

Case Nos. 10-2204, 10-2207 and 10-2214
**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

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

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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: January 25, 2011.

/s/
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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 has obtained consent to file this brief from Defendant-Appellant United States Department of Health and Human Services and from Plaintiff-Appellee Commonwealth of Massachusetts.

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.

Amicus seeks to provide information to this Court bearing on its decision of whether to endorse a legal declaration that the Defense of Marriage Act violates the Tenth Amendment.

ARGUMENT

Amicus filed a similar brief in the case of *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal., 2010), and *Amicus* believes the following will be instructive to this court in deciding this matter as *Perry* was a case that challenged

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”).

the definition of marriage as codified in the California Constitution which read, "Only marriage between a man and a woman is valid or recognized in California." In like manner, this case was brought as a challenge to the definition of marriage as found in DOMA. In the *Perry* decision, the court issued a finding of fact 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).

Amicus respectfully suggests that that finding constituted plain error, as it ignored 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.

In discussion regarding same-sex marriage, it is often suggested that sexual orientation is an immutable trait. This suggestion is not supported by the evidence.

There is some evidence that change in sexual 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 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

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>.

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).

the sexual orientation of women.⁸ Dr. Diamond's research suggests an increasing number of women insist 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.

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 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).

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 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

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.

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 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

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).

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).

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 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

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

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

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 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

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).

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).

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 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

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).

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).

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) that he treated developed full “heterosexual functioning.”³⁴ Jolande Jacobi reported treating 60 patients, six (10 percent) of whom made a satisfying transformation to 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 manifested some change in their sexual orientations. Another 16 who did not complete treatment also experienced 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

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).

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

³⁶ SOCARIDES (1978).

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 reports of varying rates of success with group therapy.⁴¹ R.A. Truax and G. Tourney described group treatment of 30 patients in a comparison group with 20 untreated individuals, and reported increased heterosexual orientation, decreased

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).

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).

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

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

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).

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>.

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 kind of change therapy and found that 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

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

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).

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 can and do change.”⁵⁰ Scott Hershberger, a distinguished scholar and statistician, subjected Spitzer’s results to additional scrutiny and concluded that 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

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).

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) .

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 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.

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

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>.

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

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

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 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.sbcbaptistpress.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).

educational therapy. It reported that 85 percent of the people that it had 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 In 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

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 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).

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 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 that Drs. Jones and

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).

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 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.

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

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).

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 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

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).

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 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

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

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.

CONCLUSION

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

Respectfully submitted: January 25, 2011.

/s/

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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 5,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: January 25, 2011.

/s/

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I hereby certify that 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 on January 25, 2011.

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Dated: January 25, 2011.

/s/

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December 17, 2010