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Army Reserve Regulations (AR) 140-111, Table 2, bar lesbians and gay men from reenlisting in the Army. In 1988, pursuant to these regulations, Sergeant Miriam benShalom was refused reenlistment despite an exemplary record as a soldier since her enlistment in 1974. She never attempted to conceal her sexual orientation from the Army.

The questions in this case are whether gay people, who have suffered invidious discrimination throughout this nation's history without protection from the political branches of government, constitute a suspect class under the Fourteenth Amendment's equal protection clause, and whether the Army regulations resulting in the refusal of Sgt. benShalom's application for reenlistment fail to survive constitutional scrutiny.

The resolution of these questions turns to a substantial degree on the answers to empirical questions about sexual orientation and the dynamics of prejudice. Equal protection doctrine accords "suspect" or "quasi-suspect" classification status to groups that have suffered from a history of prejudice or unjust stereotyping and stigmatization, due, at least in part to an "immutable" or largely involuntary characteristic that bears little or no relation to the individual's ability to contribute to society.^{1/} To determine whether homosexuality meets these largely empirical criteria, the Court should take into account scientific research, much of it conducted by psychologists, and expert scientific opinion concerning these very issues.

The Army regulations under which Sgt. benShalom was refused reenlistment are based on outmoded, empirically discredited conceptions of homosexuality, and are in conflict with the modern scientific understanding of sexual orientation. Such discrimination is harmful in at least three ways: (1) it is seriously detrimental both psychologically and otherwise to gay people; (2) it deprives governmental institutions of the services of well-qualified people

^{1/} See, e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Mathews v. Lucas, 427 U.S. 495, 505 (1976); Frontiero v. Richardson, 411 U.S. 677, 684-95, 686 (1973) (plurality opinion); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

such as Sgt. benShalom; and (3) it encourages people who hold negative attitudes to persist in holding those attitudes by giving them official approval. Such harms are the classic consequences of invidious discrimination. Cf. Brown v. Board of Education, 347 U.S. 483 (1954); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).

Amicus will outline the scientific evidence and opinion about sexual orientation as it bears upon the legal issues before the Court, showing that homosexual people constitute a "discrete and insular minority" deserving of heightened equal protection scrutiny. Homosexuality has been shown not to impair the ability of individuals to contribute to society; to be the subject of prejudicial stereotypes; and in most cases to be involuntarily acquired and highly resistant or impervious to attempts to change it. Point I. Furthermore, the Army regulations at issue do no more than give effect to those stereotypes, attempting to resolve the problems caused by prejudice by further penalizing the victims of that prejudice. Moreover, the regulations are irrational and counterproductive, and do not survive any meaningful level of equal protection scrutiny. Point II.

ARGUMENT

The district court concluded that any governmental burden imposed specially upon the class of people with a homosexual orientation is subject to heightened scrutiny under the equal protection clause. BenShalom v. Marsh, No. 88-C-468, slip op. at 15-19 (E.D. Wis. Jan. 10, 1989); accord Watkins v. United States Army, 837 F.2d 1428, 1448 (9th Cir. 1988). Most experts on human sexuality agree that an individual's sexual orientation is determined by the biological sex of the people to whom he or she is sexually attracted, the people with whom he or she shares affectional attachments, and his or her

sexual partners.^{2/} Sexual orientation is distinct from sexual conduct and refers to a pattern of sexual and affectional preferences for persons of a particular biological sex.^{3/}

Army regulations also distinguish between sexual orientation and sexual conduct, defining a "homosexual" as "a person, regardless of sex, who desires bodily contact between persons of the same sex . . . with the intent to obtain or give sexual gratification." AR 140-11, Table 4-2. They authorize the exclusion of persons who have this desire, whether or not they have ever engaged in homosexual acts. Moreover, although a non-homosexual soldier may be excused for engaging in homosexual acts, a homosexual soldier may not. *Id.* at note 1. Sgt. benShalom was deprived of the opportunity to seek reenlistment under this provision solely due to her sexual orientation. *Amicus* urges this Court to affirm the lower court's opinion holding that a classification based upon sexual orientation is subject to heightened constitutional scrutiny, and that the regulations cannot survive such scrutiny.^{4/}

I. THE TRIAL COURT'S DECISION THAT HOMOSEXUAL PEOPLE CONSTITUTE "A DISCRETE AND INSULAR MINORITY" REQUIRING THE PROTECTION OF HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE IS SUPPORTED BY SCIENTIFIC RESEARCH AND OPINION.

The lower court concluded that status as a homosexual is a suspect classification. The traditional factors that lead to a denomination of a class

2/ Shively, Jones, and DeCecco, Research on Sexual Orientation: Definitions and Methods, 9. J. Homosexuality 127-136 (1983-84).

3/ See Money, Sin, Sickness, or Status? Homosexual Gender Identity and Psycho-neuroendocrinology, 42 Am. Psychologist 384, 385 (1987) [hereinafter Money]; Herek, On Heterosexual Masculinity, 29 Am. Beh. Scientist 563 (1986).

4/ *Amicus* believes that these regulations cannot survive even rational basis scrutiny. See Point II, infra.

as suspect include: whether there has been a history of purposeful discrimination against the class in question; whether that discrimination is "invidious" as that that concept has been developed; and whether the class suffers from political disempowerment. See Watkins, 837 F.2d at 1444-1447.

Amicus submits that the lower court's conclusion that gay people have been subjected to a history of adverse treatment is indisputable.^{5/} In this brief, however, amicus wishes to address matters within its special expertise, and to provide an outline of the scientific evidence bearing on the second factor: whether discrimination against gay people has been "invidious." In light of the extant research, there is little doubt that the widespread discrimination existing in our society against homosexuals is "invidious."

As amicus will explain, the research shows that: (1) being homosexual bears no relation to ability to perform or contribute to society; (2) homosexuals have been subjected to prejudice and inaccurate stereotypes; and (3) sexual orientation is formed in childhood, constitutes a very important element of individual identity, is highly resistant to change, and therefore always or almost always is a characteristic over which individuals lack a substantial degree of control. See Watkins, 837 F.2d at 1444-1445 (collecting sources) (citation omitted).

^{5/} See, e.g., Sullivan, A Bibliographic Guide to Government Hearings and Reports, Legislative Action, and Speeches Made in the House and Senate of the United States Congress on the Subject of Homosexuality, 10 J. Homosexuality 135 (1984), reprinted in DeCecco, Bashers, Baiters & Bigots: Homophobia in American Society 135 (1985) (outlining Congressional documents concerning gay men and lesbians from 1920-1983, and indicating both level of animus against gay people by many in Congress and failure of Congress to enact legislation of any kind protecting gay people).

A. Sexual Orientation Does Not Affect a Person's Ability to Contribute to Society.

The major mental health professions no longer consider homosexuality to be a psychological disorder.^{6/} In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders, declaring that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities."^{7/} As the DSM-III states, "homosexuality per se is not a mental disorder."^{8/}

In 1975, amicus APA, based upon a review of the scientific data regarding homosexuality, passed a resolution supporting the Psychiatric Association's determination that homosexuality is not a mental disorder: "Homosexuality per se implies no impairment in judgment, stability, reliability or general social and vocational capabilities; . . . the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations."^{9/} APA noted that the prejudice and stigma to which gay people are subjected is essentially the same as that encountered by other minorities; and further

6/ A disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful symptom (distress) or impairment in one or more important areas of functioning." American Psychiatric Association, Diagnostic And Statistical Manual 6 (3d ed. 1980) [hereinafter DSM-III].

7/ Resolution of the American Psychiatric Association, December 15, 1973. "In the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease." Id.

8/ DSM-III at 380. "A significant proportion of homosexuals . . . show no significant signs of manifest psychopathology . . . and are able to function socially and occupationally with no impairment." Id.

9/ Resolution of the Council of Representatives of the American Psychological Association, 30 Am. Psychologist 633 (1975) [hereinafter APA Resolution].

resolved that "no proof of . . . judgment, capacity, or reliability shall be placed upon [homosexual persons] greater than that imposed upon any other persons."^{10/}

The declassification of homosexuality as a mental disease was the result of a long reevaluation of the "illness model" of homosexuality and was based on extensive scientific findings by a large number of independent researchers.^{11/} Extensive psychological research conducted over almost three decades has conclusively established that homosexuality is not related to psychological adjustment or maladjustment.^{12/} "Theories contending that the existence of differences between homosexuals and heterosexuals implies

10/ APA Resolution, supra n. 9. See National Association of Social Workers (NASW), Policy Statement on Gay Issues, adopted by NASW Delegate Assembly (1977) ("The Association deplores and will continue to work to combat archaic laws, discriminatory employment practices, and any of the forms of discrimination which serve to impose something less than equal status upon homosexually oriented members of the human family.").

11/ According to amicus APA's Task Force on Sexual Orientation, research that had supported the "illness model" of homosexuality was "influenced by poorly founded stereotypes and social prejudice." Weinrich, Task Force Findings: Overview and Prospect in Homosexuality: Social, Psychological, and Biological Issues 377 (W. Paul et al. eds. 1982) [hereinafter Homosexuality]. See Hooker, The Adjustment of the Male Overt Homosexual, 21 J. Projective Techniques 17 (1957) (homosexual and heterosexual men not distinguishable from each other on basis of standard psychological tests; similar majority of both groups appear free of psychopathology). Later studies have replicated these findings with female samples. See, e.g., M. Freedman, Homosexuality and Psychological Functioning (1971).

12/ See Gonsiorek, Results of Psychological Testing on Homosexual Populations, 25 Am. Behav. Sci. 385, 394 (1982) [hereinafter Psychological Testing]; Reiss, Psychological Tests in Homosexuality in Homosexual Behavior: A Modern Reappraisal 296-311 (J. Marmor ed. 1980) [hereinafter Reiss]; Hart, Roback, Titler, Weitz, Walston & McKee, Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature, 39 J. Clinical Psychiatry 604 (1978) ("findings to date have not demonstrated that the homosexual individual is any less psychologically adjusted than his heterosexual counterpart").

maladjustment are irresponsible, uninformed or both."^{13/} As is suggested by the resolutions of the Psychological, Psychiatric, and Social Work Associations, research has also demonstrated the natural corollary of these findings: gay people have an overall potential to contribute to society similar to that of heterosexual people, including in the workplace.^{14/}

The facts underlying this litigation are a dramatic case in point: the Army has rejected Sgt. benShalom despite her outstanding contributions, without any showing—even any allegation—that her status as a lesbian interfered with her job performance, or that her job performance was otherwise less than outstanding.

B. Discrimination Against Gay People Is Substantially Based on Erroneous Stereotypes.

Research confirms that those holding negative attitudes about gay people are likely to have based those attitudes on false stereotypes. Based on such evidence, psychologists generally conceptualize anti-gay prejudice as manifesting the same social psychological dynamics as racial and other ethnic prejudice.^{15/} This conclusion is reinforced by studies in which it was found

^{13/} Psychological Testing, supra note 12, at 394 (extensive review of literature); see Reiss, supra note 12, at 308.

^{14/} See, e.g., Snyder & Nyberg, Gays and the Military: An Emerging Policy Issue, 8 J. Pol. & Military Soc. 71, 77-79 (1980) (summarizing research and finding that homosexuals and heterosexuals score about the same in job stability and job satisfaction); A. Bell & M. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 141-148 (1978) [hereinafter Bell & Weinberg] ("for the majority of our homosexual respondents, male and female, the fact that they happened to be homosexual had little to do with their experiences at work or the satisfaction they derived from them"). Cf. D. McWhirter and A. Mattison, The Male Couple: How Relationships Develop 286 (1984).

^{15/} See, e.g., K. Gergen & M. Gergen, Social Psychology, 140-141 (1981); Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual
(Footnote Continued)

that people holding negative attitudes toward homosexual people (encapsulized by the term "homophobia") "are less likely to have had personal contact with lesbians or gay men," and, hence, are basing their attitudes on popular beliefs and misconceptions.^{16/}

One leading researcher has summarized the nature of negative stereotypes toward homosexuals:

Most common stereotypes are related to cross-sex characteristics. Additionally, significant numbers of individuals characterize male homosexuals as mentally ill, promiscuous, lonely, insecure, and likely to be child molesters, while lesbians have been described as aggressive and hostile toward men.^{17/}

The same researcher explains that "[l]abeling itself can lead people to perceive stereotypical behaviors, whether or not they occur," and that stereotypes can be so influential that those gay people "who violate stereotypical expectations (e.g., masculine gay men and feminine lesbians) may actually be disliked" for that reason. Id.

A second researcher reached stark conclusions about the inaccuracy of the stereotypes popularly held about gay people:

(Footnote Continued)

Attitudes, 13 Personality and Social Psychology Bull. 34 (1987); Herek, Can Functions Be Measured?, 50 Soc. Psychology Q. 285 (1987).

^{16/} Herek, Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, 10 J. Homosexuality 1, 6 (1984) [hereinafter Beyond Homophobia] (summarizing research). Similarly, several studies indicate that exposure to truthful information about lesbians and gay men often leads to a reduction in homophobia. See Herek, Beyond "Homophobia", supra; cf. Amir, The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations in Towards the Elimination of Racism 73 (D. Katz ed. 1976) [hereinafter Amir]. Public opinion research also demonstrates that people who are acquainted with someone who does not conceal her/his homosexual orientation have, in general, significantly more favorable attitudes toward lesbians and gay men. Schneider & Lewis, The Straight Story on Homosexuality and Gay Rights, Pub. Opinion 16-20, 59-60 (Feb/Mar. 1984) [hereinafter Schneider & Lewis].

^{17/} Herek, Beyond "Homophobia", supra note 16, at 9 (citations omitted).

Until now, almost without exception, people in general, . . . have been outraged, fearful, or despairing toward homosexuality because of the stereotypes they hold. Not only have they believed that homosexuals are pretty much alike, but that this similarity necessarily involves irresponsible sexual conduct, a contribution to social decay, and, of course, psychological pain and maladjustment. Given such a stereotype, it is little wonder that the heterosexual majority has seen fit to discourage the acceptance of homosexuality by . . . refusing to employ homosexuals, withholding from homosexual men and women the civil rights enjoyed by the majority and by a growing number of other minority groups

The present investigation, however, amply demonstrates that relatively few homosexual men and women conform to the hideous stereotypes people have of them

Most are indistinguishable from the heterosexual majority with respect to the nonsexual aspects of their lives and whatever differences there are between homosexuals' and heterosexuals' social adjustment certainly do not reflect any malevolent influence on society on the part of the homosexuals concerned.^{18/}

The Army's exclusion of lesbians and gay men (by means both of the enlistment regulations at issue in this case as well as the Army's discharge regulations) is based in large part on these same irrational stereotypes, which also led to "the illness model" of homosexuality that prevailed until the Psychological and Psychiatric Associations repudiated it in the early 1970s. As amicus APA's Task Force on Sexual Orientation found, that model was "influenced by poorly founded stereotypes and social prejudice."^{19/}

The history of the Army's exclusions of gay people is rife with open expressions of unfounded prejudice. In 1966, for example, the Army described its policy toward gay men and women this way:

^{18/} Bell & Weinberg, supra note 14, at 229-231 (emphasis added).

^{19/} Weinrich, Task Force Findings: Overview and Prospect in Homosexuality, supra note 11, at 377.

history of antisocial behavior [and], sexual perversion."^{22/} The Army plainly continues to view homosexuality as a disease.

The evidence thus supports the conclusion reached by the principal social science study analyzing military policies regarding lesbians and gay men: these policies "are based on stereotypes of the homosexual that research has shown to be untenable and that result in discrimination against a minority."^{23/}

C. Sexual Orientation Is Highly Resistant to Change, and It Is Therefore Abhorrent for Government to Penalize Homosexual Status.

"Immutability," if defined absolutely to mean in all cases "unable to change or mask the trait defining their class," is not essential to merit treatment as a suspect classification. Watkins, 837 F.2d at 1446 (citing alienage and illegitimacy as traits that can be changed, and gender, national origin and even race as traits that can be masked). In Lyng v. Castillo, 477 U.S. 635 (1986), the Court framed the inquiry as whether the class of people in question "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group." Id. at 638 (emphasis added). Gay people as a group certainly meet the criterion of discreteness. See L. Tribe, American Constitutional Law 1616 (1988).

Nevertheless, the degree to which an individual controls his or her acquisition of a trait and the relative ease or difficulty with which a trait can be changed, are relevant to a determination of suspectness. See, e.g., Mathews v. Lucas, 427 U.S. 495, 505 (1976). Research indicates that by early

^{22/} Moreover, like the provisions of AR 140-11, which plainly indicates a view of homosexuality as antisocial, perverted, and immoral, AR 601-280, Chapter 2, 2-24(a) and (b) (reenlistment), also disqualifies for reenlistment "insane persons" and "persons having a history of psychotic disorders."

^{23/} Williams & Weinberg, supra note 20, at 1987.

adolescence, homosexual feelings have already developed and that these feelings typically precede homosexual behavior by three years.^{24/} For some, homosexual orientation is indicated by early childhood.^{25/} The childhood sources of adult homosexuality have not been reliably identified and are very complex, but they may include biological as well as socio-environmental factors, but which may differ substantially within the population.^{26/} However, it has been reported consistently that homosexual feelings are much more common among homosexual adults than their heterosexual counterparts and the feelings appear during childhood and adolescence without prior sexual experience.^{27/} In such circumstances—where sexual orientation is acquired at a very early age—it makes little sense to argue that the trait is voluntarily acquired.

Once established, homosexual orientation is highly resistant to change. Researchers generally agree that, at most, the sexual orientation of only a small fraction of homosexual people who are highly motivated to change have been or can be modified, even through extensive attempts at therapy.^{28/}

^{24/} See A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference: Its Development in Men and Women 186-187 (1981) [hereinafter Sexual Preference].

^{25/} See R. Green, The "Sissy Boy Syndrome" and the Development of Homosexuality 370 (1987) [hereinafter Green].

^{26/} See Sexual Preference, supra note 24; Green, supra note 25; L. Ellis & M. Ames, Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality, 101 Psychological Bull. 233 (1987); Money, supra note 3; Storms, A Theory of Erotic Orientation Development, 88 Psychological Rev. 340 (1981).

^{27/} Sexual Preference, supra note 24.

^{28/} See Martin, The Emperor's New Clothes: Modern Attempts to Change Sexual Orientation in Innovations in Psychotherapy With Homosexuals (Hetrick & Stein eds. 1984) [hereinafter Martin]; Coleman, Changing Approaches to the Treatment of Homosexuality: A Review in Homosexuality, supra note 11, at 81-88; Marmor, Clinical Aspects of Homosexuality in Homosexual Behavior: A Modern Reappraisal 277 (J. Marmor ed. 1980).

"Failure" rates for such therapy are high. Moreover, the reliability of the claimed "change" over time—even in that small group for which changes have been claimed—has been called into question. Thus, at a minimum, the majority of homosexuals are unable to change their sexual orientation, even if they were to wish to do so.

Furthermore, it is ethically questionable, from the point of view of a practitioner, to seek to alter through therapy a trait that is not a disorder and is extremely important to individual identity.^{29/} Indeed, because psychologists generally agree that psychological adjustment is positively correlated with openness about one's sexual orientation, and maladjustment is positively correlated with masking of sexual orientation,^{30/} many clinicians also believe that "change of orientation therapy programs should be eliminated."^{31/} Finally, it is abhorrent for government to penalize an individual for possessing a trait so important to her or his identity and over which the individual has little or no meaningful control. Watkins, 837 F.2d at 446.^{32/}

^{29/} See Davison, Politics, Ethics and Therapy for Homosexuality in Homosexuality, supra note 11, at 89-98 [hereinafter Davison]; Malyon, Psychotherapeutic Implications of Internalized Homophobia in Gay Men in Homosexuality and Psychotherapy: A Practitioners Handbook of Affirmative Models 59 (J. Gonsiorek ed. 1982) [hereinafter Malyon].

^{30/} Bell & Weinberg, supra note 14, at 217-228.

^{31/} Davison, supra note 29, at 97.

^{32/} Because this case involves homosexual orientation, not sexual conduct, it differs fundamentally from Bowers v. Hardwick, 478 U.S. 186 (1986). The comments of the dissent in that case, which recognized the important role sexuality plays in individual identity, see, e.g., id. at 205 (Blackmun, J., dissenting), are still more compelling in the present circumstances.

D. The Army's Regulations Stigmatize Homosexual Soldiers and Encourage Them to Conceal Their Homosexuality, Which May Be Harmful to Their Mental Health.

The regulations at issue are not merely the product of prejudice; together with other laws and regulations outlawing or penalizing homosexuality they perpetuate and give rise to new prejudice and impose real social and psychological costs. In part because they are barred from service in the Nation's military, homosexuals become stigmatized as "deviants,"^{33/} and are viewed in terms of undesirable stereotypes. This process results in and reinforces homophobia against homosexuals by many heterosexual people. Homosexuals develop coping mechanisms, which are common traits in most persecuted groups. These can include denial of membership in the group and self-hatred, hatred of others in the group, and acting out self-fulfilling prophecies about one's own inferiority.^{34/} The great majority of gay people come to terms with their sexual orientation and integrate it into their lives. Studies demonstrate that these homosexual people are the most psychologically well-adjusted. But the small group who fail to do so are more troubled and dysfunctional.^{35/}

^{33/} The term "deviant" as used in the social sciences refers to the social reaction to behavior, not to the intrinsic characteristics of the behavior itself. H. Becker, *Outsiders: Studies in the Sociology of Deviance* (1963).

^{34/} G. Allport, *The Nature of Prejudice* (1954).

^{35/} Homosexuals who have been able to express their homosexuality are psychologically healthier than those who have repressed or hidden it. Bell & Weinberg, supra note 14; Hammersmith & Weinberg, Homosexual Identity: Commitment, Adjustment, and Significant Others, 36 *Sociometry* 56 (1973); M. Weinberg & C. Williams, *Male Homosexuals: Their Problems and Adaptations* (1974); Pilard, Psychotherapeutic Treatment for the Invisible Minority in Homosexuality, supra note 11, at 99; Martin, supra note 28.

The regulations at issue thus stigmatize homosexuals, thereby fostering "internalized homophobia," and other negative psychological conditions.^{36/} They also give reason for lesbian soldiers to conceal their sexual orientation, thus interfering with their own healthy psychological development.

II. THE ARMY'S SELF-DECLARED RATIONALE FOR EXCLUDING LESBIANS AND GAY MEN IS CONTRADICTED BY SCIENTIFIC RESEARCH.

A. The Government May Not Penalize a Group Solely Because Others Are Prejudiced Against It.

It is well established that government may not take action against a protected minority simply because some other group of people is antipathetic to or in disagreement with that minority, or because government fears that the consequences of that antipathy or disagreement will have disruptive effects. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); see also Terminiello v. Chicago, 337 U.S. 1, 4-5 (1948). Rather, it should be the responsibility of government to work to avoid those disruptive effects without penalizing the minority.

In this case, Sgt. benShalom, an exemplary soldier who never sought to conceal her status as a lesbian, has been refused reenlistment based on an Army regulation that purports to further seven interrelated government interests, permitting the military to:

- a. maintain discipline, good order, and morale;
- b. foster mutual trust and confidence among members;
- c. insure the integrity of the system of rank and command;

^{36/} See Gonsiorek, Psychotherapeutic Issues With Gay and Lesbian Clients in 3 Innovations in Clinical Practice: A Sourcebook 73-76 (Keller et al. eds. 1984); Malyon, supra note 29, at 59-69.

- d. facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy;
- e. recruit and retain members of the military service;
- f. maintain the public acceptability of military service;
- g. prevent breaches of security.

AR 135-178, 10-2.

But there is no evidence that the presence of Sgt. benShalom in the armed forces would adversely affect—or has adversely affected—any of these interests; to the contrary, psychological evidence as well as the record in this case, refute the Army's rationale for refusing benShalom (and homosexuals in general) reenlistment.^{37/} Absent any evidence that the exclusion of lesbians and gay men from the military actually furthers the above-mentioned government interests (except by giving effect to private prejudice), and in the face of scientific and empirical evidence to the contrary, the Army regulations at issue in this case cannot survive constitutional scrutiny. This is true, whether the Court finds that the appropriate level of scrutiny is "rational basis," see City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), "intermediate," or "strict."

B. Prejudice Against Lesbians and Gay Men in the Army Is Likely to be Reduced by Encouraging Contact Between Homosexuals and Heterosexuals.

The Army service record of Sgt. benShalom is outstanding. Yet, despite her superb performance she is being excluded from the Army because the

^{37/} The record in Watkins v. United States Army, 837 F.2d 1428, 1448-1451 (9th Cir. 1988) provide similarly eloquent testimony against these purported rationales.

Army believes that the presence of homosexuals in the Army per se harms Army objectives. Upon closer analysis, it becomes clear that the Army is simply trying to avoid the effects of private prejudice against homosexuals by excluding them. Even if citizens who are the object of prejudice could constitutionally be made to pay the price for the prejudice of others, however, research reveals that contact between the "prejudiced" class and the "prejudiced-against" class, under circumstances within the control of the Army, reduces prejudice.^{38/} Removal of these regulations would, in time, also largely remove the prejudice that provides the asserted reason for them.

Scientists studying prejudice have found that under the proper circumstances, prejudice is reduced by bringing the prejudiced and prejudiced-against groups together and putting them in a situation where each group can learn more about the other and the two can develop lasting relationships.^{39/} Conversely, barriers to communication and contact, such as those created by the Army regulations at issue in this case, tend to exacerbate intergroup hostility. Other criteria within the Army's control, in addition to mere contact, determine whether prejudice will be reduced. These include equality of status, the sharing of common goals, the success of the intergroup effort, institutional support, and the participation by members of both groups in decisionmaking.^{40/}

Particularly important for present purposes is "institutional support," or the attitude of those in authority toward the prejudiced-against group

^{38/} See generally, Ashmore & Del Boca, Psychological Approaches to Understanding Intergroup Conflicts in Towards the Elimination of Racism 73 (D. Katz ed. 1976).

^{39/} Amir, supra note 16 (summarizing research).

^{40/} Id.

and discrimination against it.^{41/} If the Army chooses to oppose prejudice, it will recede; if the Army continues to endorse prejudice through its discriminatory and invidious regulations, it will promote the very conditions it professes it wishes to avoid. Indeed, when it is realized that gay people serve in the Army—despite the regulations—in large numbers at present,^{42/} the counterproductive quality of the Army's regulations becomes apparent.

Several studies of prejudice against homosexual people suggest that intergroup contact reduces prejudice based upon sexual orientation. As noted, exposure to information about lesbians and gay men often leads to a reduction in anti-gay prejudice.^{43/} Similarly, people who know someone who is openly gay have more favorable attitudes toward gay people than people who do not.^{44/} Finally, a recent study suggests that contact with homosexual people not only lessens heterosexual's negative attitudes toward gay men and lesbians, but also significantly improves the ability of heterosexuals to work effectively with homosexual people.^{45/} The record in this case, full as it is with proof of Sgt. benShalom's commendable record and the Army's full knowledge of her sexual orientation, stands as a compelling further witness to this principle.

41/ Id.; Stephan, Intergroup Relations in II Handbook of Social Psychology 643 (Gardner et al. eds. 1985); Allport, et al., The Effects Of Segregation and the Consequences of Desegregation, 37 Minn. L. Rev. 413, 438 (1953).

42/ See Harry, supra note 21.

43/ See Herek, Beyond "Homophobia", supra note 16, at 13.

44/ Schneider & Lewis, supra note 16, at 16-20, 59-60.

45/ J. Rudolph, The Effects of a Multimodal Seminar on Mental Health Practitioners' Attitudes Toward Homosexuality, Authoritarianism, and Counseling Effectiveness (unpublished dissertation, Lehigh University 1988) (on file with amicus APA - available upon request).

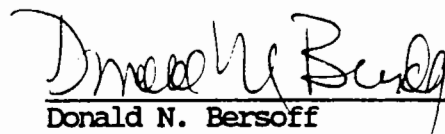
C. There Is No Rational Basis for the Army's Counterproductive Exclusion of Homosexuals.

The Army's blanket exclusion of homosexual soldiers is irrational and counterproductive. It compels the many gay men and lesbian women already in the armed forces to act in ways detrimental to themselves and the armed forces, and deprives the Nation of the services of fine, able citizens like Sgt. benShalom who makes no secret of their sexual orientation. To achieve its goal of recruiting and retaining high quality troops, the Army should base personnel decisions on merit, not sexual orientation; to reduce whatever prejudice does exist against homosexual soldiers, the Army should encourage contact between homosexual and heterosexual soldiers. The scientific data and opinion about intergroup prejudice suggest that such a policy will lead toward accomplishment of the Army's goals, while the present policy defeats the goals it is claimed to advance.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to hold the regulations at issue to be constitutionally invalid.

Respectfully submitted,



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