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VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process

Dear Members of the ICANN Board:

On behalf of our client, dotgay LLC (“dotgay”), please find attached the Second Expert Opinion of Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, addressing FTI’s purported “independent” review of the CPE process.

Professor Eskridge’s Second Expert Opinion unequivocally concludes that FTI Consulting, Inc.’s (“FTI”) findings are based on a superficial investigative methodology wholly unsuited for the purpose of an independent review. His Opinion confirms that the Economist Intelligence Unit’s (“EIU”) evaluation of dotgay’s application was incorrect, superficial, and discriminatory. In fact, a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.

We urge – indeed beseech – the Board (i) to not rely on the FTI Reports in determining how to proceed with dotgay’s application; (ii) to not hide behind technicalities and process; (iii) to carefully review Professor Eskridge’s two detailed expert opinions; (iv) to act in accordance with the spirit and letter of ICANN’s Articles of Incorporation, Bylaws, gTLD Applicant Guidebook (“AGB”), and the most basic principles of fairness, decency, and morality; and, on these bases, (v) to approve dotgay’s community priority application.

If the Board needs expert support for its consideration of dotgay’s application, we respectfully submit that it has Professor Eskridge. Professor Eskridge is a renowned expert in both legal interpretation and in sexuality, gender, and the law. He is, according to recent empirical ranking of law review citations, among the ten most-cited legal scholars in American history. He has delved in to the AGB and the Community Priority Evaluation (“CPE”) Process, and has provided empirical evidence as to why dotgay’s application

should be granted community priority status. He has demonstrated that to do otherwise would be discriminatory and unfair, and he has laid bare a number of fundamental flaws in FTI's investigation and analysis. He is available at any time to present his findings to ICANN's General Counsel, ICANN's outside counsel, and to the Board.

Professor Eskridge analyzes two of the three reports drafted by FTI: the "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports" ("Scope 2 Report"), and the "Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests" ("Scope 3 Report"). As part of this analysis, Professor Eskridge identifies the reports' fundamental errors, performs a substantive review of dotgay's application, and explains why dotgay should receive community priority status based upon a proper application of the CPE criteria to its application.

Professor Eskridge disagrees with the Scope 2 Report's conclusion that the EIU consistently applied the CPE criteria throughout the CPE process. After determining that the "Scope 2 Report is long on description and conclusory statements and short on actual evaluation,"¹ Professor Eskridge demonstrates several flaws in FTI's Scope 2 Report:

1. FTI "failed to recognize or engage the many criticisms of the EIU Panel's application of ICANN's and CPE's guidelines to the dotgay and other applications."²
2. FTI's conclusion, that "the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements,"³ "was supported by no independent analysis."⁴ In fact, "the approach followed by FTI was a 'description' of the CPE Reports, but not an 'evaluation' to determine whether the CPE Reports were actually following the applicable guidelines."⁵
3. "Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of

¹ Second Eskridge Opinion, ¶ 3.

² Second Eskridge Opinion, ¶ 37.

³ Second Eskridge Opinion, ¶ 38.

⁴ Second Eskridge Opinion, ¶ 38.

⁵ Second Eskridge Opinion, ¶ 38.

ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as in the CPE Reports.⁶

4. FTI “completely failed to examine the EIU Panel’s analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.”⁷

Professor Eskridge likewise examines the Scope 3 Report and concludes that the report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).”⁸ His study of the sources referenced in the Scope 3 Report, the very sources to which the EIU cited in support of its adverse findings against dotgay, reveals that “some of those sources directly support dotgay’s position.”⁹ For instance, one of the EIU’s major sources confirms that the term “gay” is in fact a well-recognized umbrella term for the entire LGBT community – completely contrary to the EIU’s determination in dotgay’s CPE. How could FTI have missed this? Is such a blatant omission, coupled with FTI’s superficial analysis, evidence of intentional discrimination against the gay community by ICANN, the EIU and FTI?

We respectfully submit that the best interests of ICANN as an organization would not be served by letting this matter go to an Independent Review Process. Accordingly, pursuant to the Board’ obligation to exercise due diligence, due care, and independent judgment, we sincerely hope that the Board will (1) review and agree with Professor Eskridge’s expert opinions; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay’s community priority application without any further delay.

Sincerely,



Arif Hyder Ali

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⁶ Second Eskridge Opinion, ¶ 42.
⁷ Second Eskridge Opinion, ¶ 76.
⁸ Second Eskridge Opinion, ¶ 37.
⁹ Second Eskridge Opinion, ¶ 88.

SECOND EXPERT REPORT

PROFESSOR WILLIAM N. ESKRIDGE, JR.

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APPENDIX 1

**CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF
JURISPRUDENCE, YALE LAW SCHOOL**

APPENDIX 2

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I. EXECUTIVE SUMMARY

- 1 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU), identified by FTI Consulting, Inc. as the CPE Provider, recommended that the application be denied. The predominant reason given was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender, namely, the community to be served by the string. Also, the EIU Panel authoring the Report incorrectly awarded dotgay only partial scores for the community endorsement requirement. Dotgay promptly requested reconsideration of and objected to the conclusions of its CPE Report, on the grounds that it did not properly follow the directives of the ICANN Guidebook and the principles of the ICANN Bylaws, was inconsistent with the CPE Reports for other applications, and rested upon an incomplete understanding of the facts.
- 2 Responding to the objections that dotgay and other community applicants that were raised against the CPE process, as well as certain findings of the IRP Panels in the Dot Registry and Despegar proceedings, the ICANN Board of Directors ordered a CPE Process Review. FTI Consulting, Inc. (FTI) was retained to conduct the Review. Scope 2 of the Review was supposed to be an “evaluation of whether the CPE criteria were applied consistently throughout each CPE Report.” Scope 3 was supposed to be a “compilation of the reference material relied upon by the CPE Provider * * * for the evaluations which are the subject of pending

Reconsideration Requests,” such as that of dotgay. On December 13, 2017, ICANN published FTI’s Scope 2 and Scope 3 Reports, as well as its Scope 1 Report. This Second Expert Report focuses on the Scope 2 and Scope 3 FTI Reports.

- 3 The **FTI Scope 2 Report** “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner” (p. 3). Unfortunately, the FTI Scope 2 Report is long on description and conclusory statements and short on actual evaluation. At best, it is superficial; at worst, it echoes the errors and confusion of the CPE Report for dotgay’s application. As I show in this Second Expert Report, the FTI Scope 2 Report (a) not only fails to correct the EIU Panel’s many erroneous interpretations of ICANN’s fundamental directives, but sometimes adds new mistakes of its own (such as FTI’s own erroneous statements about the requirements reflected in Criterion #2, Nexus); (b) fails to engage with the evident inconsistencies in the EIU Panel’s application of the standards to the .RADIO, .HOTEL, .OSAKA, and .SPA applications and to the .GAY application; and (c) tries to paper over the demonstrable fact that the EIU Panel showed no interest in or knowledge of gay history, made no serious attempt to gain such knowledge, misunderstood the deep interrelationship among sexual and gender minorities historically and currently, and had no systematic method for determining how the general population refers to LGBTQUIA people and their community.
- 4 The **FTI Scope 3** Report describes FTI’s compilation of the reference materials relied upon by the EIU for each of the eight pending Reconsideration Requests, including that of dotgay’s

second evaluation (p. 3 & note 11). A review of the FTI Scope 3 Report confirms the substantive criticisms of the EIU Panel’s CPE Report on the dotgay application, as outlined in the previous paragraph. Specifically, the FTI Scope 3 Report reveals that most of the evidence relied upon by the EIU Panel was not actually identified in the CPE Report (pp. 35-37), and confirms that the Panel employed no systematic methodology to determine whether, in fact, “gay” is a term that describes the broad community that includes transgender and intersex persons. Moreover, much of the evidence FTI found in the Panel’s working papers actually supports dotgay’s objections to the CPE Report’s scores for Nexus and Community Endorsement. This raises serious red flags because it calls into question whether anyone actually read the sources that the EIU Panel says it consulted.

- 5 The only proper methodological response to the many failures of the EIU Panel’s determinations would have been a substantive review of the affected applications, namely, a review that considered dotgay’s and other applicants’ objections to the EIU Panel’s interpretations of ICANN directives, its implementation of those directives for different applications, and the research methodology and findings of the EIU staff.¹ FTI chose to conduct a different kind of review—one that can only be described as superficial and far from fit for its assigned purpose. Accordingly, in my expert opinion, I do not see how the Board can rely on FTI’s review and still comply with the requirement of ICANN’s Bylaws that

¹ As part of this methodological response, for example, FTI should have taken into consideration my Expert Report of September 2016, Professor Lee Badgett’s Expert Report, the Council of Europe Report, the Recommendation from ICANN’s Ombudsman, and the ICC Independent Expert Determination. It does not appear to have done any of this.

decisions must be made by applying documented policies neutrally and objectively, with integrity and fairness, as well without discrimination.

II. QUALIFICATIONS OF THE EXPERT

6 I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent expert opinion on the validity of the ICANN Community Priority Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), which evaluated dotgay’s community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string “.gay”, as well as FTI’s review of the CPE process.

7 I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,² leading monographs,³ and dozens

² William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its fourth edition). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, “by far,” ever published in the field of legislation and suggesting that it would “alter the law school curriculum”).

³ For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.⁴

- 8 My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN’s gTLD Applicant Guidebook (AGB), especially Module 4.2.3, “Criterion #2: Nexus Between Proposed String and Community” and “Criterion #4 Community Endorsement”; (iii) the history of the terminology in dispute, especially the term “gay” and its applicability to the community of sexual and gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND AND RELEVANT ICANN DIRECTIVES

A. DOTGAY’S APPLICATION AND THE CPE REPORT

- 9 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by ICANN (the Internet Corporation for Assigned Names and Numbers).

⁴ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (most recently viewed January 23, 2018).

10 The EIU Panel completed its first evaluation and report on the dotgay application in October 2014, but a procedural error was identified and the BGC determined that the application should be reevaluated. A second evaluation and report were completed on October 15, 2015. References in this Second Expert Report will be to the second CPE evaluation and report, which I shall refer to as the CPE Report.

B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK

11 The governing legal materials include ICANN’s Bylaws and its Applicant Guidebook. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

12 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

13 ICANN’s Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay’s application. *See* AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant “community,” nexus between the proposed string and the community, registration policies, and community endorsement. AGB, Module 4.2.3. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The EIU Panel awarded dotgay a score of 10 out of 16 points, including a score of 0 out of 4 points for Criterion #2, the community nexus requirement, and a score of 2 out of 4 points for Criterion #4, the community endorsement requirement.

C. THE ICANN NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT

14 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay’s application. Dotgay’s petition lost 4 of 4 possible points on Criterion #2, “Nexus Between Proposed String and Community (0-4 Points).” In this part of this Second Expert Report I focus on the nexus element, which is responsible for 3 of the 4 points. (A uniqueness element accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)

15 An application merits **3 points** for the nexus element if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p.4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, p. 4-13. “[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, p. 4-13.

- 16 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.
- 17 An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that the “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, p. 4-13.
- 18 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element. CPE Report, pp. 4-6. Because dotgay secured 10 points from the remaining criteria and needed 14 points for approval, Criterion #2 was the main reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.
- 19 Recall that an application merits 3 points if “[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the

community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, p. 5. As I demonstrate below, this is demonstrably not correct.

20 The CPE Report did not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not “a well known short-form or abbreviation of the community” defined in dotgay’s application, but it did read into the explicit requirement (“a well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement was taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits 2 points if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation. Neither the EIU Panel nor FTI provided any explanation in this regard.

21 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, p. 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel

“determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the EIU Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6. I will return to the EIU Panel’s representation regarding the “review” it claims to have conducted “of the language used in the media as well as by organizations that work within the community” below.

22 The CPE Report did not identify the methodology the EIU Panel followed to support these sweeping empirical statements. Instead, the CPE Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, p. 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, p. 5 note 12. While this may be true to a certain extent, there is a significant and material gap between what the EIU Panel did and what is in fact feasible and indeed easily doable.

23 Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The EIU Panel conceded this point (CPE Report, p. 7) but nevertheless took the position that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, p. 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are

“many similar transgender stories in the media where ‘gay’ is not used to identify the subject.”
CPE Report, pp. 6-7 and note 14.

24 The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, p. 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, p. 7. But, the Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that although “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, p. 7 and note 19. This inconsistency is not addressed anywhere in the CPE Report or by FTI.

25 The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, p. 8.

26 Based upon this reasoning, the EIU Panel awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the Panel awarded 0 of 1 points for uniqueness. CPE Report, p. 8.

D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT

- 27 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications; Criterion #4 is “Community Endorsement.” As many as 2 points are awarded based upon support within the relevant community; as many as 2 points are awarded based upon lack of opposition within the relevant community. Dotgay’s petition lost 1 of 2 possible points on each element of Criterion #4.
- 28 Under the support element of the community endorsement criterion, **2 points** are awarded if the “[a]pplicant is, or has documented support from, the recognized community institution(s)/member organization(s) **or** has otherwise documented authority to represent the community.” AGB, p. 4-17 (emphasis added). **1 point** is awarded if there is “[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2.” AGB, p. 4-17. An applicant will be awarded 1 rather than 2 points if “it does not have support from a majority of the recognized community institutions/member organizations.” AGB, p. 4-18.
- 29 Under the opposition prong of the community endorsement criterion, **2 points** are awarded if there is “[n]o opposition of relevance.” AGB, p. 4-17. **1 point** is awarded if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 30 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 2 out of 4 possible points for Criterion #4, including 1 out of 2 possible points for support and one out of 2 possible points for opposition. CPE Report, pp. 10-11.

31 The EIU Panel awarded dotgay a partial score (1 point) for support, even though dotgay submitted strong statements of support from dozens of relevant organizations, including the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which the EIU Panel identified as perhaps the only “entity mainly dedicated to the entire global community as defined.” CPE Report, p. 3. The Panel, however, “determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have the documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).” CPE Report, p. 11.

32 The EIU Panel awarded dotgay a partial score (1 point) for opposition. The reason was that “there is opposition to the application from one group of non-negligible size.” CPE Report, p. 11. Although the CPE Report did not identify the group, it was the Q Center in Portland, Oregon. The Q Center is a small, local community center. It is a member of CenterLink, a national association of around 200 community centers. CenterLink endorsed dotgay’s application; the Q Center was the only one of its 200 members to oppose the dotgay application.

E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI

33 Dotgay objected to the conclusions reached by the CPE Report and requested a Reconsideration. Specifically, dotgay objected that its application deserved an award of all 4 possible points under Criterion #2, Nexus with the Community. Awarding 0 points, the EIU Panel made three different errors of legal or factual analysis: (i) interpretive errors, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring

ICANN's mission and core values; (ii) errors of inconsistency and discrimination, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay's application when compared with other applications; and (iii) errors of fact, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world. On September 15, 2016, I submitted an Expert Report documenting these three errors. In addition, dotgay objected that its application deserved an award of all 4 possible points under Criterion #4, Community Endorsement.

34 On October 18, 2016, the ICANN Board Governance Committee responded to the pending Reconsideration Requests with a CPE Process Review. Scope 2 of that Review was supposed to be an evaluation of whether the CPE criteria were applied consistently throughout each CPE Report. Scope 3 was supposed to be a compilation of reference materials relied upon by the EIU Panel for its evaluations of the applications of the pending Requests, including that of dotgay. Through counsel, ICANN retained FTI Consulting, Inc.'s Global Risk and Investigations and Technology Practice (FTI) to conduct the CPE Process Review. On December 13, 2017, FTI released its three Reports on Scopes 1-3. (This Second Expert Report will not discuss or analyze the FTI Report on Scope 1, which evaluates the EIU Panel's communications.)

35 FTI's Report on Scope 2, "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports," determined "whether the CPE Provider consistently applied the CPE criteria throughout each CPE." FTI Scope 2 Report, p. 2. "FTI

found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.” FTI Scope 2 Report, p. 3.

36 FTI’s Report on Scope 3, “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations Which Are the Subject of Pending Reconsideration Requests,” examined the EIU Panel’s “working papers” associated with each evaluation. FTI Scope 3 Report, p. 3. On the nexus criterion, FTI observed as many as “23 references to research or reference materials” in the working papers that were not cited in the CPE Report. FTI Scope 3 Report, pp. 38-39 & note 117. The FTI Report made no effort to evaluate these materials and so made no determination whether they supported the conclusions and generalizations of the CPE Report. On the community endorsement criterion, FTI reported three sources of information about the Q Center, which was the only opposition to the dotgay application. FTI Scope 3 Report, p. 40 & note 120.

37 This Second Expert Report addresses the FTI Scope 2 and Scope 3 Reports as they relate to the CPE Report for dotgay’s application. This Report will focus on the FTI Reports as they relate to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement). In my expert opinion, the FTI Scope 2 Report is not a serious analysis of the many interpretive and factual problems with the CPE Report. FTI failed to recognize or engage the many criticisms of the EIU Panel’s application of ICANN’s and CPE’s guidelines to the dotgay and other applications. Indeed, nothing in the FTI Scope 2 Report rescues the CPE Report from a variety of logical and analytical flaws or from its documented inconsistency with other CPE reports.

I shall set forth those criticisms in detail below. In my expert opinion, the FTI Scope 3 Report provides evidence that undermines the factual basis for the CPE Report's conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).

IV. The FTI Scope 2 Report Completely Missed the Important Ways the CPE Report Misinterpreted or Ignored the Established Directives for Evaluating Applications

38 The FTI Scope 2 Report “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines.” FTI Scope 2 Report, p. 3. The Report quoted the applicable guidelines and claimed to have considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. The conclusion was supported by no independent analysis, however. The Report uncritically repeated the conclusions found in the EIU Panel’s reports and did not ask whether the criteria the EIU Panel claimed to apply were the criteria laid out in the Applicant Guidebook and other authorities, some of which the EIU Panel and FTI ignored altogether. E.g., FTI Scope 2 Report, pp. 37-41 (Nexus). The approach followed by FTI was a “description” of the CPE Reports, but not an “evaluation” to determine whether the CPE Reports were actually following the applicable guidelines. As regards the dotgay application, they were decidedly **not**.

A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

- 39 The FTI Scope 2 Report says that EIU personnel “stated that they were strict constructionists and used the Applicant Guidebook as their ‘bible.’” FTI Scope 2 Report, p. 10. If it were true that the EIU considered the Guidebook to be its “Bible,” its personnel were far from strict constructionists—they were heretics who rewrote rather than interpreted the Guidebook’s rules for Criterion #2, especially its nexus element.
- 40 Recall the requirements ICANN has set forth, explicitly, for the nexus element in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p. 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’” AGB, p. 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
- 41 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.

42 As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁵ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes. Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes. FTI Scope 2 Report, pp. 37-41.

1. The EIU Panel and FTI Substantially Ignored the Primary Test for Nexus: Is the Proposed String “a Well Known Short-Form or Abbreviation of the Community”?

43 To begin with, the EIU Panel and FTI systematically ignored the Applicant Guidebook’s focus on whether the proposed string (“.gay”) is “**a well known short-form or abbreviation of the community**” (3 points) or “closely describes **the community**” (2 points) (emphasis added in both quotations). Notice the precise language, especially the language set **in bold**. The proposed string does not have to be “**the only** well known short-form or abbreviation of the community” and does not have to be “**the only term that** closely describes the community”

⁵ The proposition in text is explained and defended in virtually all the leading books on statutory, treaty, and contract interpretation, including such works as Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Antonin Scalia, *A Matter of Interpretation* (1997); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

(bold type for language added for contrast). More important, the primary focus is “the community,” not just “community members” (an alternative focus for the 2-point score).

44 For dotgay’s application, the overall community is sexual and gender nonconformists. As set forth in more detail in Part V below, this is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely asserted natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. “Gay” is “a well known short-form or abbreviation of the community” (the requirement for 3 points) and also “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be the only umbrella term for the community or even that it be the most popular term—but in fact “gay” remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that “gay” has been a popular word for more than a century, but also

demonstrates that once “gay rights” became ascendant in the 1990s, the term’s dominance increased and consolidated. (Appendix 2 describes the methodology underlying Figure 1.)

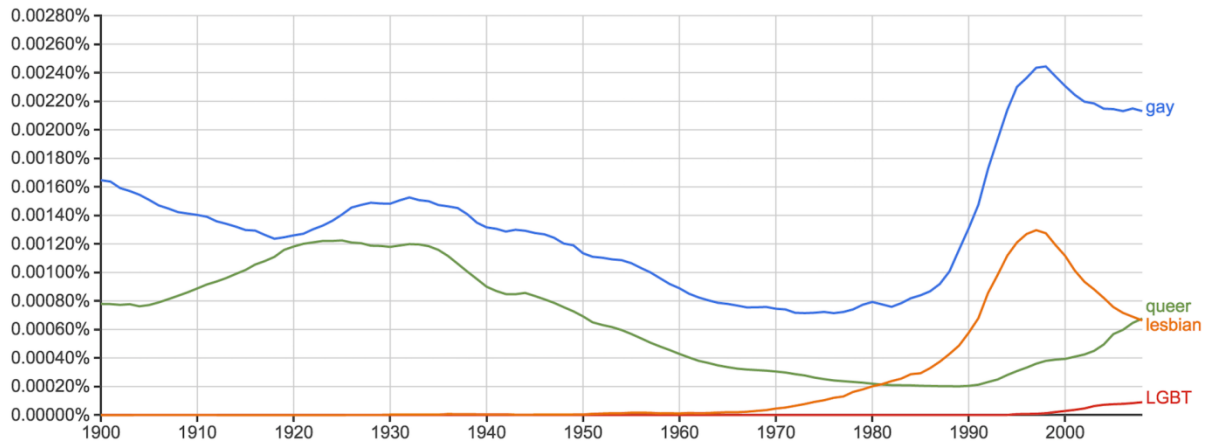


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The EIU Panel and FTI Created an “Under-Reach” Test for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the New Test to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

45 In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel has introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus element. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The EIU Panel created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.”

CPE Report, p. 5 (emphasis added). In its uncritical presentation, FTI simply repeated the error. FTI Scope 2 Report, pp. 37-39.

- 46 Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, p. 4-12, nor was it taken from the Guidebook’s definitions of “Name” or “Identify,” AGB, p. 4-13. Yet the EIU Panel and FTI cited the Applicant Guidebook for their misunderstanding of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake, a mistake completely missed by FTI.
- 47 According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. For the dotgay application, the EIU Panel recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, p. 5 (quoting the AGB). Notice that the first part [1] of the Report’s requirement is taken from the Guidebook’s 2-point nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so it ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

48 Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that, for its 2-point score, the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, p. 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The EIU Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. In evaluating the dotgay application, the EIU Panel worried that the applied-for string is narrower than the community defined in the application:

EIU Panel Concern: Applied-For String < Community Defined in Application

49 The EIU Panel imported its “under-reaching” concern into the Applicant Guidebook, but in the teeth of the ordinary meaning of its text. The Liberum Veto for “under-reaching” is a regulatory addition to the Guidebook and not a proper interpretation of the Guidebook, which only requires that the proposed string be “a well known short-form or abbreviation of the community” (3 points) or “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be only term, or even the most popular term, that would be used by every member of the community. On the other hand, the Applicant

Guidebook does say, for a 2-point score, that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community.” AGB, p. 4-13 (2 points). The explicit concern of the Applicant Guidebook is that the proposed string not “over-reach”; by omitting parallel language for “under-reach,” the Applicant Guidebook should be interpreted to allow more latitude for under-reaching.⁶ It is a widely accepted canon of contract, statutory, and even constitutional interpretation that the expression of one exception suggests the exclusion of others.⁷

50 Stating the matter more simply, and even more at odds with ICANN’s Applicant Guidebook, the FTI’s Scope 2 Report identified eight applications (including dotgay’s) where the proposed “string identified the name of the core community members,” but “failed to match or identify the **peripheral industries and entities** included in the definition of the community set forth in the application.” FTI Scope 2 Report, p. 38 & note 133 (emphasis added). To impose upon applicants the duty to carefully match each and every conceivable “peripheral” entity or subgroup to the proposed string would be absurd, and the FTI’s overstatement helps us see why the Applicant Guidebook avoids this requirement. In our dynamic culture, groups tend to expand and subdivide. If an applicant had to come up with a term that embraced every

⁶ The EIU Panel and FTI read the Applicant Guidebook as if it said that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community **and without under-reaching substantially within the community.**” AGB, p. 4-13 (new language, implicitly added by the EIU Panel, **in bold**).

⁷ Antonin Scalia & Bryan Garner, *Reading Law* 107-11 (2012); 2A *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2015).

“peripheral” entity that might be included in its community, ICANN would be pushing those applicants toward increasing complexity—such as LGBTQIA, “Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Allied.” That is too complicated a domain name—and it, too, would be subject to an “under-reaching” objection because it might not adequately describe “Asexuals,” a significant portion of the population, or even “Pansexuals,” perhaps a “peripheral” subgroup, but one that the FTI analysis would consider.

51 I shall document, in Part V, how the EIU Panel was mistaken in its application of its “under-reaching” analysis, another clear error missed by the uncritical analysis by FTI. Here, my point is that the new Librum Veto based upon the proposed string’s “under-reach” is a strong example where the “CPE Provider’s evaluation process or reports deviated * * * from the applicable guidelines,” contrary to the uncritical assumption of the FTI Scope 2 Report, p. 3. The “under-reach” analysis and the Librum Veto are also inconsistent with the CPE Guidelines, Version 2.0. *See* EIU, CPE Guidelines, pp. 7-8 (Version 2.0), analyzed below.

3. In Evaluating the Nexus Criterion, the CPE Report Ignored and Violated ICANN’s Bylaws

52 Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN’s mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support “broad, informed participation reflecting the * * * cultural diversity of the Internet.” ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those

in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.⁸

53 There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—“.gay”—is ideally suited for these purposes. Conversely, no other string would bring together all the websites of interest to sexual and gender minorities as comprehensively as “.gay.” Certainly, a longer string—like “.LGBTQIA”—would be less accessible for the general population or, as I shall demonstrate below, even for the various subgroups within the larger gay community.

54 Consider an example. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), “suicide.gay” (one of the community-operated websites proposed in the dotgay application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Second Expert Report) would think “suicide.gay” before they would think “suicide.lgbt” or “suicide.lgbtqia.” See Figure 1, above. Indeed, many educated people (including the author of this Second Expert Report) cannot easily remember the correct order of the letters in the

⁸ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85 (2006); William Eskridge Jr., *Interpreting Law* 3-11, 105-08 (2016); Robert Katzmann, *Judging Statutes* (2015); Antonin Scalia & Bryan Garner, *Reading Law* 63-66 (2012).

latter string (“lgbtqia”). Does a Librum Veto based on “under-reach” make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). As I documented in my earlier Expert Report, “gay suicide” is a common locution; the search of books published between 1950 and 2008 did not register any significant usage for “LGBT suicide” or “LGBTQIA suicide.”

55 Not least important, “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU Panel’s Librum Veto based upon a made-up “under-reaching” test has been fabricated without any notice in its own guidelines. Needless to say, other CPE evaluations have ignored that fabricated test in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian manner, namely, creating a Librum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE

56 The FTI Scope 2 Report concluded that “the CPE Provider’s scoring decisions were based upon a consistent application of the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 3. As before, the FTI said that it considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant

Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. As before, this conclusion is supported by no independent analysis. The FTI Scope 2 Report uncritically repeated the conclusions found in the CPE Reports and did not discuss or consider the various fairness and nondiscrimination objections raised by dotgay and other applicants. E.g., FTI Scope 2 Report, pp. 37-41 (nexus). This approach is a “description” of the CPE Reports, but is not an “evaluation” to determine whether the CPE Reports were actually applying the guidelines in a neutral and nondiscriminatory manner. At least as regards the dotgay application, they were decidedly **not**.

1. The CPE Report Was Inconsistent with CPE Guidelines

57 According to FTI’s interviews with EIU Panel personnel, “the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.” FTC Scope 2 Report, p. 11. Yet the EIU Panel has imported into the nexus element a *Liberum Veto* based on “under-reaching” which is strikingly inconsistent with the EIU’s CPE Guidelines. Rather than transparency, the CPE Guidelines, if read carefully in light of their ordinary meaning, are a trap for the applicant. Indeed, as applied by the EIU Panel, they open the door to discriminatory, unfair, and unpredictable application.

58 Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full

(3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.

59 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, pp. 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’” CPE Report, p. 5.

60 Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, pp. 5-6.

61 As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Moreover, this report’s unauthorized test is also directly inconsistent with the published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the CPE Guidelines developed by the Economist Intelligence Unit quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching” language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, p. 7 (emphasis added). The EIU’s CPE Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

62 The EIU’s CPE Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, p. 8 (emphasis in original). Notice that the EIU’s CPE Guidelines do **not** include the following inquiries (new language in **bold**):

*Does the string identify a **narrower** community **than that which is revealed in the applicant’s description of its community?***

*Does the string capture a **narrower** geographic/thematic remit than the community has?*

63 Given these CPE Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka.” “Members of the community are defined as those who are within the

Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, p. 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, p. 2.

64 The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to the Osaka application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. Shouldn’t the Liberm Veto, grounded upon “under-reaching,” apply here?

65 Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular Air BnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” CPE Report, p. 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

66 I must say that this kind of Liberm Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for

“.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the CPE Report.

67 By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of a possible 3 points for nexus. Osaka CPE Report, p. 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, p. 4. Yes, but the applicant defined the community much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Liberum Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

68 Notwithstanding the foregoing analysis, which was spelled out in my earlier Expert Report, FTI made no effort to reconcile the EIU Panel’s lenient treatment of the Osaka application and its draconian treatment of the dotgay application, even though the Osaka application seems like a more obvious candidate for a Liberum Veto based upon the made-up “under-reaching” requirement. Instead, FTI simply observed that the Osaka application was awarded full credit (3 points) for the nexus element of Criterion #2. FTI Scope 2 Report, p. 40.

2. The CPE Report Was Inconsistent with the EIU Panel's Own Previous Reports

69 Dotgay's application was not the first time the EIU Panel has performed a nexus analysis suggesting an "under-reach" of an applied-for string, compared with the identified community. *See* FTI Scope 2 Report, pp. 38-39. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

70 An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether ".hotel" should be approved as a top-level domain. The EIU Panel may have performed a kind of "under-reach" analysis—but it was nowhere as critical as that which it performed for dotgay's application, even though the ".hotel" name was a much more dramatic illustration of "under-reach."

71 The applicant wanted a domain that would serve the "global Hotel Community." It defined its community in this way: "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Hotel CPE Report, p. 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

72 In the discussion of the nexus requirement, the EIU Panel observed that "the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the

gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, p. 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

73 The EIU’s “under-reach” analysis of the hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the EIU Panel’s tolerant analysis in the hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in this Second Expert Report (reported below).

74 Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 possible points, including 4 of 4 possible points for nexus and uniqueness. Like the

“.hotel” applicant, the “.spa” applicant presented more significant problems of “under-reach” than dotgay’s application did.

75 The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, p. 2. The EIU Panel awarded the applicant 4 of 4 possible points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, p. 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa.” As a consumer, I should not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE DOTGAY REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER REPORTS

76 The EIU Panel awarded dotgay only 2 out of 4 points for Criterion #4, Community Endorsement. Dotgay lost 1 point for the community support element and 1 point for the community opposition element of that criterion. Both deductions by the EIU Panel were profoundly unfair and were justified by reasoning that is inconsistent with ICANN’s governing directives. As before, the FTI Scope 2 Report completely failed to examine the EIU Panel’s

analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.

77 In connection with the support element of the community endorsement criterion, dotgay’s application established wide and deep community support, with letters from around 150 organizations, including the ILGA. Founded in 1978, ILGA is a worldwide federation of more than 1100 lesbian, gay, bisexual, transgender, and intersex national and local organizations in over 100 nations on five continents. It is the leading world-wide organization dedicated to establishing the anti-discrimination norm for the benefit of sexual and gender minorities. ILGA enjoys consultative status with the Economic and Social Council of the United Nations.

78 Notwithstanding this impressive—overwhelming—support from the world gay community, the EIU Panel refused to award the full 2 points for community support. While the ILGA was clearly an entity dedicated to the community, the Panel found that it did not meet the standard of a “recognized” organization. According to the Panel, the AGB defines “recognized” to mean that the organization must “be clearly recognized by the community members as representatives of the community.” Without citing any evidence, the Panel concluded that there was no “reciprocal recognition on the part of community members of the [ILGA’s] authority to represent them.” Indeed, the Panel opined that “there is no single such organization recognized by all of the defined community members as the representative of the defined community in its entirety.” CPE Report, p. 11.

79 In the foregoing analysis, the EIU Panel, once again, rewrote the directive set forth in the Applicant Guidebook. The AGB contemplates one or more “recognized community

institution(s)/community organization(s)” and does not contemplate a situation where there is no “recognized community institution(s)/community organization(s)” at all. AGB, p. 4-17. Moreover, the Applicant Guidebook defines “recognized” to mean “the institution(s)/organization(s) that, **through membership or otherwise**, are clearly recognized by the community members as representative of the community.” ABG, pp. 4-17 to 4-18 (emphasized language omitted from the CPE Report). More than 1100 organizations representing the rights of sexual and gender minorities have become **members** of ILGA, and the United Nations has recognized it as the world-wide representative of LGBTI persons. This is surely enough to satisfy the actual requirements of the Applicant Guidebook. If there were any doubt about that, the EIU Panel should resolve the ambiguity by reference to the ICANN Bylaws, which require application of the directives in a nondiscriminatory manner.

80 Indeed, the EIU Panel applied the actual, more liberal, requirements found in the Applicant Guidebook to the application for “.hotel.” The hotel applicant could not identify a single institution that was as recognized a representative of the entire hotel industry, with the widespread membership that ILGA represents for the dotgay applicant. Instead, like dotgay, the hotel applicant offered support from a number of “recognized” organizations. The EIU Panel awarded 2 points for a submission that was less impressive than that made by dotgay. *See* Hotel CPE Report, p. 6. Even the statement of the AGB’s directive was more liberal (and more accurate) in the CPE Report for “.hotel” than in the CPE Report for “.gay.” Specifically, the EIU Panel evaluating the hotel application accurately quoted the AGB’s definition of “recognized” that included the “through membership or otherwise” language and applied the

definition with the understanding that there will normally be several “recognized” institutions and organizations. *See* Hotel CPE Report, p. 6.

- 81 In connection with the opposition element of the community endorsement criterion, only one organization registered opposition: the Q Center in Portland, Oregon, the home of an applicant for a competing string to that of dotgay. Yet the EIU Panel failed to award dotgay the full 2 points for opposition. Recall that the Applicant Guidebook requires an award of 2 points if there is “[n]o opposition of relevance,” and 1 point if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 82 To justify an award of only 1 point, the CPE Report invoked opposition from “one group of non-negligible size” (p. 11). The FTI Scope 3 Report identified that group as the Q Center in Portland, Oregon, and provided three references to the Q Center in the EIU Panel’s working papers (p. 40 note 120). The references establish that the Q Center is a local community center, geographically limited to Portland, Oregon. It is one of several gay groups and institutions in Oregon, which is a state with a small population. The Q Center is also one of more than 200 community centers in 45 states and overseas that are members of CenterLink: The Community of LGBT Centers, <https://www.lgbtcenters.org/> (viewed January 25, 2018). CenterLink is one of dozens of gay organizations that endorsed dotgay’s application. One two-hundredths of CenterLink’s membership—the Q Center in Portland—was deemed sufficient to count as opposition from “one group of non-negligible size.” In my expert opinion, the application by the EIU Panel to dotgay’s case was an absurd interpretation of the Application Guidebook’s stated approach for evaluating the support element of the community endorsement criterion.

It is standard legal interpretation to read terms of a statute, treaty, or contract to avoid absurd results.⁹ The absurdity of the interpretation morphed into the realm of the bizarre, however, once I examined the materials discussed in the FTI Scope 3 Report.

83 Two of the three references identified in the FTI Scope 3 Report raise red flags. One reference reveals that in 2014 the Q Center had an organizational meltdown. *See* Dan Borgan, “A New Era Begins at Q Center,” *P.Q. Monthly*, Dec. 19, 2014, <http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355> (viewed January 25, 2018). The article reported that the Q Center had been mismanaged for some years and that in 2014 its officers had resigned amid charges of fraud and mismanagement. “Q Center is in a tumultuous time: many staff and board members have left.” Community trust had been shattered, according to the source in the CPE working papers. A subsequent article (not identified in the working papers) says that the Q Center’s troubles worsened in 2015. According to this source, the Q Center was operated for the benefit of whites; persons of color and transgender persons felt unwelcome. A Q Center panel addressing a gay bar’s blackface performance raised tensions because it excluded voices of color. The Q Center’s turmoil seemed to deepen, and new managers took over. David Stabler, “Can the Q Center Survive Anger, Plunging Donations, and Staff Departures?,” *The Oregonian*, March 2, 2015, http://www.oregonlive.com/portland/index.ssf/2015/03/problems_at_portlands_q_center.htm 1 (viewed January 25, 2018). Soon after this article appeared, on April 1, 2015, the new Chair

⁹ *See* William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 69-73 (2016); Antonin Scalia & Bryan Garner, *Reading Law* 234-39 (2012).

of the Q Center Board wrote dotgay a letter seeking to void the earlier opposition; dotgay passed on this letter to ICANN. On July 25, 2015, however, yet another new Chair of the Q Center Board wrote ICANN a letter reasserting the Q Center's opposition.

84 In 2014-2015, was the Q Center a “group of non-negligible size,” and was its “opposition of relevance,” the stated criteria in the Applicant Guidebook? The EIU Panel answered yes to both questions, yet such an answer is not even supported by the sources the EIU Panel consulted. Indeed, those sources should have alerted the EIU Panel to proceed cautiously, given the charges of racism and transphobia that were being made against the Q Center. Should ICANN not be concerned that the gay community's application for a needed string has been penalized because of opposition by a small local group riven with strife and charged with race and trans exclusions? Why did the EIU Panel not explore this problem? Why did FTI not flag it?

V. The FTI Scope 3 Report Confirms Dotgay's Claim that the EIU Panel Ignored Important Evidence that Supports Full Credit under the Nexus Criterion

85 Assume, contrary to any sound analysis, that the EIU Panel correctly interpreted and applied the Applicant Guidebook's requirements for Criterion #2 (Community Nexus and Uniqueness). Even under the EIU Panel's excessively restrictive understanding of ICANN's requirements, dotgay's application would merit 4 of 4 possible points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

86 Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6.

87 The CPE Report made no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor did it identify the methodology or evidence the EIU Panel followed to support these sweeping empirical statements. The FTI’s Report on Scope 3 examined the EIU Panel’s working papers. Most of the sources it identified are searches allegedly conducted by the EIU Panel, using terms that are blacked out (and therefore inaccessible) in the FTI Scope 3 Report, pp. 37-39 & note 117. Has the FTI’s Scope 3 Report been censored? Or was the EIU Panel’s methodology so scattershot that even its own working papers do not reveal how it conducted its research?

88 Other sources were specifically identified—and some of those sources directly support dotgay’s position. For a dramatic example, the FTI identified, as a major source contained in the EIU Panel’s working papers, the Wikipedia entry for “LGBT Community,”

https://en.wikipedia.org/wiki/LGBT_community (viewed January 25, 2018). See FTI Scope 3 Report, p. 38 note 117. Here is the first paragraph of that entry (emphasis in the original):

The **LGBT community** or **GLBT community**, also referred to as the **gay community**, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures that exist in the larger society. The term “pride” or sometimes *gay pride* is used to express the LGBT community’s identity and collective strength; pride parades provide both a prime example of the use and a demonstration of the general meaning of the term. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of the LGBT community.

The remaining discussion in Wikipedia’s entry for “LGBT Community” uses “gay” and “LGBT” interchangeably. For example, the Wikipedia entry has an extensive discussion of “LGBT Symbols,” which starts this way: “The gay community is frequently associated with certain symbols; especially the rainbow or rainbow flags. The Greek lambda symbol (‘L’ for liberation), triangles, ribbons, and gender symbols are also used as ‘gay acceptance’ symbol. There are many types of flags to represent subdivisions in the gay community, but the most commonly recognized one is the rainbow flag.”

89 If the EIU Panel actually consulted the Wikipedia entry contained in its working papers, why did it not mention that entry in its CPE Report? If FTI actually read the Wikipedia entry that it cited in its Scope 3 Report, why did it not raise a question about whether the evidence assembled by the EIU Panel really supported its conclusion that “gay” was not a name that

matched or identified the community? These are troubling concerns. For a similar example, taken from the EIU Panel’s working papers referenced in the FTI Scope 3 Report, pp. 37-38 & note 117, *see* Wikipedia, “Coming Out, https://en.wikipedia.org/wiki/Coming_out (viewed January 25, 2018).

90 Many of the sources contained in the EIU Panel’s working papers (cited in FTI’s Scope 3 Report, pp. 37-39 & note 117) relate to the widely-known distinction between sexual orientation and gender identity. *See* GLAAD, “Glossary of Terms—Transgender,” <https://www.glaad.org/reference/transgender> (viewed January 25, 2018); Transgender Law Center, “Values—Mission,” <https://transgenderlawcenter.org/about/mission> (viewed January 25, 2018), both referenced in the FTI Scope 3 Report, p. 38 note 117. These and other sources can support the proposition that transgender persons distinguish between sexual orientation and gender identity and commonly use terms such as “trans” or “transgender” to describe themselves. One could make the same point about black women who sexually partner with other women: they distinguish among race, sex, and sexual orientation and commonly use terms such as “black” and “feminist”—rather than “lesbian” or “gay”—to describe themselves. Does that mean that “gay” cannot be a general descriptor for the larger community of sexual and gender minorities, a community that includes transgender persons, black lesbians, and intersex feminists? Of course, “gay” can be a general descriptor of such an internally diverse group.

91 The FTI Scope 3 Report reveals how unsophisticated the EIU Panel’s personnel were as they went about the process of evaluating the connection between the proposed string (“.gay”) and

the community of sexual and gender minorities. Consider a striking analogy. If the proposed string were “.car,” and the Applicant Guidebook awarded no nexus points if a proposed string “under-reached” the community (a requirement rejected by the actual ICANN Applicant Guidebook), would the nexus requirement be defeated upon a claim that “car” did not match or describe some members of the described community, such as people who are very proud of their Cadillacs and never refer to their automobiles as mere “cars”? Of course not. That would be supremely silly—but that is pretty much what the EIU Panel did when its personnel thought that because transgender persons consider themselves part of a “trans community,” they are not **also** part of a larger “gay community.” The same personnel who would conclude, “Of course, a Cadillac owner is **also** part of the larger car community,” apparently were not able to conclude, “And a transgender person is **also** part of the larger LGBT or gay community” (see Wikipedia, “LGBT Community,” quoted above). Why would they make this mistake? One explanation could be homophobia, but a much more likely explanation would be ignorance about sexual and gender minorities—and about the term “gay.”

92 My earlier Expert Report, presumably available to FTI, provided a terminological history of the term “gay” as a reference to the larger community of sexual and gender minorities. Without repeating all of that earlier evidence, let me reassemble most of it, in order to demonstrate not only how “gay” is, historically, the best term for the larger community of sexual and gender minorities, but also how “gay” brings together the ways that sexuality and gender are deeply interrelated. That is, one reason why lesbians and gay men are part of the same larger social movement as transgender and intersex persons is that all of these people have traditionally

been demonized and persecuted for the same general reason: they “deviate” from rigid gender roles that are derived from a naturalized (mis)understanding of biological sex.

A. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER MINORITIES, AND NOT JUST A TERM FOR HOMOSEXUAL MEN

93 In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”¹⁰ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.¹¹

94 Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he described as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common was that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological,

¹⁰ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

¹¹ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, pp. 46-49.

feminine woman) and procreative sexual practices that were socially expected in this country.¹²

Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.

95 Most of these terms were derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.

96 An early literary example was Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicted a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed

¹² See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908).

or posed as a man. (Such an explicit book would have been subject to immediate censorship.)

Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, the censors and most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive, literary manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

97 Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. As the twentieth century progressed, meaning (1) has been eclipsed by meanings (2) and (3), which are deeply related. There was in this early, closeted, era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity or being in on the secret.

98 An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sent his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asked why the handsome leading man was thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality or transvestism), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.¹³

99 In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. *See* Figure 1, above. Indeed,

¹³ For a provocative analysis of the Cary Grant-Randolph Scott bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

in many countries, “queer” to this day carries more negative connotations than “gay,” which continues to make “queer” a less attractive generic term.

100 A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City’s Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the “Gay Revolution.”¹⁴ Sympathetic accounts of the Stonewall riots mobilized the popular term “gay” to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the “Gay Revolution.” For example, Carter reports that this “Gay Revolution” began when a “butch dyke” punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that “special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * *

A common theme links those who resisted first and fought the hardest, and that is gender transgression.”¹⁵

101 Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts described as a “gay bar.” The patrons of the gay bar included

¹⁴ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

¹⁵ *Id.* at 261; *see id.* at 150-51 (describing the first punch thrown by the “butch dyke,” who floored a police officer).

homosexual and bisexual men who were insisting they be called “gay” and not the disapproved Greek terms (“homosexual” and “bisexual”) that had been devised by the doctors. Many of the people in the gay bar were not homosexual men, but were lesbians, gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends and allies of these gender and sexual nonconformists.¹⁶

102 Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹⁷ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other gay groups. These groups included gay men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

103 Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many

¹⁶ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹⁷ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

times since, Katz's *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called "hermaphrodites" and "man-women";¹⁸ poet Walt Whitman, who celebrated "the love of comrades," which he depicted as male bonding and intimate friendships;¹⁹ "male harlots," or prostitutes, on the streets of New York;²⁰ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;²¹ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.²² More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.²³

¹⁸ *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

¹⁹ *Id.* at 509-12 (Whitman).

²⁰ *Id.* at 68-73 (male prostitutes, called "harlots" in a contemporary report).

²¹ *Id.* at 317-90 (dozens of women who "passed" as men, many of whom marrying women).

²² *Id.* at 118-27 (Smith), 787-97 (Goldman).

²³ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of "Gay Los Angeles"); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the "gay male world" bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

104 Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.

105 Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as lesbian, gay, and bisexual persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community.

106 I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgender people.”²⁴ Although many readers were taken aback that

²⁴ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn

“gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

107 In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

108 Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? In my expert opinion, it has not. Recall that ICANN’s requirement for the nexus requirement between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. There is a great deal of evidence indicating that it is. As the FTI Scope 3 Report makes painfully obvious, none of this evidence was considered by the EIU

from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

Panel, and none was considered by FTI when it concluded that the EIU Panel faithfully adhered to the ICANN and CPE guidelines and consistently applied those guidelines.

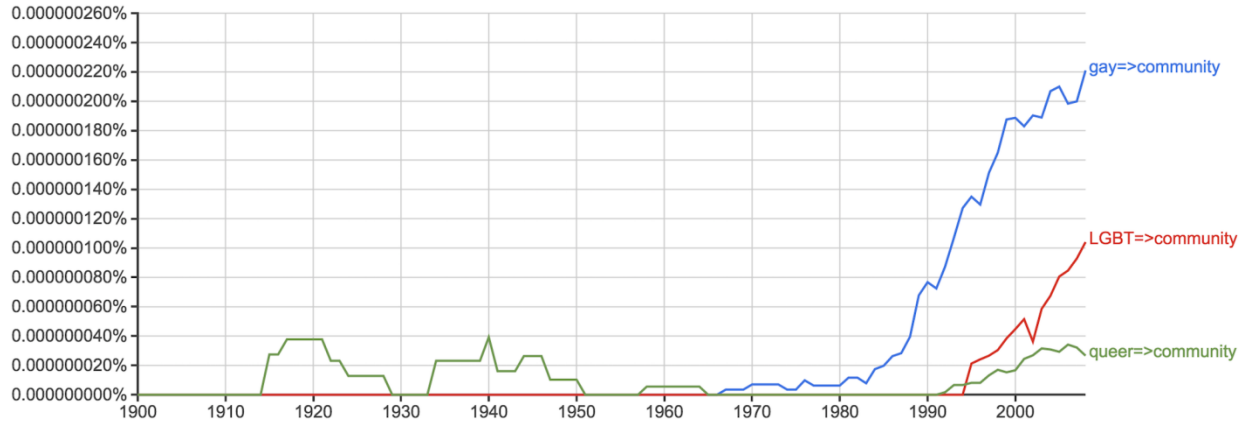


Figure 2. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

109 Figure 2, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (The methodology for the search is contained in Appendix 2.)

110 There are other corpuses that can be searched, and I have done so to check the reliability of the data in Figure 2. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed Jan. 28, 2018). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. In my 2016

search, I found 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

111 Does “gay community” generate a comparable number of hits? In my 2016 search of the BYU Corpus, I found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3 provides an illustration of these results.

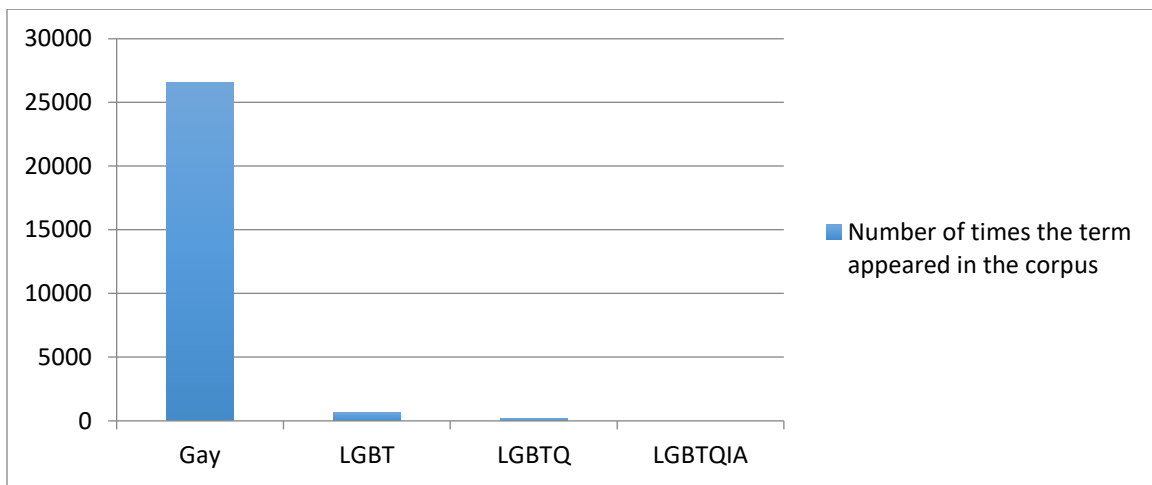


Figure 3. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

112 How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

113 Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this then-unprecedented mass assault by a single person on American soil.²⁵ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and allies, as well as many gay men.

²⁵ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

114Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁶ Most of the victims were homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

115Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was one of the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²⁷

²⁶ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed Sept. 9, 2016).

²⁷ *E.g.*, *Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

116 Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events” all over the world, <https://www.nighttours.com/gaypride/> (last viewed January 25, 2018). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

117 There are also international gay pride events. In 2017, it was World Pride Madrid, celebrating Spain’s leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid’s annual pride celebration was voted “best gay event in the world” by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as “Gay World Pride.”²⁸ The official website described World Pride Madrid as “the biggest Gay Pride Event in the World” during 2017, <http://worldgaypridemadrid2017.com/en/worldpride/> (viewed January 25, 2018). Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use “gay” **both** as a generic, umbrella term for

²⁸ *E.g., Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

B. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND ALLIED PERSONS

118 As illustrated by the accounts of the Orlando “gay bar” and the world-wide “gay pride” events, the term “gay” remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that “gay people,” the generic term, remains the most popular use of the term “gay,” with “gay men” and “gay women” also popular, but much less so.

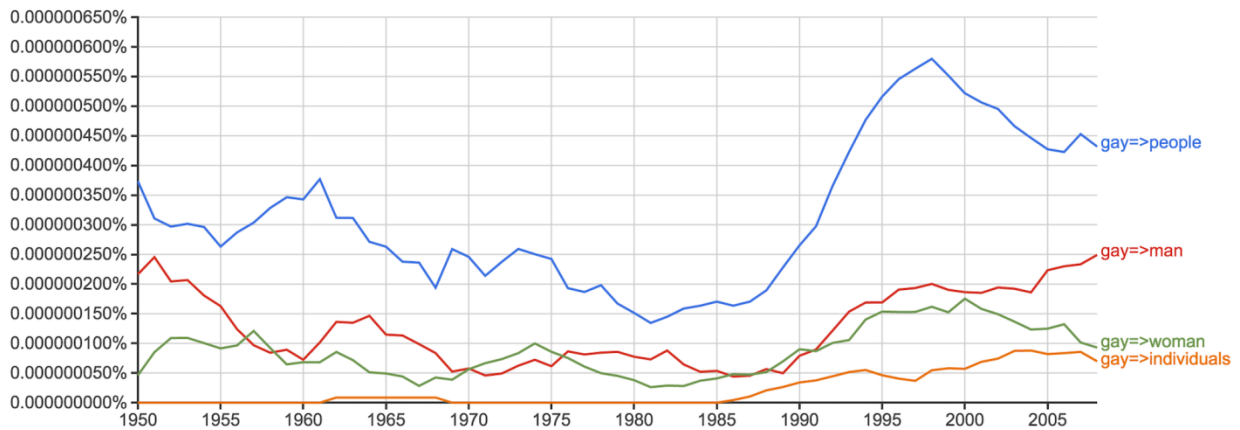


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

119 The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition,

aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing, an impression that is confirmed by the FTI Scope 3 Report, pp. 37-39. As I shall show, the EIU Panel did not browse very extensively.

120 To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Second Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term makes it perfect for an Internet domain (“.gay”) for the community that consists of sexual and gender minorities.

121 Thus, almost all of the CPE Report’s examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay’s claim that “gay” is a “well known short-form or abbreviation for the community.” The EIU Panel objected that dotgay’s analysis “fails to show that when ‘gay’ is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities.” CPE Report, p. 7. Although I do not believe that statement fairly characterized dotgay’s application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

122 Consider the famous “Gay Games,” an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. “The mission of the Federation of Gay Games is to promote equality

through the organization of the premiere international LGBT and gay-friendly sports and cultural event known as the Gay Games.”²⁹ Or: “The Gay Games and its international Federation exist to serve the needs of athletes, artists, and activists. The mission is to promote equality for all, and in particular for lesbian, gay, bi and trans people throughout the world.”³⁰ Notice how the Federation uses the term “gay” as both a generic, umbrella term (“Gay Games”) and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly, LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

123 Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

²⁹ Federation of Gay Games, *Purpose and Mission Statement*, <https://gaygames.org/Mission-&-Vision> (viewed January 25, 2018).

³⁰ Federation of Gay Games, “How We Do It,” <https://gaygames.org/> (viewed January 25, 2018).

124 The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy. CPE Report, p. 7.³¹ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”³²

125 In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.³³

³¹ See *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (last viewed January 25, 2018) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

³² E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

³³ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

Gay Star News is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.³⁴

126 Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’.” * * * But, as she affirms, there is a panoply of identities from which to choose in an expansive **gay L.A.**³⁵ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the Applicant Guidebook’s test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

³⁴ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

³⁵ Faderman & Timmons, *Gay L.A.*, pp. 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

127 Miley Cyrus is a famous singer and celebrity. She views herself as “gender fluid” and “pansexual.” From the perspective of the EIU Panel, she ought not be a person who would consider herself part of a larger “gay community,” but in the last few years she has been sporting t-shirts and caps adorned with the slogan “Make America Gay Again.”³⁶ Her selfie wearing her stylish “Make America Gay Again” t-shirt went viral on Instagram, reaching more than a million viewers.

128 As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. In 2016, my research associates and I ran a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” has become associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

³⁶ Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (last viewed January 25, 2018).

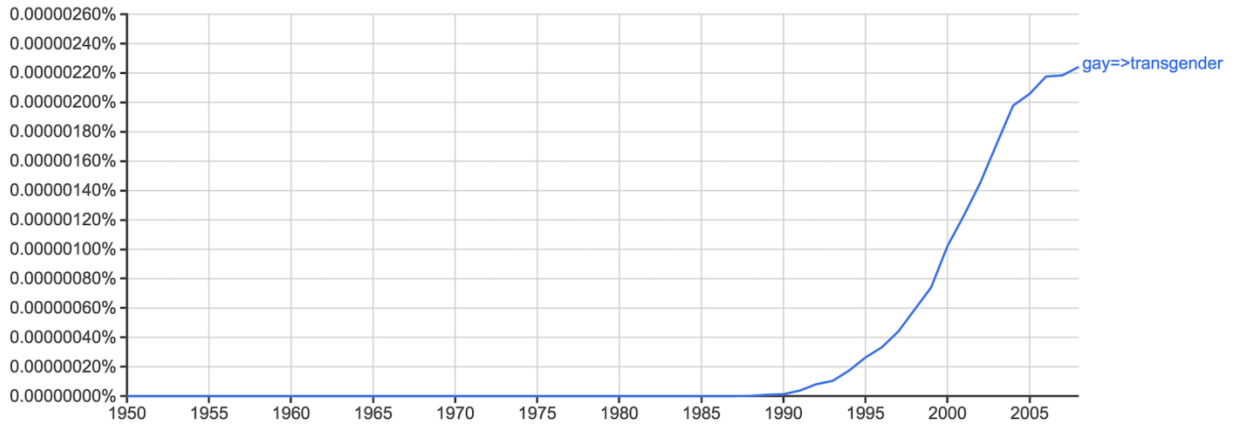


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

129 The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer term, and it is not clear how many intersex persons there are in the world. Most discussion of intersex persons in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon—starting with the ILGA, which strongly supports dotgay’s application and which includes intersex persons and organizations within its membership.

130 Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya

of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³⁷

131 Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website, *Everyone Is Gay*.³⁸ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁹ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

VI. CONCLUSION AND SIGNATURE

132 Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique

³⁷ See Caroline Symons, *Gay Games: A History* (2010) (describing the “Gender in Sport” policy, opening up the Gay Games to intersex and transgender persons on an equal basis).

³⁸ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (last viewed Sept. 9, 2016).

³⁹ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (last viewed Sept. 9, 2016).

identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

133 Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Second Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly, ICANN’s requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay’s application. Led by ILGA, the world-wide gay community supports this application as well, which ought to have generated a higher score for community endorsement, Criterion #4 in the Applicant Guidebook.

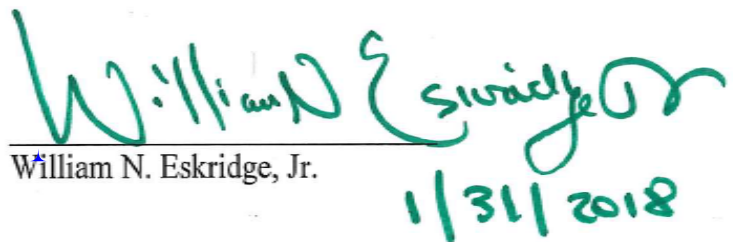
134 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

135 Evaluating dotgay’s application, the EIU Panel has not acted in a completely “open and transparent manner,” nor has it followed “procedures designed to ensure fairness.” To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU’s own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

136 Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and the conclusions reached by FTI in its Scope 2 Report.

Respectfully submitted,

Date: January 31, 2018



William N. Eskridge, Jr.

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995
Stanford, 1995
Toronto, 1999, 2001
Vanderbilt, 2003
Columbia, 2003
Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011
Fordham, 2008
Pennsylvania, 2018 (expected)

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998
Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 – 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

“Dishonorable Passions”: Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

“Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,” 127 *Yale L.J.* 322 (2017)

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 Hous. L. Rev. 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 Tex. L. Rev. 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 B.U.L. Rev. 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 Wis. L. Rev. 411

“The New Textualism and Normative Canons,” 113 Colum. L. Rev. 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 NYU Rev. L. & Soc. Change 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 St. Louis U.L. Rev. 865 (2012)

“Vetogates and American Public Law,” J.L. Econ. & Org. (April 2012)

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 Geo. L.J. 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 Ga. L. Rev. 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 Washburn L.J. 1 (2010)

“Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 Colum. L. Rev. 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

“The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy,” Calif. L. Rev. (2009)

“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

“Equality Practice: Reflections on the Jurisprudence of Civil Unions,” 64 Alb. L.J. 853 (2001) (Sobota Lecture)

“January 27, 1961: The Birth of Gaylegal Equality Arguments,” 58 NYU Ann. Survey Am. Law 39 (2001)

“No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review,” 75 NYU L. Rev. 1327 (2000)

“Destabilizing Due Process and Evolutive Equal Protection,” 47 UCLA L. Rev. 1183 (2000)

“Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions,” 31 McGeo. L.J. 641 (2000)

“The Circumstances of Politics and the Application of Statutes,” 100 Colum. L. Rev. 558 (2000)

“Multivocal Prejudices and Homo Equality,” 100 Ind. L.J. 558 (1999) (Harris Lecture)

“Norms, Empiricism, and Canons in Statutory Interpretation,” 66 U. Chi. L. Rev. 671 (1999)

“*Hardwick* and Historiography,” 1999 U. Ill. L. Rev. 631 (Baum Lecture)

“Relationships Between Formalism and Functionalism in Separation of Powers Cases,” 22 Harv. J.L. & Pub. Pol’y 21 (1998)

“Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?,” 66 *Geo. Wash. L. Rev.* 1301 (1998)

“Textualism, the Unknown Ideal,” 96 *Mich. L. Rev.* 1509 (1998) (book review)

“A Jurisprudence of ‘Coming Out’: Religion, Sexuality, and Liberty/Equality Collisions in Public Law,” 106 *Yale L.J.* 2411 (1997)

“Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961,” 24 *Fla. St. U.L. Rev.* 703 (1997) (Mason Ladd Lecture)

“Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981,” 25 *Hofstra L. Rev.* 817 (1997) (Visiting Scholar in Residence Lecture)

“Willard Hurst, Master of the Legal Process,” 1997 *Wis. L. Rev.* 1181

“From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945,” 82 *Iowa L. Rev.* (1997) (Murray Lecture)

“Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” 68 *U. So. Cal. L. Rev.* 1447 (1995) (co-authored with Jenna Bednar)

“Virtual Logrolling: How the Court, Congress, and the States Multiply Rights,” 68 *U. So. Cal. L. Rev.* 1545 (1995)

“Regulatory Variables and Statutory Interpretation,” 73 *Wash. U.L.Q.* 1103 (1995) (co-authored with Judith Levi)

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“The Supreme Court, 1993 Term – Foreword: Law as Equilibrium,” 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

“The Elastic Commerce Clause: A Political Theory of American Federalism,” 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

“The Making of ‘The Legal Process,’” 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

“From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct,” 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

“The Economics Epidemic in an AIDS Perspective,” 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

“Gaylegal Narratives,” 46 *Stan. L. Rev.* 607 (1994)

“Post-Enactment Legislative Signals,” 57 *Law & Contemp. Probs.* 75 (Winter 1994)

“The Judicial Review Game,” 88 *Nw. U.L. Rev.* 382 (1993)

“Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet,” 2 *Reconstruction* 52 (1993)

“The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell,” 61 *Geo. Wash. L. Rev.* 1731 (1993)

“A History of Same-Sex Marriage,” 79 *Va. L. Rev.* 1419 (1993)

“The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation,” in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

“A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda,” 102 *Yale L.J.* 333 (1992) (review essay)

“Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,” 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

“The Article I, Section 7 Game,” 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

“Overriding Supreme Court Statutory Interpretation Decisions,” 101 *Yale L.J.* 331 (1991)

“Making the Deal Stick: Enforcing the Original Constitutional Understanding,” *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

“Reneging on History? Playing the Court/Congress/President Civil Rights Game,” 79 *Calif. L. Rev.* 613 (1991)

“The New Public Law Movement: Moderation as a Postmodern Cultural Form,” 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

“The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases,” 88 *Mich. L. Rev.* 2450 (1990)

“Legislative History Values,” 66 *Chi.-Kent L. Rev.* (1990)

“Dynamic Interpretation of Economic Regulatory Statutes,” 21 *L. & Pol'y Int'l Bus.* 663 (1990)

“Gadamer/Statutory Interpretation,” 90 *Colum. L. Rev.* 609 (1990)

“The New Textualism,” 37 *UCLA L. Rev.* 621 (1990)

“Statutory Interpretation as Practical Reasoning,” 42 *Stan. L. Rev.* 321 (1990) (co-authored with Philip Frickey)

“Spinning Legislative Supremacy,” 78 *Geo. L.J.* 319 (1989)

“Public Values in Statutory Interpretation,” 137 *U. Pa. L. Rev.* 1007 (1989)

“Metaprocedure,” 98 *Yale L.J.* 945 (1989) (review essay)

“Interpreting Legislative Inaction,” 87 *Mich. L. Rev.* 67 (1988)

“Overruling Statutory Precedents,” 76 *Geo. L.J.* 1361 (1988)

“Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,” 74 *Va. L. Rev.* 275 (1988)

“Dynamic Statutory Interpretation,” 135 *U. Pa. L. Rev.* 1479 (1987)

“Legislation Scholarship & Pedagogy in the Post-Legal Process Era,” 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

“*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem,” 25 Va. J. Int’l L. 281 (1985)

“One Hundred Years of Ineptitude,” 70 Va. l. Rev. 1083 (1984)

“The Iranian Nationalization Cases,” 22 Harv. Int’l L.J. 525 (1981)

“*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA,” 86 Yale L.J. 885 (1977) (student note)

ENDOWED LECTURES

Sullivan Lecture, Capital University School of Law, “Ohio’s 2004 Super-DOMA and Constitutional Deliberation,” October 2017

Henry J. Miller Lecture, Georgia State University College of Law, “Marriage Equality, 1967-2017,” September 15, 2016

Frankel Lecture, University of Houston Law Center, “Marriage Equality as a Testing Ground for Original Meaning,” November 2014, published as “Marriage Equality and Original Meaning” (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, “Marriage Equality’s Cinderella Moment,” September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, “Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012,” November 15, 2012, published as “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States” (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?”

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as “Noah’s Curse and Paul’s Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty” (2012)

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, “Administrative Constitutionalism,” March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as “America’s Statutory constitution” (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as “The Supreme Court’s Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)” (2008)

Center for Religious Studies at Princeton University, November 2005, “Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia”

Lockhart Lecture at University of Minnesota School of Law, “Same-Sex Marriage and Equality Practice,” October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as “Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” Fla. L. Rev. (2005)

President’s Lecture at Davidson College, March 2004, “The Case for Same-Sex Marriage”

Brennan Lecture at Oklahoma City University School of Law, March 2004, “*Lawrence v. Texas* and Constitutional Regime Shifts”

Dean’s Diversity Lecture at Vanderbilt University School of Law, February 2000, “Prejudice and Theories of Equal Protection”

Steintrager Lecture at Wake Forest University, February 1999, “Jeremy Bentham and No Promo Homo Arguments”

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as “Multivocal Prejudices and Homo Equality” (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, “Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law”

Baum Lecture at the University of Illinois School of Law, November 1997, published as “*Hardwick* and Historiography” (1998)

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981” (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as “Privacy Jurisprudence and the Apartheid of the Closet” (1997)

Murray Lecture at the University of Iowa, January 1996, published as “From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945” (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as “The Many Faces of Sexual Consent” (1995)

Donley Lectures at West Virginia University School of Law, published as “Public Law from the Bottom Up” (1994)

Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

H.R. 1283, The Fairness in Asbestos Compensation Act, House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1st Sess. (1993)

Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

S. 2279, the Lobbying Disclosure Act of 1992, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

Statutory Interpretation and the Uses of Legislative History, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990)

Adjustable Rate Mortgages (ARMs), Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98th Cong., 2d Sess. (1984)

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

FIGURE 2. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

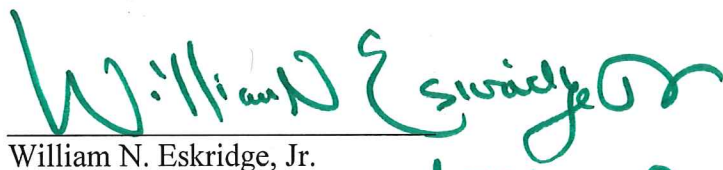
The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

Expert Declaration

The Author makes the following declaration:

1. I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures by any party participating in ICANN's New gTLD Application process;
2. I confirm that all matters upon which I have expressed an opinion are within my area of expertise;
3. I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and to all matters, of which I am aware, which might adversely affect my opinion;
4. I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion; and
5. I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify ICANN, dotgay LLC, and their respective counsel.



William N. Eskridge, Jr.

1/31/2018