

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-224-03T5

MARK LEWIS and DENNIS WINSLOW;
SAUNDRA HEATH and CLARITA
ALICIA TOBY; CRAIG HUTCHISON
and CHRIS LODEWYKS; MAUREEN
KILLIAN and CINDY MENEHIN;
SARAH and SUYIN LAEL; MARILYN
MANEELY and DIANE MARINI; and
KAREN and MARCYE NICHOLSON-MCFADDEN,

Civil Action

Plaintiffs-Appellants,

On Appeal from the Superior
Court of New Jersey,
Appellate Division

v.

GWENDOLYN HARRIS, in her official
capacity as Commissioner of the
New Jersey Department of Human
Services; CLIFTON R. LACY, in his
official capacity as the Commissioner
of the New Jersey Department of
Health and Senior Services; and
JOSEPH KOMONISKI, in his official
capacity as Acting State Registrar
of Vital Statistics of the New Jersey
State Department of Health and
State Services,

Defendants-Respondents.

Sat Below:
Stephen Skillman, P.J.A.D.
Anthony J. Parillo, J.A.D.
Donald G. Collester, Jr., J.A.D.

**BRIEF AMICI CURIAE OF PROFESSORS OF PSYCHOLOGY AND PSYCHIATRY IN
SUPPORT OF DEFENDANTS-RESPONDENTS**

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PROCEDURAL HISTORY

Amici adopts the statement of procedural history of the defendants.

STATEMENT OF FACTS

Amici adopts the statement of facts of the defendants.

BRIEF OF AMICI CURIAE

Amici are scholars of psychiatry and psychology with a professional interest in orientation issues. They seek to provide information to this Court bearing on its decision of whether to endorse a legal declaration that orientation is a fixed and immutable characteristic similar to race or gender. The names and institutional affiliations of *amici* are set forth in the attached Appendix.

INTRODUCTION

Plaintiffs and their *amici* assert a claim on behalf of a larger group, designated in the briefs as "lesbian and gay individuals" (Brief of Appellants at 1) who make up "one class of citizens" (Brief of Appellants at 3). The claim is that this group as a *class* has been denied liberty and equality. Thus, they urge comparisons to racial minorities and women who have been the victims of discrimination based on largely immutable group characteristics. Brief of Appellants at 24 (analogy to interracial marriage) & 50 (analogy to coverture).

As experts in psychiatry and psychology, we offer scientific information that is directly relevant to this court in assessing whether orientation as a category is sufficiently similar to race and gender to merit analogous treatment in Constitutional law. We point out two highly relevant facts: (1) there is no scientific consensus on what homosexuality is, and the number of people who fit in the class "gay and lesbian" varies widely, depending on which definition of homosexuality is used and (2) there is no scientific consensus that homosexuality is exclusively or primarily genetic in origin. In fact, the most recent studies on identical twins cast increasing doubt on genetic explanations as primary reasons for sexual orientation.

In the absence of a social and scientific consensus that orientation is an immutable or fixed class, laws defining marriage as a union of male and female should not trigger strict scrutiny on the grounds they deny marriage rights to a fixed class.

I

THERE IS NO SCIENTIFIC AGREEMENT ON THE DEFINITION OF HOMOSEXUALITY.

The American and New Jersey Psychological Associations (Brief of American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of

Plaintiffs-Appellants at 3), describe sexual orientation as "an enduring pattern or disposition to experience sexual, affectional, or romantic attractions." Id. at 8. Rather than being easily identifiable, they say "sexual orientation ranges along a continuum." Id. In fact, *amici* say that the characterization of "sexual orientation" as an individual characteristic is simplistic because "sexual orientation is always defined in relational terms and necessarily involves relationships with other individuals." Id. at 9. These relationships vary widely and may be difficult to quantify. According to *amici* they include quantifiable things like "sexual acts" but also subjective factors like "romantic attraction" or "desiring to act." Id. at 9. Even the quantifiable factors cover an extremely wide range to include not only sexual matters but "actions as simple as holding hands with or kissing another person." Id.

Amici thus concede that orientation is not an easily identifiable class of people sharing an immutable characteristic, like race or gender.

In the scientific literature there are three basic definitions of orientation, based on either (a) sexual behavior, (b) sexual attraction, or (c) self-ascribed

social identity. EDWARD O. LAUMANN, ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290 (1994).

Within each category there are significant subvariations, as well. For example, if homosexuality is defined behaviorally ("men who have sex with men") is a gay man any man who reports ever having sex with a man? In the last year? *Id.* at 294-295. In the last five years? If a man typically has sex with women, but has also had sex with a man is he gay, bisexual, or straight? The class of people who count as "gay or lesbian" will increase or decrease significantly depending on the classifications the scholar (or the government) chooses to adopt.

If orientation is defined by attraction, rather than behavior, do we use physical attraction or romantic attraction as the primary criteria? *Id.* at 297. In addition sexual attraction typically exists on a continuum with many individuals recognizing some degree of attraction to members of both sexes. If a man identifies himself as a "2" or a "3" on a scale in which 1 represents "only attracted to men" and 7 represents "only attracted to women" is he gay or straight or something else?

These are not minor variations on a theme but fundamentally different ways of understanding who is "gay"

that produce large variations in estimates of who counts as a member of this class.

The clearest definition of homosexuality is self-ascription: people are gay or lesbian if they say they are, that is, if they adopt these as social identities. But such a definition also makes orientation fundamentally different in character and nature than skin color or gender.

Laumann and colleagues faced the difficulties of definition in the context of the "Chicago Sex Survey" which is considered one of the most reliable scholarly efforts to determine sexual practices in the United States." Their research, the authors report, "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. . . . this preliminary analysis provides unambiguous evidence that no single number can be used to provide an accurate and valid characterization or the

incidence and prevalence of homosexuality in the population at large. In sum, homosexuality is fundamentally a multidimensional phenomenon that has manifold meanings and interpretations, depending on context and purpose." LAUMANN at 300-301.

Other researchers report similar definitional complexities, e.g. "There 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 may not all agree." A.E. MOSES & R.O. HAWKINS, JR., COUNSELING LESBIAN WOMEN AND GAY MEN: A LIFE ISSUES APPROACH 43 (1982).

How much difference do varying definitions of homosexuality make? The 2000 Census reports 3,013,338 men and 3,313,454 women over 18 in New Jersey. Applying the Chicago Sex Survey's proportions if New Jerseyans are defined as gay by self-identification as either gay or bisexual, 84,373 men and 46,388 women in the state are gay or lesbian (reports that "2.8 percent of the men and 1.4 percent of the women" surveyed in the U.S. "reported some level of homosexuality (or bisexual) identity". (LAUMANN at 293). If homosexuality is defined by sexual attraction,

however, the numbers would be 185,553 for women and 135,600 for men. LAUMANN at 297. Who is gay in New Jersey? The number of men varies from 85,000 to 186,000 and the number of women from 46,000 to 136,000 depending on the definition used. Thus the class of people who are gay and lesbian may more than double or be cut by more than half, depending on the equally scientifically legitimate and commonly used definition employed.

Research into the origins of orientation is in its infancy. But the research we have shows flux in adults' own self-ascription of homosexuality. That is, research that asks individuals to rate themselves on the homosexuality continuum, and then asks these same individuals to rate themselves again several months or years later, finds that many individuals vary, with some becoming more "gay" and some becoming less "gay" in their own estimation over time. "[W]e realize that homosexuality is not some monolithic construct one moves toward or from in a linear way; movement toward homosexuality fails to capture the fluid and contextual nature of sexuality. We also acknowledge that changes in sexual feelings and orientation over time occur in all possible directions." Joseph P. Stokes, et al, *Predictors of Movement Toward*

JOURNAL OF SEX RESEARCH 304, 305 (1997).

Scholars of orientation are beginning to find an increasing number of women who insist that their self-identity as lesbians is in fact a personal choice, rather than a biological constraint. 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). One study notes that "variability in the emergence and expression of female same-sex desire during the life course is normative rather than exceptional." Diamond & Savin-Williams at 298. 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." Id. at 301. In another study, the author notes that "[h]alf of the young women in this sample relinquished the first sexual-minority identity they adopted." Diamond at 247.

Other researchers report similar results. For example Charbonneau and Lander interviewed 30 women who had spent

half their lives as heterosexuals, married, and had children and then in midlife became lesbian. Some of these women explained their lesbianism as a process of self-discovery. But a "second group of women . . . regarded their change more as a choice among several options of being lesbian, bisexual, celibate or heterosexual." Karen L. Bridges and James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns* 73 *Journal of Counseling and Development* 134, 135 (Nov./Dec. 1994) (describing C. Charbonneau and P.S. Lander, *Redefining Sexuality: Women Becoming Lesbian in Mid-Life* in *LESBIANS AT MID-LIFE* 35 (B. Sang, et al. editors, 1991)).

In addition to these sources of flux, recent scientific research that shows that at least some strongly motivated individual can change their orientation, both in terms of identity, behavior and self-reported sexual attraction. 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).

The absence of any scientific or social agreement about who counts as homosexual, and evidence of at least some flux in self-ascription over time, makes orientation fundamentally different in nature than race or gender.

II

EMERGING EVIDENCE SUGGESTS THAT HOMOSEXUALITY IS NOT AN INNATE CHARACTERISTIC LIKE RACE OR SEX.

Many people believe that homosexuality is genetic in origin, and therefore structurally similar to race or gender. There is, however, no scientific consensus that homosexuality is exclusively or primarily genetic in origin, and recent scientific research and opinion is pointing away from genetics as the primary explanation. As two Columbia University sociologists suggest in a recent study, the efforts to establish genetic or hormonal effects on sexual orientation have been "inconclusive at best." Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction* 107 AMERICAN JOURNAL OF SOCIOLOGY 1179, 1180 (2002).

Two scholars recently put it ". . .[T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology." What causes homosexuality? It is apparent that biological, psychological and social factors interacting in complex and various ways shape human sexual orientation. RICHARD C. FRIEDMAN AND JENNIFER I. DOWNEY, *SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE* 39 (2002).

Identical twin studies are used to tease out the genetic component of behaviors. The evidence from these studies is mixed. But the most recent and best identical twins study using large, nationally representative data found no evidence of any genetic influence at all. The recent trend in scientific research on orientation is to reject genetic explanations as primary. For example 1991 and 1993 studies, involving twin pairs recruited through homosexual publications, reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. J.M. Bailey, et al., *Heritable Factors Influence Sexual Orientation in Women* 50 ARCHIVES OF GENERAL PSYCHIATRY 217 (1993); J.M. Bailey & R.C. Pillard, *A Genetic Study of Male Sexual Orientation* 48 ARCHIVES OF GENERAL PSYCHIATRY 1089 (1991). However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other identical twins are gay). Moreover, as sociologists Bearman and Bruckner note, using common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests "substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%),

chewing gum (58%), and riding a taxi (38%).” Bearman & Bruckner at 1185 note 8.

A small-scale study published in 2000 showed even lower concordance rates (31.6 percent). Kenneth S. Kendler, et al., *Sexual Orientation in a U.S. National Sample of Twin and Nontwin Sibling Pairs* 157 *AMERICAN JOURNAL OF PSYCHIATRY* 1843, 1845 (2000) (sample of nineteen pairs).

Identical twin studies suffer from some of the same recruitment problems that other non-probability or “convenience” samples face. Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and some studies rely on twin’s estimates of their twin’s orientation, which have been shown to be unreliable. 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 at 1184. Their own study focused on “same-sex romantic attraction” in a large, nationally representative sample (the Add-Health database, which is representative of all teens in schools in the late 1990s). This study found no noticeable pattern suggesting genetic influence at all. Concordance rates for identical twins were only 6.7 percent, about the same as for fraternal twins. (7.2

percent). *Id.* at 1197-1198. They conclude: “[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.

There is no scientific consensus that orientation is exclusively or primarily genetic in origin. This makes orientation fundamentally different in character from race or gender.

III

CONCLUSION

Society is moving towards greater acceptance of and accommodations for the legitimate social needs of gay and lesbian individuals at a rapid rate. It would be a mistake for the court to freeze into law a view of sexual orientation that may well not hold up under future scientific scrutiny. Many gay people, especially lesbians, are clearly asserting their right to a homosexual identity as a matter of choice, not genes, and recent scientific research support their conclusion that, in this respect, homosexuality is not analogous to race or gender

We suggest that it would be inappropriate for this court to conclude that strict scrutiny is needed to protect orientation as a class, or to mandate a redefinition of

marriage when no scientific or social consensus exists on the nature, membership and characteristics of the class claiming discrimination.

Dated:

Respectfully submitted,

Michael P. Laffey

APPENDIX

Names and Institutional Affiliations of Signers

Dr. Paul McHugh, M.D.

Henry Phipps Professor of Psychiatry and Director of the
Department of Psychiatry and Behavioral Sciences, Johns
Hopkins University School of Medicine

Dr. Paul C. Vitz, Ph.D.

Professor Emeritus of Psychology, New York University

Dr. M. Gawain Wells, Ph.D.

Professor and Chair, Department of Psychology, Brigham
Young University

Institutional affiliations are provided for identification
purposes only.