

12-2335 (L)

No. 12-2435 (Con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDITH SCHLAIN WINDSOR, In her Official capacity as
Executor of the estate of Thea Clara Spyer,

Plaintiff-Appellee,

v.

BIPARTISAN LEGAL ADVISORY GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES,

Intervenor-Defendant-Appellant,

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of New York

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

James A. Campbell
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020 (Tel)
(480) 444-0028 (Fax)
jcampbell@alliancedefendingfreedom.org

Corporate Disclosure Statement

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

/s/ James A. Campbell
James A. Campbell
Counsel for *Amicus Curiae*
August 17, 2012

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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 most difficult 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.

Amicus's interest in this case is to show that sexual orientation is a qualitatively different characteristic than those traits, like race, that have been granted heightened scrutiny under the Equal Protection Clause. *Amicus* believes that the vast differences between the civil rights movement for Black Americans and the current movement to redefine marriage to include same-sex couples are illustrated by, among other things, the fundamental distinction between race and sexual orientation. 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.¹

¹ 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 the preparation or submission of this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission 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 not known with certainty, researchers believe that it derives from a complex combination of biological, environmental, and sociological factors. Sexual orientation also fails the second component of the Supreme Court’s immutability requirement—objective determinability. No universally accepted definition of sexual orientation exists. Instead, scholars routinely use at least three different definitions (some of which depend upon subjective considerations like self identification), and most notably,

each of these definitions identifies different classes of people. By all accounts, then, sexual orientation is not an objectively determinable construct.

Tellingly, the question whether sexual orientation is subject to heightened scrutiny has not been difficult for the eleven circuit courts that have addressed it. As the district court recognized, every circuit that has considered this question (all but this Circuit and the Third Circuit) has uniformly rejected the argument. Such unanimity on any question—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. *See* Dist. Ct. Op.15, ECF 93 (“[A]s the Supreme Court has observed, ‘courts have been very reluctant, as they should in our federal system,’ to create new suspect classes.”) (quoting *Cleburne*, 473 U.S. at 442).

In short, under Supreme Court precedent, sexual orientation does not qualify as a suspect or quasi-suspect classification.

Argument

I. Immutability Means That the Characteristic Is Solely an Accident of Birth.

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); *Oyama v. California*, 332 U.S. 633 (1948) (national origin)).² What the Supreme Court means by that term is not what Plaintiff-Appellee asserted in the court below and will undoubtedly assert here: “whether the characteristic that defines the group is ... so integral an aspect of one’s identity that it is not appropriate to require a person to repudiate or change it.” Pl.’s Mem. Supp. Summ. J. 12, ECF No. 29. Plaintiff-Appellee 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. *See Parham*, 441 U.S. at 353 (illegitimacy); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage).

² Sometimes religion is mistakenly described as a suspect class under the Equal Protection Clause. *See, e.g., Golinski v. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 981 (N.D. Cal. 2012). 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 birth.

The Supreme Court does not use the term “immutability” to mean something that is resistant to change.³ 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 analyzed this question using that standard 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. The veterans argued that they shared an immutable characteristic—the status of World War II veterans from the Philippines—because that status could never change. Then-Judge Ginsberg, writing for the court, explained that the veterans’ argument was misplaced: “[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)).

³ Even if the Supreme Court understood 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* at Section III.

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 notes, "to date there are no replicated scientific studies supporting *any* specific biological etiology for homosexuality." American Psychiatric Association, *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) ("[T]here is little evidence that biological factors are a major determinant of women's sexual orientation"); Letitia Ann 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 ("[T]he impact of biological factors in determining women's sexual orientation appears to be weak or non-existent.").

Indeed, as researchers have 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.”). Instead, studies suggest that there are many factors at play in causing same-sex attraction. Here are a few:

- **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.” A.F. Jorm et al., *Cohort Difference in Sexual Orientation: Results from a Large Age-Stratified Population Sample*, 49 Gerontology 392, 392, 393 (2003); see also 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 Socioeconomic Status**: Education and socioeconomic levels have also been identified as contributing factors to homosexuality. See M.V. Lee Badgett, *Sexual Orientation Discrimination: An International Perspective* 23 (2007) (“[S]exual behavior and sexual identities might also be related in some way to economic outcomes or to an individual’s socioeconomic class background”); 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.”). In particular, educational background appears to have a predominant influence. According to one survey, “completing college doubled the likelihood that a man identified as gay or bisexual [and] 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.

- **Political Values:** Other researchers 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 likely contribute to a person’s sexual orientation, whereas all other classifications 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 twins recruited through gay and lesbian publications reported a concordance rate (similarity across the twins) of only approximately fifty percent; these studies thus show that 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, e.g.*, 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”); 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) (finding, in a small-scale study that analyzed a sample of nineteen twins, concordance rates as low as 31.6 percent); 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 that “[i]t is clear that our current genetic and psychological theories are untenable” because “[t]he co-twins of men and women who identify themselves as homosexual appear to have a potential for a range of sexual expression”).

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 study analyzed data about same-sex romantic attraction drawn from the National Longitudinal Study of Adolescent Health (Add Health)—a large, nationally representative study of adolescents in seventh to twelfth grade. *Id.* at 1190. Using

this nationally representative database, they found no noticeable pattern suggesting genetic influence at all. Concordance rates for identical twins were only 6.7 percent, which was nearly the same as the 7.2 percent rate 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. . . . [Instead], we find substantial indirect evidence in support of a socialization model at the individual level.” *Id.* at 1199.

III. Sexual Orientation Is Extremely Fluid.

Even if immutability were legally defined under Equal Protection jurisprudence as a trait that does not change, research clearly establishes that a person’s sexual orientation can change over time and actually does change for a significant number of people. One study found that “[c]ontrary to the notion that most sexual minorities undergo a one-time discovery of their true identities, 50% of [that 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). Another study noted that “[h]alf of the young women in [its] 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 sexual orientation occurs in both men and women, and it shifts over time in different directions for different people. *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) (“The findings ... 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 show that many people who enter a same-sex marriage, domestic partnership, or civil union have previously been married to a person of the opposite-sex; these figures further demonstrate the fluidity of sexual orientation. *See, e.g.*, Gary J. Gates et al., *Marriage, Registration and Dissolution by Same-Sex Couples in the U.S.*, Williams Institute 2 (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”); *id.* at 10 (“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,” something that “differ[s] over time.” Fritz Klein et al., *Sexual Orientation: A Multi-Variable Dynamic Process*, 11 J. Homosexuality 35, 38 (Sept. 1985).

Edward Laumann’s study, 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, also shows that many individuals with same-sex partners have also had an opposite-sex partner at one time. Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 310-11 (1994). As the study recounts:

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 study also 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 homosexual and some becoming less homosexual in their own estimation over time.⁴ In one 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). This further demonstrates “that sexual orientation is not static and may vary throughout the course of a lifetime.” Michael R. Kauth & Seth C. Kalichman, *Sexual Orientation 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. “Female sexual development is a potentially continuous, lifelong process in which multiple changes in sexual orientation are possible. ... Women who have had

⁴ The self-identification method is of questionable value because, for example, “[s]elf-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 the individual suffers from an ailment, are far more reliable than self-identification studies on the multi-faceted subject of homosexuality. The questioned individuals may not fully or consistently understand the role of environmental influences and tend to adjust for them in varying ways.

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 (noting that “both women’s identification as lesbian, bisexual, or heterosexual and women’s actual behavior can vary over time” and that “[t]here 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, 9-12 (2001); *id.* at 12 (“[T]he 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 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). Thus, even if immutability is defined as a trait that does not change, sexual orientation would still not qualify as an immutable characteristic for purposes of Equal Protection analysis.

IV. Sexual Orientation Is Not Objectively Determinable.

The immutability question also considers 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. The Court noted that there were competing definitions about how to define mental disability, *id.* at 442 n.9, and declined to apply heightened scrutiny to such an ill-defined class because "it would be difficult to find a principled way to distinguish a variety of other groups" seeking status as a suspect class. *Id.* at 445; *see also San Antonio Indep. Sch. Dist. 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 an amorphous classification 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). Simply put, “the 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) illustrates the amorphous nature of the proposed classification. “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.” See American

Psychological Association, *Sexuality, What is sexual orientation?* (2012).⁵

The first sentence of the APA's definition focuses on the presence of an "enduring" subjective disposition, but this vague concept provides no standard at all. It is unclear how long a person's attractions must endure—a week, a month, a year, perhaps a decade—before qualifying as a member of a class. Putting aside this problem, a more fundamental and obvious concern emerges: namely, that a person's subjective attractions are, quite plainly, not objectively determinable.

The second sentence of the APA's definition underscores its starkest contrast with traditional suspect or quasi-suspect classifications like race. While race undoubtedly impacts an individual's sense of personal and social identity, it does not merit heightened protection because of, nor is it determined by, that "sense of identity." *See id.* Moreover, race does not receive heightened scrutiny because of, nor is it determined by, a person's "behaviors" or "membership in a community." *See id.*

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

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

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 Definitions of Sexual Orientation Identify Different Groups of People.

As alluded to above, scientific literature includes at least three different definitions of sexual 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 . . . Does 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).

These definitional variations are not simply different ways of describing the same class of people, for each definition—sexual behavior, sexual attraction, and self-ascribed social identity—captures a different group of people. *See* C.S. Carpenter & G.J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 *Demography* 573, 574 (2008) (acknowledging that it is “well-known” that “self-reported sexual orientation . . . 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 (“[T]here 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 only 15% overlap on all three dimensions for women and 24% for men).

Once again, this is a point on which both sides of the debate agree. M.V. Lee Badgett, 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,”⁶ 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 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)

⁶ *Mission*, The Williams Institute, <http://williamsinstitute.law.ucla.edu/mission/> (last visited June 11, 2012).

(“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 Plaintiff-Appellee’s request for heightened scrutiny—quite simply, 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 as demonstrated, the chosen definition greatly impacts the number of people included in the class. Consider the immense variation in the class depending on the definition selected. A self-identification definition yields a very small group since 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). A behavioral definition, in contrast, may include two to six percent of the population (based on homosexual behavior in the past five years). *Id.* More broadly still, “up to 21% of the population reports same-sex attraction at least once in adulthood.” *Id.* “Therefore, depending upon how [the class] 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 Sexual Orientation Is Even Broader Than Conduct, Attraction, or Self-Identity.

The problem of definitional ambiguity is not limited to the three different definitions of sexual orientation. Within each of the three definitional categories, there are significant subvariations. *See Dean & Meyer, supra*, at 135 (“Within each of the above three dimensions there is even further variation.”); *see also 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.” *Diamond & Savin-Williams, Gender & Sexual Identity, supra*, at 102.

Once again, experts on both sides of the debate agree—homosexuality cannot be defined simply by choosing one of the three primary definitions. In her book, M.V. 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, for 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. *See* 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 even further still, other researchers say that sexual orientation must be analyzed on a continuum. *See* 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, Inst. of Med., *Lesbian Health* 25-26 (Andrea L. Solarz ed., 1999) (“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 another issue upon which scholars agree. As one researcher notes:

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). He 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, M.V. 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.

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 qualifies as gay or lesbian. *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); Carpenter & Gates, *supra*, at 574.

But there is more. Some researchers have noted 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. . . . [T]hese are not mutually exclusive categories.” John P. DeCecco, *Gay Personality and Sexual Labeling* 16 (1985).

In sum, the absence of any scientific or social agreement about who qualifies as gay or lesbian—together with the evidence (discussed above) showing that sexual orientation is not solely a result of birth and that sexual orientation shifts for a significant number of people throughout their lives—demonstrates that sexual orientation is fundamentally different in nature than race, sex, or any other class entitled to heightened scrutiny.

Conclusion

For the foregoing reasons, *Amicus* respectfully requests that this Court join the eleven other circuits that have held that classifications based on sexual orientation are not subject to heightened scrutiny.

Respectfully submitted this 17th day of August, 2012.

/s/ James A. Campbell _____

James A. Campbell
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020 (Tel)
(480) 444-0028 (Fax)
jcampbell@alliancedefendingfreedom.org

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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 6,074 words, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii), according to the word-count feature of Microsoft Word 2007.

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Dated: August 17, 2012.

/s/ James A. Campbell

James A. Campbell

Certificate of Service

I hereby certify that on August 17, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF System.

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James A. Campbell