

Nos. 12-15388 & 12-15409

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
JOHN BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
JOHN BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant.

On Appeal from the United States District Court for the
Northern District of California

**BRIEF OF *AMICUS CURIAE* FREDERICK DOUGLASS
FOUNDATION IN SUPPORT OF INTERVENOR-DEFENDANT-
APPELLANT AND IN SUPPORT OF REVERSAL**

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

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June 11, 2012

Statement of Compliance with Rule 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF *AMICUS CURIAE*

The Frederick Douglass Foundation, Inc. (Amicus) is a public policy and educational organization favoring limited government and the sanctity of the free market as the best tools to address the hardest problems facing our nation. Amicus consists of proactive individuals committed to developing innovative approaches to today's problems, particularly those of African-Americans, with the help of elected officials, university scholars, and community activists.

Its interest in this case is to show that sexual orientation is a qualitatively different characteristic than those traits that have been granted heightened scrutiny under the Equal Protection Clause, especially race. The fundamental distinction between race and sexual orientation is one of many aspects that illustrate the vast difference between the civil rights movement for Black Americans and the current movement to redefine marriage to include same-sex couples. And as an organization of predominately Black Americans, *Amicus* is able to offer a unique perspective on civil rights and immutable characteristics.

All parties consented to the filing of this brief.

Summary of the Argument

Supreme Court precedent establishes two necessary components in determining whether a trait is “immutable” for Equal Protection purposes. First, an immutable trait is a “characteristic determined solely by the accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Second, the class must be objectively determinable. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46, 442 n.9 (1985). Those two factors apply to every class entitled to heightened scrutiny—without exception—and form the basis of what the Supreme Court means by the term “immutable.”

As described in more detail below, sexual orientation meets neither of these components, and is thus fundamentally different than any other class entitled to heightened scrutiny. Sexual orientation is—by virtually everyone’s admission—not determined solely by birth. Although its causes are generally unknown, researchers believe that it derives from a complex combination of biological, environmental, and sociological factors. But even if there were solid proof that sexual orientation was determined solely by accident of birth, it still would not meet the second component of being objectively determinable. Indeed, competing definitions of sexual orientation confound consistent application and often rely on self identification.

Whether sexual orientation is subject to heightened scrutiny has not been a difficult question for the eleven circuit courts that have addressed it. Every circuit, including this one, has uniformly rejected the argument. Such unanimity on any question—and especially one as socially sensitive as this—may be unusual. But it should not be surprising given the Supreme Court’s strict test for determining whether a class is entitled to heightened scrutiny under the Equal Protection Clause.

In short, sexual orientation could not be considered a suspect or quasi-suspect class without a seismic shift in how the Supreme Court uses the term immutability.

I. Immutability Means that the Characteristic is Solely An Accident of Birth.

The district court fundamentally erred in its view of immutability by reasoning that what the Supreme Court means by that term is that it is something “highly resistant to change.” *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012). That led to the court’s second error that “the Supreme Court has granted suspect class status to groups whose distinguishing characteristic is not immutable.” *Id.* at 987 n.6.

But the Supreme Court has been unambiguous and explicit that all five classes entitled to heightened scrutiny are “based upon certain . . . immutable human attributes.” *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Gomez v. Perez*, 409 U.S. 535 (1973)

(illegitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Reed v. Reed*, 404 U.S. 71 (1971) (sex)¹; *Oyama v. California*, 332 U.S. 633 (1948) (national origin)).

The district court was incorrect that the Supreme Court uses immutability to describe a trait that is resistant to change. Otherwise, it would be impossible to explain how the Court can label alienage and illegitimacy as immutable, since both characteristics can obviously change: an alien can become naturalized and an illegitimate child can become legitimized. *Parham*, 441 U.S. at 353 (illegitimacy); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage).

The Supreme Court does not use the term “immutability” to mean something that is resistant to change.² Rather, immutability, as the Supreme Court uses that term, means a “characteristic determined solely by the accident of birth.”

Frontiero, 411 U.S. at 686; *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977). Justice Ginsberg made a helpful analysis of this question

¹ Sometimes religion is mistakenly described as a suspect class under the Equal Protection Clause. *See Golinski*, 824 F. Supp. 2d at 981. But the Supreme Court has made it clear that the source of heightened scrutiny for religion derives from the Free Exercise Clause, not the Equal Protection Clause. *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004). So a claim of religion-based discrimination under the Equal Protection Clause receives rational basis scrutiny unless the Free Exercise Clause is also violated. *Id.* Thus, it is irrelevant that religion is not a trait solely determined by accident of birth.

² Even if the Supreme Court used the common dictionary definition of immutability to mean something resistant to change, sexual orientation still would not be considered immutable because, as researchers detail, there is remarkable fluidity within the class. *See, infra*, Section III.

in a case decided when she was a judge on the D.C. Circuit. In *Quiban v. Veterans Administration*, 928 F.2d 1154 (D.C. Cir. 1991), a group of Philippine World War II veterans claimed that they should be a class entitled to heightened scrutiny under Equal Protection. Part of the argument was that they shared an immutable characteristic—that of World War II veterans from the Philippines—because that status could never change. Then-judge Ginsberg, writing for the court, explained that that was the wrong question. “[T]he ‘immutable characteristic’ notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a trait ‘determined *solely* by accident of birth.’” *Id.* at 1160 n.13 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 229 n.11 (1981)) (emphasis in original).³

II. Sexual Orientation is Not *Solely* An Accident of Birth.

It is virtually undisputed that homosexuality is not a genetic trait determined solely as an incident of a person’s birth. As the American Psychiatric Association

³ As the House argues, the district court shrugged off binding Ninth Circuit precedent on the level of scrutiny applied to sexual orientation, *High Tech Gays v. Defense Industrial Security Clearing Office*, 895 F.2d 563, 571 (9th Cir. 1990). *See also Witt v. Dep’t of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (finding that circuit precedent established that rational basis applies to claims of sexual orientation discrimination); *Perry v. Brown*, 671 F.3d 1052, 1080 n.13 (9th Cir. 2012) (noting that the Supreme Court applied rational basis scrutiny in *Romer v. Evans* and applying rational basis scrutiny to California’s marriage amendment, Proposition 8). In fact, the Supreme Court has refused to expand the number of suspect or quasi-suspect classes in at least four decades. The five classes that it recognized 40 years ago remain the same five that it recognizes today, despite many invitations to expand the list.

notes, “to date there are no replicated scientific studies supporting *any* specific biological etiology for homosexuality.” APA, *Sexual Orientation* (2011), <http://healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx> (last visited June 8, 2012); *see also* Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation*, 56 *J. Soc. Issues* 329, 332 (2000) (“there is little evidence that biological factors are a major determinant of women’s sexual orientation”); Peplau et al., *The Development of Sexual Orientation in Women*, 10 *Annual Review of Sex Research* 70, 81 (1999) (“Available evidence indicates that biological contributions to the development of sexual orientation in women are minimal.”); *id.* at 87 (“the impact of biological factors in determining women’s sexual orientation appears to be weak or non-existent.”).

Indeed, as two researchers stated, “the assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.” Richard C. Fried & Jennifer I. Downey, *Sexual Orientation and Psychoanalysis: Sexual Science and Clinical Practice* 39 (2002); *see also* Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 *Am. J. of Sociology* 1179, 1180 (2002) (noting that efforts to establish genetic or hormonal effects on sexual orientation have been “inconclusive at best.”). One of the researchers cited by the district court, G.M. Herek, gave

extensive testimony on this in the recent case, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Professor Herek candidly explained that there is no evidence of a biological origin for homosexuality:

[W]e don't really understand the origins of sexual orientation in men or in women. There are many different competing theories, some biologically based, others based more on culture and individual experience. So I would say that [what researchers are] suggesting is that the available evidence doesn't support the idea of there being a strong biological factor that explains the development of sexual orientation in women.

Trial Tr. at 2285:1-2285:8 (G.M. Herek), *Perry*, 704 F. Supp. 2d 921 (No. C09-2292 VRW). Professor Herek accurately summarized the research. Studies suggest that there are many factors at play in causing same-sex attraction.

- **Cohort effect**: “An analysis of some national survey data from the United States found that women in recent birth cohorts were more likely to report having a female sexual partner during adulthood.”; “These findings suggest a major cohort effect in same-gender sexual behavior and perhaps also in sexual orientation. If a cohort effect in sexual orientation exists, it has implications for purely biological theories of sexual orientation, because there must be historical changes in environmental factors that account for such an effect.” See A.F. Jorm et al., *Cohort Difference in Sexual Orientation: Results from a Large Age-Stratified Population Sample*, 49 *Gerontology* 392, 392, 393 (2003); Peplau, *The Development of Sexual Orientation in Women*, *supra*, at 92 (“In the U.S., Gagnon (1990) suggested that the creation of visible urban gay and lesbian communities made the choice of a same-sex lifestyle more attractive to wider audiences[.]”).
- **Education and Socioeconomics**: Education and socioeconomic levels have also been suggested as contributing factors to homosexuality. See M. V. Lee Badgett, *Sexual Orientation Discrimination: An International Perspective* (2007) at 23 (“sexual behavior and sexual identities might also be related in some way to economic outcomes or to an individual's socioeconomic class background”). Education alone appears to heavily

influence homosexuality. Linda D. Garnets & Letitia Anne Peplau, *A New Look at Women's Sexuality & Sexual Orientation*, CSW Update 4 (2006) (“Women’s sexual orientation is shaped by such social and cultural factors as women’s education, social status and power, economic opportunities and attitudes about women’s roles.”). According to one survey, “completing college doubled the likelihood that a man identified as gay or bisexual but was associated with a 900% increase in the percentage of women identifying as lesbian/bisexual.” Peplau, *A New Paradigm for Understanding Women's Sexuality & Sexual Orientation*, *supra*, at 332.

- **Politics:** Others assert that some “develop a lesbian or gay identity primarily on the basis of political or esthetic values rather than erotic attractions.” G.M. Herek, *Homosexuality*, in 4 *Encyclopedia of Psychology* 149, 150 (A.E. Kazdin ed., 2000).

One or all of these factors are likely contributory sources of a sexual orientation, whereas all other classes entitled to heightened scrutiny, such as race and alienage, are solely a result of one’s birth.

Identical twin studies further confirm that homosexual orientation is not solely a matter of genetics. *See, e.g.*, E. Eckert et al., *Homosexuality in Monozygotic Twins Reared Apart*, 148 *British J. Psychiatry* 421 (1986) (finding no genetic component of homosexuality); J. Michael Bailey et al., *Genetic & Environmental Influences on Sexual Orientation & Its Correlates in an Australian Twin Sample*, 78 *J. Personality & Soc. Psychology* 524 (2000) (finding no genetic component of homosexuality). For example, 1991 and 1993 studies, involving twin pairs recruited through gay and lesbian publications, reported a concordance rate (similarity across the twins) of only approximately fifty percent. Clearly, genetics

alone are not determinative. J.M. Bailey, et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 Archives of Gen. Psychiatry 217 (1993); J.M. Bailey & R.C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Archives of Gen. Psychiatry 1089, 1094-95 (1991). Other twin studies support this conclusion. See Niklas Langstrom et al., *Genetic and Environmental Effects of Same-Sex Sexual Behavior: A Population Study of Twins in Sweden*, Arch. Sexual Behavior 77-78 (2010) (finding genetic effects explained .34-.39 of the variance in men and .18-.19 of the variance in women and concluding that “same-sex behavior arises not only from heritable but also from individual specific environmental sources.”); Michael King & Elizabeth McDonald, *Homosexuals who are Twins*, 160 British J. Psychiatry 407, 409 (1992) (finding a striking “discordance for sexual orientation in both monozygotic and dizygotic pairs . . . [that] confirms that genetic factors are insufficient explanation of the development of sexual orientation” and concluding “[i]t is clear that our current genetic and psychological theories are untenable. The co-twins of men and women who identify themselves as homosexual appear to have a potential for a range of sexual expression.”). A small-scale study published in 2000 showed low concordance rates of 31.6 percent. Kenneth S. Kendler et al., *Sexual Orientation in a U.S. National Sample of Twin and Nontwin Sibling Pairs*, 157 Am. J. of Psychiatry 1843, 1845 (2000) (sample of nineteen pairs).

Additionally, Columbia professors Bearman and Bruckner note that “[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines.” Bearman & Bruckner, *supra*, at 1184. Their own study focused on “same-sex romantic attraction” in a large, nationally representative sample (the Add-Health database, which is nationally representative study of students in 7th to 12th grade from 1994-95). *Id.* at 1190. This study found no noticeable pattern suggesting genetic influence at all. Concordance rates for identical twins were only 6.7 percent, which was about the same as the 7.2 percent found for fraternal twins. *Id.* at 1197-98. They concluded: “[W]e find no support for genetic influences on same-sex preference net of social structural constraints. . . . Finally, we find substantial indirect evidence in support of a socialization model at the individual level.” *Id.* at 1199.

III. Sexual Orientation Is an Extremely Fluid Trait.

Even if immutability were legally defined under Equal Protection jurisprudence as something that does not change, research also clearly establishes that homosexual orientation can change over time and actually does change for a significant number of people. “Contrary to the notion that most sexual minorities undergo a one-time discovery of their true identities, 50% of [a study’s] respondents had changed their identity label more than once since first relinquishing their heterosexual identity.” Lisa M. Diamond & Ritch C. Savin-

Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. of Soc. Issues 297, 301 (2000). In another study, the author noted that “[h]alf of the young women in this sample relinquished the first sexual-minority identity they adopted.” Lisa M. Diamond, *Sexual Identity, Attractions, and Behavior Among Young Sexual-Minority Women Over a 2-Year Period*, 36 Dev. Psychology 241, 247 (2000).

Change in homosexual orientation is not limited to women. *See e.g.*, Nigel Dickson et al., *Same Sex Attraction in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 161-12 (2003) (“Overall 451 men and 436 women reported their current sexual attraction at both ages 21 and 26.”; “The findings also reveal a surprising degree of change over time. Ten percent of men, and nearly a quarter of women, reported same-sex attraction at any time, but this 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.”). Statistics relating to same-sex couples who have registered as domestic partners or married also demonstrate changes in sexual orientation. Gary J. Gates et al., *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.*, Williams Institute 2, 10 (2008) (“Data from three states suggest that more than one in five individuals in same-sex couples who marry or register have previously been

married to a different-sex partner.”; “In Massachusetts, Vermont, and California, the proportion of individuals in same-sex couples who have been previously married [to opposite-sex partners] varies from 11 to 29%”). Accordingly, many researchers view “sexual orientation as multi-variate and dynamic” for all individuals, and as something that “differ[s] over time.” Fritz Klein, et al., *Sexual Orientation: A Multi-Variable Dynamic Process*, 11 J. Homosexuality 35, 38 (Sept. 1985).

The authoritative study of Edward Laumann, also known as the “Chicago Sex Survey,” which is considered one of the most reliable scholarly efforts to determine sexual practices in the United States, shows that many of those with same-sex partners report that they have also had an opposite-sex partner. Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 310-11 (1994). “In the past five years, 4.1% of the men and 2.2% of the women had at least one same-gender partner. About half these men had both male and female partners in this time period. The women are more likely than the men to have had sex with both men and women than only same-gender partners. Almost two-thirds of the women reporting a female partner in the last five years also report a male partner.” *Id.*; see also Carren Strock, *Married Women Who Love Women* (1998). The University of Chicago study found that among men and women who have had *any* same-sex intimate partners since age 18, only

approximately 20 percent of those men and 10 percent of those women limited themselves *only* to same-sex intimate partners since that age. Laumann, *supra*, at 310-12.

Further, some research asks individuals to rate themselves on the homosexuality continuum, and then asks these same individuals to rate themselves again several months or years later. Like other studies, this type of research demonstrates that many individuals vary, with some becoming more “gay” and some becoming less “gay” in their own estimation over time.⁴ In one such study using a “self-rated seven-point sexual orientation scale, 73 respondents moved toward homosexuality (34%), 37 moved toward heterosexuality (17%), and 106 did not change (49%)” over a designated time period. Joseph P. Stokes et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 34 J. of Sex Research 304, 308 (1997). These behavior/attraction/self-identification dimensions all “suggest[] that sexual orientation is not static and may vary throughout the course of a lifetime.” Michael R. Kauth & Seth C. Kalichman, *Sexual Orientation*

⁴ The self-identification method is of questionable use because, for example, “Self-identification varies over time for some individuals and is heavily influenced by socio-cultural factors.” Williams Institute, *Best Practices for Asking Questions about Sexual Orientation on Surveys* 6 (2009). Self-identification studies on a concrete condition, such as whether or not the subject suffers from an ailment, are far more reliable than self-identification studies on the multi-faceted subject of homosexuality. The subjects may not fully or consistently understand the role of environmental influences and tend to adjust for them in varying ways. In addition, self-identification surveys often do not provide an adequate understanding of the subjects’ thinking, motivation, or behavior.

and Development: An Interactive Approach, in The Psychology of Sexual Orientation, Behavior, and Identity: A Handbook 82 (Louis Diamant & Richard D. McAnulty eds., 1995).

The fluidity of sexual orientation is especially well-documented among women.⁵ “Female sexual development is a potentially continuous, lifelong process in which multiple changes in sexual orientation are possible.... Women who have had exclusively heterosexual experiences may develop an attraction to other women, and vice versa.” Garnets & Peplau, *supra*, at 5. *See also* Peplau & Garnets, *A New Paradigm for Understanding Women’s Sexuality & Sexual Orientation, supra*, at 333, 336 (“Further, both women’s identification as lesbian, bisexual, or heterosexual and women’s actual behavior can vary over time” and “There is mounting research evidence that the patterning of women’s sexuality and sexual orientation varies across time and place”).

This has been referred to as the “‘astonishing sexual plasticity’ of the human female.” Peplau, *The Development of Sexual Orientation in Women, supra*, at 93; *see also* Letitia Ann Peplau, *Rethinking Women’s Sexual Orientation: An Interdisciplinary, Relationship-Focused Approach*, 8 *Personal Relationships* 1, 9-

⁵ The study of lesbianism is difficult, however, because—as discussed earlier—lesbians do not constitute a fixed class of research subjects. Committee on Lesbian Health Research Priorities, Inst. of Med., *Lesbian Health* 23 (Andrea L. Solarz ed., 1999) (“Lesbians do not constitute an identifiable homogenous group for research study.”).

12 (2001); *id.* at 12 (“the concept of erotic plasticity is the cornerstone of a new paradigm for understanding women’s sexual orientation.”). Illustrating that plasticity, one study found that within a ten-year period, sixty-seven percent of lesbian women changed their sexual identity at least once, and thirty-six percent changed more than once. Lisa M. Diamond, *Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, 44 *Dev. Psychology* 5, 7-9 (2008).

IV. Sexual Orientation Is Not Objectively Determinable.

The immutability question also involves whether the class can be objectively determined. The Supreme Court’s decision in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), is instructive on this point. There the Court rejected the argument that the mentally disabled were entitled to heightened scrutiny under the Equal Protection Clause because, in part, it was a “large and amorphous class” that could not be objectively defined. *Id.* at 455, 442 n. 9. There, there were competing definitions about how to define mental disability, which represented a broad spectrum within it. *Id.* at 442 n. 9. The Court concluded that applying heightened scrutiny to such an ill-defined class would be difficult and “it would be difficult to find a principled way to distinguish a variety of other groups” seeking heightened scrutiny. *Id.* at 445; *see also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973) (rejecting heightened scrutiny based on

discrimination against the poor because, in part, class was “large, diverse, and amorphous”); *Holloway*, 566 F.2d at 662 n.3, 663 (finding that there is no “accepted definition of the term transsexual” and that “the complexities involved merely in defining the term . . . would prohibit a determination of suspect classification for transsexuals”).

Sexual orientation is also a large and amorphous class that lacks a consistent definition. “There is currently no scientific or popular consensus . . . that definitively ‘qualify’ an individual as lesbian, gay, or bisexual.” Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 *J. of Clinical Child & Adolescent Psychology* 490, 492 (2003). *See also* Lisa M. Diamond & Ritch C. Savin-Williams, *Gender & Sexual Identity*, in *Handbook of Applied Developmental Science* 101, 102 (Richard M. Lerner et al. eds., 2003) (“There is currently no scientific or popular consensus on the exact constellation of experiences that definitively ‘qualify’ an individual as lesbian, gay, or bisexual”). “Much of the confusion about sexual orientation occurs because there is no single agreed upon definition of the term. . . . There is no one universally accepted definition of sexual orientation, nor of who is bisexual, lesbian, or gay.” Gail S. Bernstein, Ph.D., *Defining Sexual Orientation*, *Selfhelp Magazine*, http://www.selfhelpmagazine.com/article/sexual_orientation (last visited June 8, 2012). “[T]he meaning of the phrase ‘sexual orientation’ is complex and not

universally agreed upon.” Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008).

The definition of “sexual orientation” provided by the American Psychological Association (APA) displays the amorphous nature of the proposed class. “Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person’s sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions.” Sexuality, What is sexual orientation?, American Psychological Association.⁶ Under this definition, sexual orientation is an “enduring” disposition—but how enduring? Presumably, one could join or leave the class within a year—or less.

But the final portion of the APA’s definition of sexual orientation underscores its starkest contrast with race. Race (or gender) is a visible, unchangeable characteristic. While it no doubt impacts a sense of personal and social identity, race does not merit heightened protection *because of* that sense of identity. And race most assuredly does not receive heightened scrutiny because of “behaviors” or “membership in a community.” *Id.*

Unlike the clearly defined classes of race, gender, national origin, alienage and legitimacy, nearly all studies of sexual orientation describe the difficulty in

⁶ <http://www.apa.org/topics/sexuality/orientation.aspx#> (last visited June 5, 2012).

defining the population of homosexuals. The authors of the “Chicago Sex Survey,” noted the following:

[The authors’ research] raises quite provocative questions about the definition of homosexuality. While there is a core group (about 2.4 percent of the total men and about 1.3 percent of the total women) in our survey who define themselves as homosexual or bisexual, have same-gender partners, and express homosexual desires, there are also sizable groups who do not consider themselves to be either homosexual or bisexual but have had adult homosexual experiences or express some degree of desire.

Laumann et al., *supra*, at 300-301. Other researchers report similar definitional complexities, *e.g.*, “[T]here is a physical orientation, an affectional orientation, and a fantasy orientation, with each of those three further divided into a past (historical) component and a present component. A person’s behavior may be totally at variance with all aspects of orientation, and the various parts of orientation might not all agree.” A.E. Moses & R.O. Hawkins, Jr., *Counseling Lesbian Women and Gay Men: A Life Issues Approach* 39 (1982).

A. The three most commonly-used scientific definitions of sexual orientation capture very different groups of people.

Scientific literature includes at least three different basic definitions of orientation, based on (1) sexual behavior, (2) sexual attraction, or (3) self-ascribed social identity. Laumann, *supra*, at 291. *See also* M.V. Lee Badgett, *Money, Myths, & Change: The Economic Lives of Lesbians & Gay Men* 4 (2001) (discussing the difficulty in “[d]efining the [] boundary around the sexual orientation of gay men and lesbians . . . [d]oes it mean someone who engages in same-sex sexual

behavior? Someone who fantasizes about such acts? Someone who will identify himself or herself as gay or lesbian?"); Williams Institute, *supra*, at 6 (“Conceptually, sexual orientation has three major dimensions,” including sexual attraction, sexual behavior, and self-identification).

The same group does not simply go by various names. Each definition—sexual behavior, sexual attraction, and self-ascribed social identity—captures a different group of people. C.S. Carpenter & G.J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 *Demography* 573, 574 (2008) (“We believe that self-reported sexual orientation—which as is well-known, is not always concordant with sexual behavior . . . ”); John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy* 8 (1991) (“It can be safely assumed that there is no necessary relationship between a person’s sexual behavior and self-identity unless both are individually assessed.”); Letitia Anne Peplau et al., *The Development of Sexual Orientation in Women*, *supra*, at 83 (“there is ample documentation that same-sex attractions and behaviors are not inevitably or inherently linked to one’s identity”).

In addition, the labels are not used consistently. “Sizable numbers of people reporting only same-sex attraction and/or behavior self-identify as heterosexual or bisexual. Similarly, sizable numbers of those who identify as gay or lesbian report

some sexual partners of a different sex and/or some level of attraction to different sex partners.” Williams Institute, *supra*, at 6-7. *See also* Letitia Anne Peplau & Linda D. Garnets, *A New Paradigm for Understanding Women’s Sexuality and Sexual Orientation*, *supra*, at 334 (“A woman might identify as lesbian, be attracted exclusively to women, and have sex with women partners only. But exceptions to this pattern of consistency are common.”).

These complications mirror researchers’ findings that few individuals consistently fall into all three of the common definitions of homosexual orientation. *See* Laumann, *supra*, at 299 (diagram showing 15% overlap on all three dimensions for women, 24% for men).

Once again, this is a point on which both sides agree. The research director for the Williams Institute for Sexual Orientation Law and Public Policy, an organization formed to “advance[] sexual orientation and gender identity law and public policy”⁷ explains:

Perhaps the findings from the 1992 National Health and Social Life Survey reveal the [definitional] complexity most clearly. One group of respondents, 6.2 percent of men and 4.4 percent of women, report feeling sexual attraction to people of the same sex. A smaller group, 4.1 percent of women and 4.9 percent of men, have engaged in sexual behavior with someone of the same sex since the age of 18. An even smaller group, 2.8 percent of men and 1.4 percent of women, reported that they think of themselves as gay (or

⁷ *Mission*, The Williams Institute, <http://williamsinstitute.law.ucla.edu/mission/> (last visited June 11, 2012).

lesbian for women) or bisexual, and the potential nesting is not necessarily complete or consistent.

M.V. Lee Badgett, *Sexual Orientation Discrimination: An International Perspective* (2007). See also G.M. Herek & L.D. Garnets, *Sexual Orientation and Mental Health*, 3 Annual Review Clinical Psychology 353, 362-63 (2007)

(“Indeed, two leading researchers in this area estimated that only half of the individuals who report sexual contact with a same-sex adult actually identify as lesbian, gay, or bisexual. Consistent with this observation, the proportion of adults who identified as gay, lesbian, or bisexual in a 2000 national probability sample was roughly the same as the proportion who reported same-sex behavior but identified as heterosexual.”).

These uncontroverted definitional ambiguities highlight the impossibility of Golinski’s request for heightened scrutiny—this Court has no generally accepted method to identify which individuals might fall into a new protected class of gays and lesbians. The definitional possibilities are numerous. And the definition used greatly impacts the number of people included in the class. For example, only one to four percent of the U.S. population self-identifies as gay or lesbian. Lauren Dean & Ilan H. Meyer, et al., *Lesbian, Gay, Bisexual, and Transgender Health: Findings and Concerns*, 4 J. Gay & Lesbian Med. Assoc. 101, 135 (2000). But a behavioral definition may include two to six percent of the population (based on homosexual behavior in the past five years). *Id.* In fact, studies indicate that “up to 21% of the

population reports same-sex attraction at least once in adulthood.” *Id.* “Therefore, depending upon how it is defined and measured, 1-21% of the population could be classified as lesbian or gay to some degree, with the remainder classified as bisexual or heterosexual to some degree.” *Id.*

B. The scientific definition of “homosexual” is even broader than conduct, attraction, or self-identity.

The problem of definitional ambiguity is not limited to just three different definitions of sexual orientation. Each definitional category has significant subvariations. Dean & Meyer, *supra*, at 135 (“Within each of the above three dimensions there is even further variation.”); Peplau & Garnets, *A New Paradigm for Understanding Women’s Sexuality & Sexual Orientation*, *supra*, at 342 (“Sexual identity, attractions, and behavior can be varied, complex, and inconsistent.”). Each of the three commonly-used definitions can be broken out “for example, between gender identity and sexual identity, desire and behavior, sexual versus affectional feelings, early-appearing versus late-appearing attractions and fantasies, or social identifications and sexual profiles . . . [it is] complicated . . . because few individuals report uniform inter-correlations among these three domains.” Diamond & Savin-Williams, *Gender & Sexual Identity*, *supra*, at 102.

Once again, experts on both sides of the debate agree—homosexuality cannot be simply defined by choosing from the three commonly-used definitions. In her book, homosexual advocate Lee Badgett suggested that a comparison of two of the

three common sexual orientation definitions might produce helpful results.

The simplest way to categorize people would be to label as gay or lesbian those who have ever had a same-sex partner. Since bisexual people will also fall into that category using the behavioral measure, this analysis compares heterosexual people with gay, lesbian or bisexual people. ... But a second categorization that might capture the usualness of same-sex partners is to compare the number of same-sex partners to the number of opposite-sex partners. If someone has had at least as many same-sex as opposite-sex partners, it seems unlikely that he or she would have a strictly heterosexual orientation. ... [A 1992 survey using this comparison reported o]f the people who have had one or more same-sex partners 46.3 percent (fifty individuals) classified themselves as heterosexual, suggesting a poor match between the simple classification by behavior and self-identity. Of [those] with at least as many same-sex as opposite-sex partners, however, only 15.7 percent considered themselves heterosexual, while 56.9 percent considered themselves ‘homosexual,’ 11.8 percent called themselves ‘bisexual,’ and 13.7 percent considered themselves ‘something else.’”

Badgett, *Money, Myths & Change*, *supra*, at 30.

The definitional problem is actually even *more* complex, as it is not limited to only three criteria—conduct, attraction, or self-identity—and their subvariations. Some recommend the use of a seventeen question, multiple subpart test to measure sexual orientation. John C. Gonsiorek et al., *Definition and Measurement of Sexual Orientation*, 25 *Suicide and Life-Threatening Behavior* 40 App. (1995) (acknowledging that “[g]iven such significant measurement problems, one could conclude there is serious doubt whether sexual orientation is a valid concept at all”). Going further, some researchers believe sexual orientation must be analyzed on a continuum. Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* 639 (1948) (“Males do not represent two discrete populations, heterosexual and

homosexual.”); Committee on Lesbian Health Research Priorities, *supra*, at 25-26 (“In general, sexual orientation is most often described as including behavioral, affective (i.e., desire or attraction), and cognitive (i.e., identity) dimensions that occur along continua.”).

This highly fluid definitional view of homosexuality is one more aspect that no one disputes. Professor Herek agrees that “Homosexuality encompasses a variety of phenomena related to a same-sex sexual orientation. Although definitions of the term often focus mainly on sexual acts and attractions between persons of the same biological sex, homosexuality also refers to patterns of same-sex romantic and emotional bonding, identities and communities based on same-sex desires, and the shared culture created by those communities.” G.M. Herek, *Homosexuality*, in *Encyclopedia of Psychology* 149, 149 (A.E. Kazdin ed., 2000). Herek adds: “Homosexuality has at least five different components (sexual attraction and desire, sexual behavior, identities, relationships and families, communities).” *Id.* at 149-151. Also acknowledging the vast array of categorization options, Lee Badgett wrote, “For economists and other social scientists interested in survey-based comparisons of economic outcomes by sexual orientation, the different possible measures of sexual orientation obviously pose an empirical challenge.” Badgett, *Sexual Orientation Discrimination*, *supra*, at 21.

The bottom line is that “[T]here is no one ‘right’ way to define who is a lesbian.” ... Comm. on Lesbian Health, *supra*, at 33. As one expert conceded: “[W]hat is the correct definition of the LGB population? The answer depends on the purpose of the study[.]” Meyer & Wilson, *supra*, at 24.

It is important to understand that the many possible definitions of homosexuality are not minor variations on a theme. Rather, they present fundamentally different ways of understanding who is “gay.” See Laumann, *supra* at 294-295, 297; Ritch C. Savin-Williams, *Then and Now: Recruitment, Definition, Diversity, and Positive Attributes of Same-Sex Populations*, 44 *Dev. Psychology* 135, 135-38 (2008); Bernstein, *supra*; Carpenter & Gates, *supra*, at 574.

But there is more. Researchers note that “[i]t will be useful to expand our notions of sexual orientation to include more than just bisexuality, heterosexuality and homosexuality. . . . With respect to various components of sexual orientation, an individual may be heterosexual, homosexual, bisexual, as well as fetishistic, transvestitic, zoophilic, and so on. . . . these are not mutually exclusive categories.” John P. DeCecco, *Gay Personality and Sexual Labeling* 16 (1985). Essentially, the full spectrum of sexual orientations and corresponding definitional difficulties preclude sexual orientation from suspect classification.

The absence of any scientific or social agreement about who is included as gay or lesbian, together with the evidence discussed above show at least some flux in

self-ascription over time and a lack of evidence that homosexuality is innate, makes sexual orientation fundamentally different in nature than race, gender, or any other class entitled to heightened scrutiny.

Conclusion

For the foregoing reasons, *Amicus* respectfully requests that the decision of the district court be reversed.

Respectfully submitted this 11th day of June, 2012.

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Certificate of Compliance

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) because it contains 6,149 words, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii), according to the word-count feature of Microsoft Word 2007.

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman.

Dated: June 11, 2012.

/s/ Dale Schowengerdt
Dale Schowengerdt

Certificate of Service

I hereby certify that on June 11, 2012, I electronically filed the foregoing amicus brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

/s/ Dale Schowengerdt
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