

Docket No. 10-16696 (L), 10-16751

In the
United States Court of Appeals
For the
Ninth Circuit

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
and
CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Intervenor-Appellee,
v.
ARNOLD SCHWARZENEGGAR,
in his official capacity as Governor of California, et al.,
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors,
and
COUNTY OF IMPERIAL, et al.,
Appellants.

*Appeal from a Decision of the United States District Court for the Northern District of California,
No. 09-CV-02292 · Honorable Vaughn R. Walker*

**BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION FOR RESEARCH
& THERAPY OF HOMOSEXUALITY (NARTH), IN SUPPORT OF THE
INTERVENING DEFENDANTS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that the *amicus* is not a corporation that issues stock or has a parent corporation that issues stock.

Dated: September 21, 2010

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Table of Contents

CORPORATE DISCLOSURE STATEMENT	i
Table of Authorities	iii
Interest of the <i>Amicus</i>	1
ARGUMENT	2
I. Research and reports from a century of experience suggest some people can and do experience changes in sexual orientation.	3
A. Historical research points to a real possibility of change in sexual orientation.	5
B. Recent studies support the idea that individuals can experience change in orientation.	13
C. Meta-analyses provide further evidence that change is possible.	15
D. Anecdotal reports and experiences of individuals seeking religious assistance also indicate the possibility of change.....	16
E. There are inevitable limitations in the existing research data but the studies cited here provide important evidence to rebut the claim of immutability...	19
II. Ample evidence presented to the court below supports the research findings that change in behavior, self-identification and orientation are possible.....	22
CONCLUSION	27
CERTIFICATE OF COMPLIANCE	28
CERTIFICATE OF SERVICE.....	29

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Interest of the *Amicus*

The National Association for the Research and Therapy of Homosexuality is a professional, scientific, organization that offers hope to those who struggle with unwanted homosexuality. As an organization, *amicus* disseminates educational information, conducts and collects scientific research, promotes effective therapeutic treatment, and provides referrals to those who seek its assistance.

The president of *amicus*, Dr. Julie Hamilton, has explained: “NARTH's leaders value and esteem both those who have embraced homosexual identities as well as those who seek change of orientation or identity. Many NARTH members originally became involved with NARTH because they had clients who needed help, and they had compassion and a desire to assist those clients in meeting their goals, even if doing so would bring criticism from others. Some became involved with NARTH because of their own personal experience with homosexuality, and others became involved out of love for their family members who struggled with issues of gender and sexual orientation. Other members simply feel a scientific and ethical responsibility to present what science can and cannot say about homosexuality as well as to foster psychological care consistent with the best outcomes for those who seek it. Such care should be extended to all individuals, regardless of their sexual orientation. In the spirit of diversity and anchored to the

ethical principles of client self-determination and client autonomy¹, NARTH members are committed to providing scientifically grounded psychological care rendered in the context of compassion.”

Amicus seeks to provide information to this Court bearing on its decision of whether to endorse a legal declaration that sexual orientation is a fixed and immutable characteristic, similar to race or gender, that would justify extending strict scrutiny to classifications on the basis of sexual orientation.

This brief is filed pursuant to consent of Counsel of Record for all parties.

ARGUMENT

In a finding of fact meant to support the conclusion that sexual orientation classifications invoke strict scrutiny, the court below averred: “No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.” Doc. 708 at 74 (Finding of Fact #46). Presumably, this finding is meant to establish the idea that sexual orientation is immutable. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (using the term “immutable” in describing factors for invoking heightened scrutiny).

¹ See American Psychological Association, *Ethical Principles of Psychology and Code of Conduct* 57 AMERICAN PSYCHOLOGIST 1060 (2002), Principle E (“psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination”).

Amicus respectfully suggests that this finding constitutes plain error. First, it is not supported by the evidence cited by the court below. Second, it ignores research and reports in the relevant literature. This research is collected in a treatise published by *amicus*. James E. Phelan, et al., *What Research Shows* 1 JOURNAL OF HUMAN SEXUALITY 1 (NARTH 2009). Its key findings relevant to the question of immutability will be summarized in this brief. The full treatise can be consulted for further information about the studies and reports described here.

I.

Research and reports from a century of experience suggest some people can and do experience changes in sexual orientation.

The first significant problem with the suggestion of immutability by the court below is that it is contradicted by the very evidence cited in its support. This is clear from the court's descriptions of, and quotes from, that evidence.

Although not carefully discussed by the court below, there is some evidence that change in orientation can occur without specific intervention, or spontaneously. A 2007 literature review found evidence of sexual fluidity: "A summary of these studies . . . is that about half of those with exclusive SSA [same-sex attraction] were once bisexual or even heterosexual. And about the same number changed from being exclusively SSA to bisexual or even heterosexual"²

² N.E. WHITEHEAD & B.K. WHITEHEAD, MY GENES MADE ME DO IT! A SCIENTIFIC LOOK AT SEXUAL ORIENTATION, chapter 12, p. 3 (2nd ed. 2007) at <http://www.mygenes.co.nz>.

An earlier study reported that approximately 2 percent of the heterosexual population they surveyed had reported having been exclusively homosexual at an earlier time.³ The study also found that those who report themselves as homosexuals showed variety in their sexual experiences when measured on a continuum: 65 percent of homosexual men and 84 percent of homosexual women reported having had heterosexual intercourse.⁴ This is consistent with other studies.⁵ One study reported that seeing an attractive woman “intensively” excited 13 percent of a sample of homosexual men.⁶ The author of another study reported that as many as half of the lesbians whom she knew had reportedly been heterosexual until middle age.⁷ In the last decade Dr. Lisa Diamond reported significant longitudinal data that clearly shows the fluidity of the sexual orientation of women.⁸ Dr. Diamond’s research suggests an increasing number of women insist

³ A. P. BELL, M.S. WEINBERG, S.A. HAMMERSMITH, *SEXUAL PREFERENCE* (1981).

⁴ *Id.*

⁵ R. Warczok, *Correlates of Sexual Orientation in German Democratic Republic* 17 *ARCHIVES OF SEXUAL BEHAVIOR* 179 (1988) (citing Paczensky and Dannecker & Reiche).

⁶ *Id.* at 181.

⁷ WHITEHEAD & WHITEHEAD (citing Tanner).

⁸ Lisa M. Diamond (2003). *Was it a phase? Young women’s relinquishment of lesbian/bisexual identities over a 5-year period* 84 *J. OF PERSONALITY AND SOCIAL PSYCHOLOGY* 352 (2003); Lisa M. Diamond, *What we got wrong about sexual identity development: Unexpected findings from a longitudinal study of young women* in *SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY AND DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE* 79 (A. M. Omoto & H. S. Kurtzman, eds. 2005); Lisa M. Diamond, *A new view of lesbian subtypes: Stable versus fluid identity trajectories over an 8-year period* 29 *PSYCHOLOGY OF WOMEN*

that their self-identity as lesbians is in fact a personal choice, rather than a biological constraint.⁹ One study notes that “variability in the emergence and expression of female same-sex desire during the life course is normative rather than exceptional.”¹⁰ Also, “[c]ontrary to the notion that most sexual minorities undergo a one-time discovery of their true identities, 50% of the respondents had changed their identity label more than once since first relinquishing their heterosexual identity.”¹¹ In another study, the author notes that “[h]alf of the young women in this sample relinquished the first sexual-minority identity they adopted.”¹²

A.

Historical research points to a real possibility of change in sexual orientation.

While no published study has sought a random population from which to assess treatment success rates for clients seeking to change their unwanted homosexuality and develop their heterosexual potential, such treatment has been widely documented in the literature since the late 19th century. Clinicians and

QUARTERLY 119 (2005); Lisa M. Diamond, *Introduction: In search of good sexual-development pathways for adolescent girls* 12 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 1 (2006); Lisa M. Diamond, *Female bisexuality from adolescence to adulthood: Results from a 10-year longitudinal study* 44 DEVELOPMENTAL PSYCHOLOGY 5 (2008).

⁹ Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women* 56 JOURNAL OF SOCIAL ISSUES 297 (2000); Lisa M. Diamond, *Sexual Identity, Attractions, and Behavior Among Young Sexual-Minority Women Over a 2-Year Period* 36 DEVELOPMENTAL PSYCHOLOGY 241 (2000).

¹⁰ Diamond & Savin-Williams at 298.

¹¹ *Id.* at 301.

¹² Diamond at 247 (2000).

researchers who have used or investigated a variety of reorientation approaches have reported positive outcomes.

The 2009 article by James Phelan referenced above provides an exhaustive catalogue of the relevant historical research in this area. We briefly refer to the leading historical studies below in chronological order.

Late-Nineteenth Century

In 1882, Charcot published a paper titled *Inversion of the Genital Sense*. Already famous for his treatment of hysterics through hypnotic induction, Charcot applied the same type of therapy to homosexual men. He reported success because “the homosexual became heterosexual.”¹³

In 1892, Albert von Schrenck-Notzing reported success in treating twenty patients who had homosexual desires, behaviors, or both.¹⁴ Of the 32 cases on which he reported (some did not involve same-sex attractions), 12 (37.5 percent) were classified as “cured.”¹⁵ The term *cured* meant that patients were completely

¹³ W.R. Horstman, *Homosexuality and psychopathology: A study of the MMPI responses of homosexual and heterosexual male college students* (Unpublished doctoral dissertation, University of Oregon, Eugene 1972), p. 5.

¹⁴ A. VON SCHRENCK-NOTZING THE THERAPY OF SUGGESTION FOR PATHOLOGICAL APPEARANCES OF THE SEX DRIVE (1892).

¹⁵ M. Prince, *Sexual perversions or vice? A pathological and therapeutic inquiry* 25 J. OF NERVOUS & MENTAL DISEASE 237, 256 (1898).

able to “combat fixed ideas [about homosexuality], deepen a sense of duty, self-control, and right-mindedness.”¹⁶

1930s

Though Sigmund Freud did not condemn homosexuality outright and thought change in orientation not always necessary, he reported that such was possible with strong motivation.¹⁷ Some who have used psychoanalysis in treatment subsequently reported cases of change. Wilhelm Stekel reported four cases of clients who later happily married.¹⁸

1950s

Frank Caprio reported that “many patients of mine, who were former lesbians, have communicated long after treatment was terminated . . . that they are convinced they will never return to a homosexual way of life.”¹⁹ Edmund Bergler reported that in his 30 years of practice, he had successfully used psychoanalysis to help approximately 100 homosexuals change their orientation, and that a real shift toward *genuine heterosexuality* had indeed occurred, reflecting a 33 percent success rate with success understood as the patients being able to function as

¹⁶ Id at 255.

¹⁷ SIGMUND FREUD, *BEYOND THE PLEASURE PRINCIPLE*, vol. 18 (1920).

¹⁸ W. Stekel, *Is homosexuality curable?* 17 *PSYCHOANALYTIC REVIEW* 443 (1930).

¹⁹ F.S. CAPRIO, *FEMALE HOMOSEXUALITY: A PSYCHODYNAMIC STUDY OF LESBIANISM* 299 (1954) .

heterosexuals, whereas before treatment they were exclusively homosexual.²⁰

Ludwig Eidelberg reported that two out of five cases that he had been involved with were still successfully functioning as heterosexuals three years after treatment. Albert Ellis concluded that those who engaged in psychoanalytically oriented psychotherapy could be “distinctly helped to achieve a satisfactory heterosexual orientation” if they sought such change. In a sample of 40 individual cases, Ellis concluded that 18 men and 12 women had outcomes of either “distinct or considerable improvement.” This meant that they began to lose their fears of the other sex, to enjoy effective heterosexual relations, and to lose their obsessive thoughts about, or compulsive, homosexual activity. Not all patients were identified as exclusively homosexual prior to treatment. Six of the men and 6 of the women had moderate or considerable heterosexual activity prior to treatment, whereas the rest had little or none.²¹

There are many other examples. Clifford Allen described 14 people who he considered “cured” of homosexuality as indicated by reports ranging from complete attraction change to an increase in opposite-sex attraction though accompanied by some same-sex attractions.²² J.A. Hadfield, described nine men who changed their attractions and followed up with four who said they “were

²⁰ E. BERGLER, *HOMOSEXUALITY: DISEASE OR WAY OF LIFE?* (1956).

²¹ A. Ellis, *The effectiveness of psychotherapy with individuals who have severe homosexual problems* 20 *J. OF CONSULTING PSYCHOLOGY* 191, 192-194 (1956).

²² C. BERG & C. ALLEN *THE PROBLEM OF HOMOSEXUALITY* (1958).

completely cured . . . with no further episodes.”²³ Anna Freud also reported four cases in which homosexual clients “became heterosexual” as a result of treatment.²⁴ Others reported small numbers of clients who experienced change.²⁵

1960s

R. Monroe and R. Enelow reported treating seven men over a period ranging from three to 18 months with follow-up five years later and said three of the seven successfully changed.²⁶ Irving Bieber and colleagues conducted research on two samples of 106 individuals and reported that after treatment 29 (27 percent) became exclusively heterosexual.²⁷ Of the 15 who maintained contact five years later, all remained heterosexual.²⁸ In 1979, Dr. Bieber reported that since the original study, experience with more than 1,000 homosexual men supported the original findings and that even 20 years later, an unspecified number of patients

²³ J.A. Hadfield, *The cure of homosexuality* 1 BRITISH MEDICAL J. 1323, 1324 (1958).

²⁴ Anna Freud, *Studies in Passivity: Part I Notes on Homosexuality* in THE WRITINGS OF ANNA FREUD, volume 4, 251 (1968).

²⁵ L.S. LONDON & F.S. CAPRIO, SEXUAL DEVIATIONS: A PSYCHODYNAMIC APPROACH (1950); C. Allen, *On the Cure of Homosexuality II* 5 INT’L. J. SEXOLOGY 139 (1952).

²⁶ R.R. Monroe & R.G. Enelow, *The Therapeutic Motivation in Male Homosexuals* 14 AM. J. PSYCHOTHERAPY 474 (1960).

²⁷ I. BIEBER, ET AL., HOMOSEXUALITY: A PSYCHOANALYTIC STUDY (1962).

²⁸ I. Bieber, *Sexual Deviations II: Homosexuality* in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (A.M. Freedman & H.I. Kaplan, eds., 1967).

were exclusively heterosexual.²⁹ S. Coates described 45 homosexual patients and found seven (16 percent) reported no active homosexual behaviors.³⁰ Daniel Cappon described his clinical work with 150 patients and reported a 50 percent change rate for men and 30 percent rate for women.³¹ Peter Mayerson and Harold Lief studied 14 men and five women who had sought treatment related to homosexual problems and found that, after treatment, 47 percent identified themselves as exclusively heterosexual.³² Elizabeth Mintz reported three of ten men who sought psychoanalysis who identified themselves, after treatment, as exclusively heterosexual.³³

1970s

Charles Socarides reported that over a decade 20 of 44 patients (45 percent) he treated developed full “heterosexual functioning.”³⁴ Jolande Jacobi reported treating 60 patients, six (10 percent) of whom made a satisfying transformation to

²⁹ I. Bieber & T.B. Bieber, *Male Homosexuality* 24 CANADIAN J. PSYCHIATRY 409 (1979).

³⁰ S. Coates, *Homosexuality and the Rorschach Test* 35 BRITISH J. MEDICAL PSYCHOLOGY 177 (1962).

³¹ D. CAPPON, TOWARD AN UNDERSTANDING OF HOMOSEXUALITY (1965).

³² P. Mayerson & H. Lief, *Psychotherapy of Homosexuals: A Follow-Up Study in SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY* 302 (J. Marmor ed., 1965).

³³ E. Mintz, *Overt Male Homosexuals in Combined Group and Individual Treatment* 30 J. CONSULTING PSYCHOLOGY 193 (1966).

³⁴ CHARLES W. SOCARIDES, HOMOSEXUALITY: PSYCHOANALYTIC THERAPY 406 (1978).

heterosexuality.³⁵ An unpublished report of the Central Fact-Gathering Committee of the American Psychoanalytic Association was one of the first surveys that compiled results of treatment of unwanted homosexuality. Of those who completed treatment (total number not reported), 8 were cured and 13 manifest some change in their sexual orientations. Another 16 who did not complete treatment also experiences some change in their sexual orientation. In the 8 reported cures, follow-up showed that the patients had assumed full heterosexual roles and functioning.³⁶

1980s

In 1988, Elaine Siegel described treating 12 women and reported more than half became “fully heterosexual.”³⁷

A number of reports of group therapy disclose success in changing orientation. Samuel Hadden reported a 38 percent success rate after treating 32 homosexuals in group therapy.³⁸ Lee Birk, Elizabeth Miller and Bertram Cohler reported a similar success rate³⁹ as did at least two other reports.⁴⁰ There are other

³⁵ J. Jacobi, *Case of Homosexuality* 154 J. ANALYTICAL PSYCHOLOGY 48 (1969).

³⁶ SOCARIDES (1978).

³⁷ E.V. SIEGEL, *FEMALE HOMOSEXUALITY: CHOICE WITHOUT VOLITION* (1988).

³⁸ S.B. Hadden, *Treatment of Male Homosexuals in Groups* 16 INT’L. J. OF GROUP PSYCHOTHERAPY 13 (1966); S.B. Hadden, *Group Therapy for Homosexuals* 5 MEDICAL ASPECTS OF HUMAN SEXUALITY 116 (1971).

³⁹ L. Birk, E. Miller & B. Cohler, *Group Psychotherapy for Homosexual Men* 128 ACTA PSYCHIATRICA SCANDINAVICA 1 (1970).

reports of varying rates of success with group therapy.⁴¹ R.A. Truax and G. Tournay described group treatment of 30 patients in a comparison group with 20 untreated individuals and reported increased heterosexual orientation, decreased homosexual preoccupation, and changes in sexual behavior.⁴² Lee Birk reported that of 66 patients treated, 85 percent experienced “at least partial heterosexual shifts,” while 52 percent experienced “striking, nearly complete heterosexual shifts.”⁴³ He later reported that 10 of 14 (71 percent) exclusively homosexual men in treatment for more than two and a half years were married to women at follow-up.⁴⁴

⁴⁰ T.B. Bieber, *Group Therapy with Homosexuals* in COMPREHENSIVE GROUP PSYCHOTHERAPY (H.I. Kaplan & B.J. Sadock 1971); F.S. Pittman & C.D. De Young, *The Treatment of Homosexuals in Heterosexual Groups* 21 INT’L. J. GROUP PSYCHOTHERAPY 62 (1971).

⁴¹ M.W. Ross & F. Mendelsohn, *Homosexuality in College* 80 AM. MED. ASSOC. ARCHIVES OF NEUROLOGY AND PSYCHIATRY 253 (1958); J.C. Finny, *Homosexuality Treated by Combined Psychotherapy* 6 J. SOCIAL THERAPY 27 (1960); R.A. Buki, *A Treatment Program for Homosexuals* 25 DISEASES OF THE NERVOUS SYSTEM 304 (1964); E. Mintz, *Overt Male Homosexuals in Combined Group and Individual Treatment* 30 J. CONSULTING PSYCHOLOGY 193 (1966); P.M. Miller, J.B. Bradley, R.S. Gross & G. Wood, *Review of Homosexuality Research (1960-1966) and Some Implications for Treatment* 5 PSYCHOTHERAPY: THEORY, RESEARCH & PRACTICE 3 (1968).

⁴² R.A. Truax & G. Tournay, *Male Homosexuals in Group Therapy: A Controlled Study* 32 DISEASES OF THE NERVOUS SYSTEM 707 (1971).

⁴³ L. Birk, *Group Psychotherapy for Men Who Are Homosexual* 1 J. OF SEX AND MARITAL THERAPY 29, 41 (1974).

⁴⁴ L. Birk, *The Myth of Classical Homosexuality: Views of a Behavioral Psychotherapist* in HOMOSEXUAL BEHAVIOR 376 (J. Marmor, ed., 1980).

B.

Recent studies support the idea that individuals can experience change in orientation.

Elan Karten's 2006 dissertation studied 117 men who had participated in some type of reorientation activity and found that meaningful sexual reorientation had occurred.⁴⁵ Nicholas Cummings, former APA president, estimates 2,400 clients of the Kaiser-Permanente Health Maintenance Organization successfully reoriented their sexuality to heterosexuality over a 20 year period.⁴⁶ A survey of 285 anonymous members of the American Psychoanalytic Association conducted by Houston MacIntosh revealed that of 1,215 homosexual patients analyzed by those members, 23 percent changed from homosexuality to heterosexuality and 84 percent received significant therapeutic benefits.⁴⁷

More recent reports have indicated a significant possibility of change.

Joseph Nicolosi surveyed 689 men and 193 women who had participated in some

⁴⁵ E. Karten, *Sexual Reorientation Efforts in Dissatisfied Same-Sex Attracted Men: What Does It Take to Change*, unpublished doctoral dissertation, Fordham University, New York (2006).

⁴⁶ Nicholas Cummings, *Former APA President Dr. Nicholas Cummings Describes His Work with SSA Clients* (2007) at <http://www.narth.com/docs/cummings.html>.

⁴⁷ H. MacIntosh, *Attitudes and Experiences of Psychoanalysis of in Analyzing Homosexual Patients* 42 J. AM. PSYCHOANALYTIC ASSOC. 1183 (1994).

kind of change therapy and found 34.3 percent reported a shift from a homosexual orientation to an exclusively or almost exclusively heterosexual orientation.⁴⁸

Robert Spitzer, professor of psychiatry at Columbia University and one of the individuals prominently involved in changing the *Diagnostic and Statistical Manual* of the American Psychiatric Association to de-list homosexuality as a mental disorder, interviewed 143 men and 57 women who had participated in sexual reorientation treatment and who considered their therapeutic and/or religiously-mediated experiences successful. In a peer reviewed study he found their mean scores in a scale indicated a shift from the “very high homosexual range” before attempting reorientation to the “very high heterosexual range” after having attempted reorientation. No subjects reported exclusive same-sex attractions, and 17 percent of the men and 54 percent of the women reported exclusive opposite-sex attraction.⁴⁹ In announcing the results, Dr. Spitzer had said “Like most psychiatrists I thought that homosexual behavior could be resisted, but sexual orientation could not be changed. I now believe that's untrue--some people

⁴⁸ Joseph Nicolosi, A. Dean Byrd & Richard W. Potts, *Retrospective Self-Reports of Changes in Homosexual Orientation: A Consumer Survey of Conversion Therapy Clients* 86 PSYCHOLOGICAL REPORTS 1071 (2000).

⁴⁹ Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change From Homosexual to Heterosexual Orientation* 32 ARCHIVES OF SEXUAL BEHAVIOR 403 (2003).

can and do change.”⁵⁰ Scott Hershberger, a distinguished scholar and statistician, subjected Spitzer’s results to additional scrutiny and concluded the “orderly, law-like pattern of changes in homosexual behavior, homosexual self-identification and fantasy observed in Spitzer’s study is strong evidence that reparative therapy can assist individuals in changing their homosexual orientation to a heterosexual orientation.”⁵¹

C.

Meta-analyses provide further evidence that change is possible.

A number of meta-analyses (articles that review numerous studies on a subject and report the combined results) also disclose reports of change. J.A. Clippinger demonstrated that of 785 homosexuals treated, 307 (40 percent) either significantly improved in the direction of their desired goal, or had made at least some shift toward heterosexuality.⁵² E. C. James concluded that when the results of all research studies before 1978 were combined, approximately 35 percent of the homosexual clients had shifted to heterosexuality, 27 percent had improved, and 37

⁵⁰ *Prominent Psychiatrist Announces New Study Results: “Some Gays Can Change”*, NARTH at <http://www.narth.com/docs/spitzer2.html>.

⁵¹ Scott L. Hershberger, *Guttman Scalability Confirms the Effectiveness of Reparative Therapy* in EX-GAY RESEARCH AND ITS RELATION TO SCIENCE 137, 140 (J. Drescher & K. Zucker, eds., 2006) .

⁵² J.A. Clippinger, *Homosexuality Can Be Cured* 20 CORRECTIVE & SOCIAL PSYCHIATRY & J. BEHAVIORAL TECHNOLOGY, METHODS & THERAPY 15 (1974).

percent had neither changed nor improved.⁵³ Drs. Jones and Yarhouse used meta-analysis to review 30 studies conducted between the years 1954 and 1994 and found that of the 327 total subjects from all the studies, 108 (33 percent) were reported to have made at least some heterosexual shift. In an analysis of 17 studies, Rob Goetze found that a total of 44 subjects who had been exclusively or predominately homosexual had experienced a shift toward heterosexual adjustment.⁵⁴

D.

Anecdotal reports and experiences of individuals seeking religious assistance also indicate the possibility of change.

In addition to these reports, a number of individuals have shared their personal experience of change in sexual orientation.⁵⁵ Others have staged protests at professional gatherings to draw attention to their experience of change.⁵⁶

⁵³ E.C. James, *Treatment of Homosexuality: A Reanalysis and Synthesis of Outcome Studies*, unpublished doctoral dissertation, Brigham Young University, Provo, Utah (1978).

⁵⁴ R.M. Goetze, *Homosexuality and the Possibility of Change: A Review of 17 Published Studies*, New Direction Ministries of Canada (1997) at <http://www.newdirection.ca/research/index.html>.

⁵⁵ W. AARON, STRAIGHT: A HETEROSEXUAL TALKS ABOUT HIS HOMOSEXUAL PAST (1972); F. WORTHEN, STEPS OUT OF HOMOSEXUALITY (1984); J. KONRAD, YOU DON'T HAVE TO BE GAY (1987); A. COMISKEY, PURSUING SEXUAL WHOLENESS (1988); L.R. Judkins, *Someone to Devour* 128 ALLIANCE LIFE: A JOURNAL OF CHRISTIAN LIFE & MISSIONS 8 (1993); J. Breedlove, V. Plechash & D. Davis, *Once Gay, Always Gay?* FOCUS ON THE FAMILY 2 (March 1994); G. Strong, *Once I Was Gay and What I Did to Change* 85 SOCIAL JUSTICE REV. 75 (1994); B. DAVIES & L. RENTZEL, COMING OUT OF HOMOSEXUALITY: NEW FREEDOM FOR MEN AND

An important agent of change is a religiously-mediated ministry. E.M. Pattison and M.L. Pattison reported change for 11 individuals who participated in a Pentecostal fellowship.⁵⁷ Roger Mesmer surveyed more than 100 people participating in a ministry of former gays and lesbians. He found that 41 percent of them had achieved a shift toward heterosexual adaptation.⁵⁸ Exodus International—a parent Christian ministry for a coalition of more than 100 ministries and Christian counselors worldwide—offers individual, group, and educational therapy. It reported that 85 percent of the people it served experienced sexual reorientation.⁵⁹ Christy Ponticelli conducted a qualitative study and concluded that there was more evidence for change in the women’s sexual identities than in actual orientation from Exodus programs as have other studies.⁶⁰

WOMEN (1993); A. GOLDBERG, *LIGHT IN THE CLOSET: TORAH, HOMOSEXUALITY AND THE POWER TO CHANGE* (2008).

⁵⁶ M. Davis, *Protesters Blast APA’s Position* PHILADELPHIA INQUIRER, B4 (May 22, 1994); P. Gorner, *Analysts Drop Gay Therapy Discussion* CHICAGO TRIBUNE A1 (May 18, 2000); M. Foust, *Ex-Homosexuals Protest APA’s Position on Homosexuality* BP NEWS (Aug. 14, 2006) at <http://www.sbc Baptist Press.org/bpnews.asp?ID=23786>.

⁵⁷ E.M. Pattison & M.L. Pattison, “*Ex Gays*”: *Religiously Mediated Change in Homosexuals* 137 AM. J. PSYCHIATRY 1553 (1980).

⁵⁸ R. Mesmer, *Homosexuals Who Change Lifestyles* 14 J. CHRISTIAN HEALING 12 (1992).

⁵⁹ W. Consiglio, *Homosexual No More: Ministry and Therapy for the Recovering Homosexual* 20 SOCIAL WORK & CHRISTIANITY: AN INT’L. J. 46 (1993).

⁶⁰ C.M. Ponticelli, *Crafting Stories of Identity Reconstruction* 62 SOCIAL PSYCHOLOGY Q. 157 (1999); C.M. Ponticelli, *The Spiritual Warfare of Exodus: A Post Positivist Research Adventure* 2 QUALITATIVE INQUIRY 198 (1996); M. Wolkomir, *The Social Environment of Identify Making*, paper presented at the

A survey of 248 men and women at an Exodus International Annual Conference participants rated their current sexual orientation as significantly more heterosexual than when they were 18 years of age.⁶¹ A follow-up study of 140 of the original participants found that 61 percent of men and 71 percent of women had maintained abstinence from same-sex sexual contact in the last year of the study, 29 percent of this sample indicated that they had changed their sexual orientation to exclusively heterosexual, and 65 percent reported that they were still in the process of change.⁶² Jeff Robinson interviewed seven men participating in Evergreen International, a Latter-day Saint (LDS) program for people seeking to change their homosexual orientation, and found positive change” in all the subjects—all married men who sought to maintain their marriages.⁶³

Eighty-six male participants in a “Journey into Manhood” retreat sponsored by an organization called People Can Change reported their feelings before and after the event. The post-retreat report indicated a six percent increase in the men

meeting of the American Sociological Association (1996); M. WOLKOMIR, *BE NOT DECEIVED: THE SACRED AND SEXUAL STRUGGLES OF GAY AND EX-GAY CHRISTIAN MEN* (2006); T. ERZEN, *STRAIGHT TO JESUS: SEXUAL AND CHRISTIAN CONVERSIONS IN THE EX-GAY MOVEMENT* (2006).

⁶¹ K.W. Schaeffer, et al., *Religiously Motivated Sexual Orientation Change* 19 J. PSYCHOLOGY & CHRISTIANITY 61 (2000).

⁶² K.W. Schaeffer, et al., *Religiously Motivated Sexual Orientation Change: A Follow-Up Study* 27 J. PSYCHOLOGY & THEOLOGY 329 (1999).

⁶³ J. W. Robinson, *Understanding the Meaning of Change for Married Latter-day Saint Men with Histories of Homosexual Activity*, unpublished doctoral dissertation, Brigham Young University, Provo, Utah (1998).

who reported sexual feelings as “exclusively heterosexual, with no homosexual interest at all,” and a 13 percent increase in men who reported feelings that were “primarily heterosexual, but with some slight homosexual feelings or interests.” There was also a 4 percent decrease in the number of men who described themselves before the weekend as exclusively homosexual with no heterosexual feelings or interests but who shifted to another category, describing themselves as having at least slight heterosexual feelings or interests after the retreat.

Stanton Jones and Mark Yarhouse reported on a study of 77 men and women who had sought help through Exodus International and found that 15 percent reported “considerable resolution of homosexual orientation issues and substantial conversion to heterosexual attraction,” and 23 percent reported that “homosexual attraction is either missing or present only incidentally and in a way that does not seem to bring about distress.” The group of participants Drs. Jones and Yarhouse predicted least likely to change, those classified as “truly gay,” actually changed the most.⁶⁴

E.

There are inevitable limitations in the existing research data but the studies cited here provide important evidence to rebut the claim of immutability.

Amicus acknowledge unavoidable limitations in the body of scientific literature described in this brief. The first set of limitations is definitional. The

⁶⁴ S.L. JONES & M.A. YARHOUSE, EX-GAYS? A LONGITUDINAL STUDY OF RELIGIOUSLY MEDIATED CHANGE IN SEXUAL ORIENTATION (2007).

second set is methodological. Although they do indicate a need for caution and further study, the limitations do not extinguish the probative value of the research.

The primary definitional limitation is the lack of precision in the concept of sexual orientation. Indeed, this concept is generally not clearly defined or understood.⁶⁵ It is characterized by a number of factors such as self-identification, thoughts, feelings and behavior.⁶⁶ Thus, a person's self-identified orientation may be at odds with other factors such as that person's feelings or behavior. The best way to understand sexual orientation is to think of it as a continuum rather than a discrete category.

The second differential challenge is the meaning of "change" as it relates to orientation. Successful change has typically been defined as a decrease in same-sex sexual attractions and a shift toward opposite-sex sexual attractions. Measuring this change is made difficult by the reality that people who seem to have experienced some kind of change may later also experience continued feelings of attraction or behavior that are at odds with their self-identification. This challenge is possible in

⁶⁵ J.C. Gonsiorek, R.L. Sell, & J.D. Weinrich, *Definition and Measurement of Sexual Orientation* 25 (Suppl.) SUICIDE & LIFE THREATENING BEHAVIOR 40 (1995); R.L. Sell, *Defining and Measuring Sexual Orientation: A Review* 26 ARCHIVES OF SEXUAL BEHAVIOR 643 (1997).

⁶⁶ M.S. Schneider et al., *Implementing the Resolution on Appropriate Therapeutic Responses to Sexual Orientation: A Guide for the Perplexed* 3 PROFESSIONAL PSYCHOLOGY: RESEARCH & PRACTICE 265 (2002).

many course of therapy.⁶⁷ The difficulty of defining sexual orientation, of course, will complicate this problem so that an individual might report that they have experienced change in one factor, like behavior, but be questioned by a critic if they still occasionally experience homosexual feelings. In the absence of more objective measures, self-reporting by clients may be an unavoidable benchmark. Though these reports will be subjective, they still provide a practical way to measure the possible changes in orientation. Additionally, the belief among many researchers and theorists that sexuality is fluid could affect the reported outcomes of studies. An important final note is that most of the reports and research collected over a century and more have involved men.

The methodological shortcomings of the research described in this brief are common to many clinical reports and scientific studies. The most common challenge will be self-reported data; nonrandom samples; retrospective reporting; and the absence of control groups, robust measurements, longitudinal research, and replicable designs. The older research and reports, while acceptable by the clinical and research standards of the day, have limitations when compared to current standards of research. Despite the limitations, however, amicus believe a fair consideration of all the literature provides consistent and compelling evidence that

⁶⁷ M.J. Lambert & B.M. Ogles, *The Efficacy and Effectiveness of Psychotherapy* in BERGIN & GARFIELD'S HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 139 (5th edition M.J. Lambert, ed., 2004).

some individuals can change sexual identity, as well as affective, cognitive, and behavioral components of their sexual orientation.

Some have claimed that therapy to assist in sexual orientation change can be harmful.⁶⁸ No existing studies document that the therapies are, in fact, harmful.⁶⁹

Amicus acknowledges that change in sexual orientation may be difficult to attain. As with any psychological treatment, the client's motivation and determination to comply with treatment predicts the greatest positive response in most cases.⁷⁰ As with other deeply ingrained psychological conditions and behavioral patterns, change through therapy does not come easily, and there is a substantial therapeutic failure rate, as well as a need for ongoing maintenance of any success that is attained. Reverting to old forms of thinking and behaving are, as is the case with most forms of psychotherapy for most psychological conditions, fairly common. But even when clients have failed to change sexual orientation, other benefits commonly have resulted from their attempts.

⁶⁸ M. DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1991); SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL & RESEARCH PERSPECTIVES (Shidlo et al., eds. 2001); M.L. Shidlo & M. Schroeder, *Changing Sexual Orientation: A Consumer's Report* 33 PROFESSIONAL PSYCHOLOGY: RESEARCH & PRACTICE 249 (2002).

⁶⁹ M. Forstein, *Overview of Ethical and Research Issues in Sexual Orientation Therapy* 177 SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL & RESEARCH PERSPECTIVES (Shidlo et al., eds. 2001).

⁷⁰ R. Fine, *Psychoanalytic Therapy* in MALE & FEMALE HOMOSEXUALITY: PSYCHOLOGICAL APPROACHES 81 (1987); J.F. Clarkin & K.N. Levy, *The Influence of Client Variables on Psychotherapy* in BERGIN & GARFIELD'S HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 194 (5th edition M.J. Lambert, ed., 2004).

II.

Ample evidence presented to the court below supports the research findings that change in behavior, self-identification, and orientation are possible.

One of the plaintiffs in this case gave testimony that suggests an individual's sexual orientation can change over the course of a lifetime. When asked if it had "always been the case that you've had an enduring pattern or disposition to experience sexual, affectional, or romantic desires for and attractions to women? Has that always been the case in your life?" she answered, "No, it has not." Stier Dep. 198:24-199:3. She testified that she had previously been married to a man and that, "I did love [my ex-husband] when I married him" and that they had been married for 12 years. Tr. 161:22-25; 165:13-14; 172:24. She also acknowledged that at the time she was married she did not have any "feeling" that she was a lesbian and that she realized she was a lesbian "fairly late in life, in [her] mid-thirties." Tr. 162:4-6; 161:17-21.

Two of the plaintiffs' witnesses are on record, one at trial and the other in an article admitted as evidence in the trial, discussing this possibility of change. Gregory Herek was asked if he agreed with the statement "that sexual orientation is not static and may vary throughout the course of a lifetime" and answered, "As I said earlier, it is possible. And it may vary, yes." Tr. 2234:24-2235:3. An article co-authored by Letitia Peplau included this statement: "Female sexual development is a potentially continuous, lifelong process in which multiple

changes in sexual orientation are possible. Women's sexuality is responsive throughout the lifespan to a wide range of social, cognitive, and environmental influences. Women who have had exclusively heterosexual experiences may develop an attraction to other women and vice versa."⁷¹ These authors had also written that "both women's identification as lesbian, bisexual, or heterosexual and women's actual behavior can vary over time."⁷²

A study introduced in evidence in this case "validated the theoretical model of sexual orientation as multi-variate and dynamic."⁷³ Another claims: "Self-identification varies over time for some individuals and is heavily influenced by socio-cultural factors."⁷⁴

In fact, the record of this case shows that many individuals' orientation does change over a lifetime. Plaintiffs' witness Gregory Herek acknowledged that people report that they have experienced a change of sexual orientation at various points in their life. Tr. 2212:21-24. He had earlier written that "some [people]

⁷¹ Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality and Sexual Orientation* CSW UPDATE, December 2006, p.5 at http://www.csw.ucla.edu/Newsletter/Dec06/Dec06_garnets_peplau.pdf.

⁷² Linda D. Garnets & Letitia Anne Peplau, *A New Paradigm for Understanding Women's Sexuality and Sexual Orientation* 56 JOURNAL OF SOCIAL ISSUES 330, 333 (Summer 2000) (DIX1235).

⁷³ Fritz Klein, et al., *Sexual Orientation: A Multi-Variable Dynamic Process* 11 J. HOMOSEXUALITY 35, 38 (1985) (DIX1265).

⁷⁴ Williams Institute, *Best Practices for Asking Questions About Sexual Orientation on Surveys* at 6 (November 2009) (DIX1108) at <http://escholarship.org/uc/item/706057d5>.

experience considerable fluidity in their sexuality throughout their lives.”⁷⁵ A study cited by the court below (Doc. 708 at 72) found that only $\frac{3}{4}$ of men and women with a same-sex partner in the last year had only same gender partners; for a five-year period about half of the men and $\frac{2}{3}$ of the women who had a same-sex partner also had a partner of the opposite-sex; the proportion of men who had only male partners since age 18 was only twenty percent and for women who had only female partners it was ten percent.⁷⁶ The Diamond study noted above is also part of the record and discloses that of 79 “nonheterosexual” women interviewed 67% “had changed their identities at least once” though the author does not interpret this as a change in their sexual orientation.⁷⁷ Another study in the record “reveals a surprising degree of change over time. Ten percent of men and nearly a quarter of the women reported same-sex attraction at any time, but this was nearly halved for current attraction at age 26. The changes were not just in one direction. The instability was most marked for women, with a greater movement away from exclusively heterosexual attraction from age 21 to 26 than among men.”⁷⁸ An

⁷⁵ G.M. Herek, *Homosexuality* in ENCYCLOPEDIA OF PSYCHOLOGY (2nd edition, R.J. Corsini, ed. 1994) (PX918).

⁷⁶ E.O. LAUMANN, J.H. GAGNON, R.T. MICHAELS & S. MICHAELS, THE SOCIAL ORGANIZATION OF SEXUALITY 310-311 (1994) (PX943).

⁷⁷ Lisa M. Diamond, *Female bisexuality from adolescence to adulthood: Results from a 10-year longitudinal study* 44 DEVELOPMENTAL PSYCHOLOGY 5, 7 & 9 (2008) (DIX856).

⁷⁸ N. Dickson, *Same Sex Attraction in a Birth Cohort* 56 SOCIAL SCIENCE & MEDICINE 1607, 1611-1612 (2003) (DIX626).

earlier study in the record of 216 individuals found that “73 respondents moved toward homosexuality (34%), 37 moved toward heterosexuality (17%), and 106 did not change (49%) from Time 1 to Time 2.”⁷⁹

In particular, research indicated women’s sexual orientation tends to be particularly “fluid, malleable, shaped by life experiences, and capable of change over time.”⁸⁰ Dr. Herek was asked about research data that “suggests that women are somewhat more likely to perceive their sexuality as fluid and involving some degree of choice” and responded, “I think that when we look at women’s histories, we do more often see the idea that their ... romantic relationships and their experiences of sexuality are more likely to change, or change in more women than is the case for men, over the course of their lives.”Tr. 2208:6-13. As another witness noted in her writing, scientists from an evolutionary perspective “have commented on the ‘astonishing sexual plasticity’ of the human female.”⁸¹ Thus, it

⁷⁹ Joseph P. Stokes, et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men* 34 J. SEX RESEARCH 304, 307-308 (1997) (DIX666).

⁸⁰ Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women’s Sexuality and Sexual Orientation* CSW UPDATE, December 2006, p.5 at http://www.csw.ucla.edu/Newsletter/Dec06/Dec06_garnets_peplau.pdf (DIX 1010); Linda D. Garnets & Letitia Anne Peplau, *A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation* 56 JOURNAL OF SOCIAL ISSUES 330, 329, 336, 345 (Summer 2000) (DIX1235); Letitia Anne Peplau, *Rethinking women's sexual orientation: an interdisciplinary, relationship-focused approach*, 8 PERSONAL RELATIONSHIPS 1, 5, 12-13 (2001) (DIX1229).

⁸¹ Letitia Peplau, et al., *The Development of Sexual Orientation in Women* 10 ANNUAL REV. OF SEX RESEARCH 70, 93 (1999) (DIX1239).

should not be surprising that yet another plaintiff witness had shown “Compared to those in different-sex married couples, women in same-sex couples are about as likely to have been previously married and men in same-sex couples are less likely to have been married. Presumably, those in same-sex couples are reporting a previous different-sex marriage.”⁸²

In short, ample trial testimony and record evidence confirm the findings of amicus’ study—change is possible for some people and same-sex attraction is not an immutable trait. The conclusion of the court below to the contrary is an error.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court uphold the constitutionality of Proposition 8 and reverse the judgment of the district court.

Respectfully submitted: September 21, 2010.

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⁸² M.V. Lee Badgett, et al., *Marriage Registration and Dissolution by Same-Sex Couples in the U.S.* (2008) (PX909).

Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 24, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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