Mr. Cooper has talked about a lot earlier, not so much today

but he has talked about it, the breakdown of marriage, it turns out that Mr. Blankenhorn talked about that during the trial, as well. And I want to just play -- I'm just going to do two more short clips from Mr. Blankenhorn.

Mr. Cooper wanted him to stay as an expert in this case. And we'll accept that because he turns out to be fairly helpful to us.

(Laughter)

But he talked about this deinstitutionalization of marriage. And if we can put the -- pull the right switches. Hear what he had to say.

(Video played in open court.)

MR. OLSON: And Dr. Cott pointed out the increase in marriage -- decrease in marriage, the increase in divorce, the increase in cohabitation happened all over the world between 1970 and 1985.

One of it was the institution of no-fault divorce. New York is considering no fault divorce now. It will be the fiftieth state to adopt no-fault divorce. So much for the channeling function in those fifty states.

But the point is that the so-called breakdown of certain aspects of marriage, as Mr. Blankenhorn admits and testifies under oath -- and, good for him, he did come here for cross-examination -- was a product of the breakdown of the heterosexual marriage. It didn't happen because someone in the

California -- the California Supreme Court decided that this is a right that cannot be withheld from individuals.

As far as raising children in a happy, stable environment, here is the last clip from Mr. Blankenhorn.

(Video played in open court.)

MR. OLSON: Well, there you have it.

(Laughter)

There's 37,000 children in same-sex families in California. According to Dr. Blankenhorn, they are better off, perhaps, than in opposite-sex marriages. Now, maybe they are not. But all of the evidence was that they would not be any worse. Several of the evidence -- much of the evidence suggested those children are in happy relationships. And Mr. Blankenhorn also suggested that when marriage is legalized between their parents, they will be better off still.

Now, it is important to say another word or two about procreation and whether it's a state's interest. I mentioned this before, but I want to emphasize it.

If it's the state's interest in procreation that animates the right to marriage, what if the state changes its mind?

There have been cultures throughout the world that have decided, "We've had too much procreation. We have too much population growth."

What if the State of California decided ten years

from now, "We don't want so many people in California?" Would they be able then -- I don't think anyone here would agree that the state could then cut off the right to marry. Because it is an individual right of privacy, liberty, association. And that's what it is.

So the state can't put the switch on and the switch off, because it's not the state's right. It's the individual's right.

We mentioned the 14 Supreme Court cases. None of them said, including the one that Mr. Cooper mentioned over and over again, the *Maynard* case, none of them said it's the state's interest in procreation.

And those cases included, where they were talking about the fundamental right to marriage, they talked about the fundamental right to marriage as an individual right in the context of contraception, which is not procreative, interracial marriage, which is neutral on the subject, divorce, which is not channeling somebody into a relationship, mandatory leave for public school teachers, family occupancy of a particular family home, prisoners, and so forth. Abortion even. Including the last case, *Lawrence vs. Texas*, which talked about it in the context of the rights of homosexuals to seek autonomy, the same right for these decisions just as a heterosexual person may do.

And Mr. Cooper twice or three times cited Justice

Stevens, the minority in the *Bowers vs. Hardwick* case. It turns out that Justice Stevens, in his dissent in *Bowers vs. Hardwick*, is quoted in the majority decision in *Lawrence vs. Texas*. So the same authority that Mr. Cooper was relying on says this, on page 578 of *Lawrence vs. Texas*. His dissent in Bowers is placed on the record and a part of the majority in *Lawrence.*

"Individual decisions by married persons concerning the intimacies of their physical relationship even when not intended to produce offspring are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

That's the oracle of Justice Stevens, confirming the point of all the witnesses that talked about that in this case, the expert witnesses, Dr. Cott, Dr. Peplau.

And so it isn't -- that is not the definition of the institution of marriage. And Proposition 8 isn't changing the institution of marriage. It is correcting a restriction based upon sex and sexual orientation.

You asked the question -- I'll be brief on this -- what happened in California or throughout the United States? Why have things changed with respect to -- why are we all of a sudden talking about same-sex marriage?

Several of our witnesses talked about the fact that

the history of discrimination, that no one denies, has improved. It's ameliorated. It's no longer against the law to work for the federal government. It's no longer against the law, in most places, to walk into a bar if you're homosexual.

The breakdown, thank God, of some of these barriers has changed people's attitudes. And I'm sure that contributes to people saying, now, well, if that's the case -- and psychiatrists have changed their view about homosexuality. People no longer think it's a disorder, or anything like that. They've explained, and people have begun to understand the differences between various members of society. And we've found out that all of those horrible taboos are not justified in fact. And the stories, some of which were in the ads which were supporting Proposition 8, are no longer true.

So, of course, people are thinking, well, if these are our fellow citizens and they don't present a risk to us, they are not damaging, they are just like us, why shouldn't we start talking about marriage?

You talked a bit about the *Loving* case and the change that occurred there. 41 states -- it wasn't just a southern thing. It wasn't just -- just in the south. It was 41 states, at one point, had had a prohibition on interracial marriage. And the proponents of the change in that case said this is going to change the traditional definition of marriage. It's going to weaken marriage. And the Supreme Court brushed that

aside.

THE COURT: But in 1967, it wasn't 41 states who had those restrictions.

MR. OLSON: No. It was about 14 or 15 in 1967.

THE COURT: 14 or 15.

MR. OLSON: But it had been, at one point, 41 states.

THE COURT: All right.

MR. OLSON: And California broke the barrier 20 years before *Loving*.

THE COURT: So, some 27 states removed the restriction?

MR. OLSON: And that first one, the ice was broken by a court decision --

THE COURT: I fully understand. But there was already a tide running, a political tide running with respect to interracial marriage. And, as Mr. Cooper duly commented about the Supreme Court, the Supreme Court took note of that.

Now, do we have a political tide here that's going to carry the Supreme Court?

MR. OLSON: I believe, Your Honor, that there is a political tide running. I think that people's eyes are being opened. People are becoming more understanding and tolerant. The polls tell us that. That isn't any secret.

But that does not justify a judge in a court to say, "I really need the polls to be just a few points higher. I

need someone to go out and take the temperature of the American public before I can break this barrier and break down this discrimination."

Because if they change it here in the next election in California, we still have Utah. We still have Missouri. We still have Montana. This case is going to be in a court. Some judge is going to have to decide what we've asked you to decide.

And there will never be a case with a more thorough presentation of the evidence. There will never be a case with such a wildly crazy system that California has. There will never be a case more like *Romer*, where the right existed and then it was taken away. There will never be a case against the background.

The Supreme Court really made that step that you are talking about, in *Lawrence vs. Texas*. And that overruled *Bowers vs. Hardwick*, which was only 20 years earlier. But that broke the barrier by saying that the behavior, the conduct between the individuals is a right of privacy, and it's protected by the Constitution.

And the right of privacy is the same right that we're talking about in the context of marriage. And I don't think that is justification for waiting any longer.

And, as I said, the most compelling thing that I have read on that subject was the arguments that were being made to

Martin Luther King saying, you know, "You ought to ease up. The people aren't ready for these kind of changes. There's going to be a backlash."

And his letter from a Birmingham jail explaining why he could not wait to press the civil rights of his fellow citizens is as compelling a statement on that subject that's ever been written.

Now, we talked a little bit about -- oh, Mr. Cooper came up with something that I hadn't really heard about until the closing argument in this case. I really don't remember the evidence. "The threat of irresponsible procreation."

I tried to figure out what that means, because the clients I represent don't present a threat of irresponsible procreation. They are interested in getting married to someone of the same sex. Mr. Cooper acknowledged they are not a threat of irresponsible procreation.

On the other hand, heterosexual couples who practice sexual behavior outside their marriage are a big threat to irresponsible procreation, if that's what it's all about. So if --

THE COURT: Heterosexuals that have led to the deinstitutionalization of marriage, and heterosexuals ...

(Simultaneous colloquy.)

MR. OLSON: ... that's right. And people will run out, and, yeah, "Well, that's it. That's it."

But we don't have the proof of it. And we don't know what will happen. And the experts said that it wouldn't happen. And the experts said that marriage would be stronger.

But the one thing we do know, unless you believe that, that allowing them into the institution, you're going to have all these heterosexual people running out and engaging in extramarital conduct, that is not going to happen. That is not the evidence in this case. And just because a lawyer says it in here, doesn't mean it's true.

We have evidence. We have a three-week trial that demonstrates it.

We had a short discussion about the motivations of the voters. You asked a question.

THE COURT: Right.

MR. OLSON: And was -- was the procreation protection goal a part of why the voters voted for Proposition 8?

Mr. Cooper cited two examples. Well, he cited three. The voter pamphlet. And I'm going to come back to that. He cited PX97 and PX27.

While I was sitting here, we looked at those exhibits. And they do have to do with men and women, but they don't mention procreation. So that wasn't put before the voters in those two documents.

I hope I'm not mistaken, but I'm quite certain that we looked at those, and that's the answer to that.

As far as the ballot, the official ballot pamphlet is concerned, here is the argument. This, I think, was Exhibit 1, Exhibit 1 in this case. And here's the -- there's -- there's about six paragraphs of arguments about why Proposition 8 should be adopted.

I just did a hurried look. I couldn't find the word "procreation." I could find the words "activist judges."

(Laughter)

But the words that I found the most were "protect our children." They are in there about five or six times in those four short paragraphs. Protect our children from learning that gay marriage is okay. That is to say that gay people are okay.

The motivation for the adoption, if there's one thing that would have more significance than anything else, all of the advertising, all of the advocacy or anything, it's the argument that the proponents made and put before the voters in the hands of every single voter.

I submit that that is the kind of discriminatory animus -- I'm not projecting an evil motive. I'm simply saying, when you're projecting on a group of people that they are different, and you don't want your children to know about them, you certainly don't want your children to think they are normal, that is what animated Proposition 8. And that's the best evidence of it.

Now, the trial. The trial -- we relied on a

definition of marriage, as I pointed out, that was supported by 14 Supreme Court decisions. I've said them over and over again. Privacy and association and liberty, and that sort of thing.

Mr. Cooper has been mentioning some Appellate Court decisions. With all due respect, the 122-year history from the United States Supreme Court outweighs that.

We have the evidence of the plaintiffs and some other witnesses during the trial talking about what marriage meant to them and what it meant to be denied marriage. That was pretty powerful evidence. We didn't have anything on the other side.

And then we had eight witnesses who are experts, the best ones we could find in the world, on the history of marriage, marriage itself, the stigma caused by discrimination, the emotional damage caused by discrimination on the basis of sexual orientation.

Immutability, we had all kinds of evidence about that. I don't know how my opponent can stand up in here and say that there was evidence on the other side. There wasn't evidence on the other side.

He said it's a matter of choice. Well, it is not a matter of choice. It may -- there -- some people may change, but it is a sexual identity that most people have or don't have one way or the other. And the experts testified that it wasn't an immutable characteristic. And political power, anyway.

That was all of the evidence in this case: Supreme Court decisions, testimony by the people affected by Proposition 8, and eight of the leading experts in the world.

And then there was Mr. Blankenhorn, who really sort of came over to our side.

(Laughter)

But, on the other side of that, if you discount Mr. Blankenhorn, there is nothing. This is a trial where all of the evidence was supported on one side.

With respect to immutability, Mr. Cooper quoted the *High Tech Gays* case from the Ninth Circuit. I must have heard that phrase six or eight times during his closing argument.

The *High Tech Gays* case was in 1990, I think it was. It was -- it relied on *Bowers vs. Hardwick*, which the Supreme Court specifically reversed and overruled.

Bowers vs. Hardwick isn't anything that you can rely on, in the Ninth Circuit or anywhere else. The *High Tech Gays* case was superseded by *Hernandez vs. Montreal*, which is a 1999 decision. And on page 1093, I'll just read one sentence.

"Sexual orientation and sexual identity are immutable. They are so fundamental to one's identity that a person should not be required to abandon them."

That, if we're going to have a Ninth Circuit precedent that would be guidance for Your Honor, that's the case.

The standard of review, I think I will skip that over. I think it's important for me to finish to talk about what is happening here.

What is happening here -- and it affects the standard of review because we think it's the Court's strict scrutiny or level of higher scrutiny. You asked Mr. Cooper the question: Isn't it a gender-based distinction? And he acknowledged that it is.

Your choice of your marital partner is dependent upon their gender. A certain number of people are disqualified from your freedom of choice because of their gender. That's gender discrimination. And the choice of gender is driven by sexual orientation, so it's discrimination on that basis.

And it does have to do with the -- if you believe that it's a fundamental right to marriage, not fundamental right to be married in June or fundamental right to be married to certain types of people, if it's a fundamental right to marriage, it's strict scrutiny.

But, in any event, you have to have a reason. And you have to have a reason that's real. Not a post hoc justification. Not speculation. Not built on stereotypes. And not hypothetical. That's what the Supreme Court decisions tell us.

We don't have that here. We have a decision that takes -- and there isn't any question -- a group of people who

have been victims of discrimination, who are a discreet minority, who have identifiable characteristics, their sexual orientation, and we want to foreclose them from participating in the most fundamental relationship in life.

Now, rational basis, strict scrutiny, or some kind of intermediate scrutiny tells you those are basic facts. You are discriminating against a group of people. You are causing them harm. You are excluding them from an important part of life. And you have to have a good reason for that.

And I submit, at the end of the day, "I don't know" and "I don't have to put any evidence," with all due respect to Mr. Cooper, does not cut it.

It does not cut it when you are taking away the constitutional rights, basic human rights and human decency from a large group of individuals, and you don't know why they are a threat to your definition of a particular institution.

The combination, as I said before, of those 14 Supreme Court decisions that tell us how valuable marriage is, the *Romer* case that says you can't take away rights and make them unconstitutional to -- impossible to recover except by amending your state constitution, and the *Lawrence* case that says that the sexual orientation of individuals in their private conduct is a protected right, you cannot then, in the face of all those decisions by the United States Supreme Court, say to these individuals, "We are going to take away the

constitutional right to liberty, privacy, association, and sexual intimacy that we tell you that you have, and then we will now use that as a basis for not allowing you the freedom to marry."

That is not acceptable. It's not acceptable under our Constitution. And Mr. Blankenhorn is absolutely right. The day that we end that, we will be more American.

THE COURT: Very well. Thank you, Mr. Olson. And with that, the matter will be submitted.

Thank you very much, counsel. I appreciate the advocacy on both sides. It's been splendid, both the written advocacy, oral advocacy, and the presentations that you've made.

So, if there is nothing further, Mr. Cooper?

MR. COOPER: Nothing.

MR. OLSON: No, Your Honor. Thank you so much.

THE COURT: Very well. The matter is submitted.

MR. COOPER: Thank you, Your Honor.

(At 4:00 p.m. the proceedings were adjourned.)

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I N D E X

CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and DEBRA L. PAS, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-2292 VRW, **Kristin M. Perry, et al. vs. Arnold Schwarzenegger, in his official capacity as Governor of California**, **et al**., were reported by us, certified shorthand reporters, and were thereafter transcribed under our direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

Debra L. Pas, CSR #11916, RMR CRR
U.S. Court Reporter

Wednesday, June 16, 2010