TESTIMONY OPPOSING THE NOMINATION OF JUDGE DAVID SOUTER TO THE UNITED STATES SUPREME COURT

Senate Judiciary Committee
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Delivered by
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Good afternoon. My name is Paula Ettelbrick. I am the Legal Director for Lambda Legal Defense and Education Fund, and I want to thank the Committee for allowing me the time to present Lambda's views regarding the nomination of Judge David Souter to the United States Supreme Court.

As an organization that has fought in the courts for seventeen years against discrimination and prejudicial treatment of gay and lesbian people, Lambda Legal Defense and Education Fund strongly opposes Judge Souter's nomination. Lambda decided to oppose the nomination, only the second time we have taken such a stand, primarily because of Judge Souter's participation in a decision of the New Hampshire Supreme Court barring gay men and lesbians from becoming foster or adoptive parents. Opinion of the Justices, 430 A.2d 21 (N.H. 1987).

Judge Souter joined three other New Hampshire Supreme Court justices in ruling that the state's goal of providing a "healthy environment and role model for our children" was a rational basis upon which to bar all individuals who are gay or lesbian, or who engage in homosexual sexual conduct, from becoming foster or adoptive parents.[1] While we do not argue with the state's goal in this regard, we strongly object to the court's view that gay people, per se, undercut such goals. On upholding the law, Judge Souter and three of his colleagues relied on the discredited theory that lesbian and gay parents do not provide appropriate role models because there is a "reasonable possibility" that they may influence a child's "developing sexual identity."

Several briefs were submitted to the court presenting evidence to refute the legislature's

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[1] The Court did not uphold the provision of the law which would bar gay people from being licensed to run day care centers on the grounds that the applicant may in fact be a corporation, not a person, and that day care operators do not have continuous contact with children to justify the role model rationale. Oddly enough, the court found that licensing authorities should subject cases to individual review, an option not pursued or questioned with regard to the exclusion of gay people from foster or adoptive parenting. Thus, applicants for day care licenses which would allow [illegible] business opportunity, have greater due process rights than individuals wishing to nurture and love children in need.

role model theory. Most notable was a brief from the Majority of the House Committee on the Judiciary opposing the constitutionality of the statute in its entirety. Judge Souter and his colleagues conceded that the evidence before it consisted of "a number of studies that find no correlation between a homosexual orientation and the sexual orientation of their children." Id. at 25. Yet, the court rejected these studies. Instead, the majority found that since the "source of sexual orientation is still inadequately understood," the state is allowed to bar the entire class of lesbians and gay men from these state controlled parenting options. The majority's only support was one reference to an article noting that environmental conditioning may be one of several factors in the development of sexual orientation.

This decision met with the clear disapproval of one dissenting judge, Justice Batchelder, who was provoked to remind the court that the "State is never more humanitarian than when it acts to protect the health of its children. The State is never less humanitarian than when it denies public benefits to a group of its citizens because of ancient prejudices against that group." Id. at 28. Most importantly, Justice Batchelder exposed the fact that the legislature "received no meaningful evidence to show that homosexual parents endanger their children's development of sexual preference...any more than heterosexual parents. The legislature received no such evidence because apparently the overwhelming weight of professional study on the subject concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents." Id. at 28.[2]

As the most substantial constitutional decision in which Judge Souter took part on the New

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[2] In support of his statement, Justice Batchelder cited five authoritative studies, including the study relied upon by the majority in upholding the exclusion

Hampshire Supreme Court, Opinion of the Justices deserves close scrutiny and study with regard to Judge Souter's approach to individual rights and constitutional guarantees of equal protection, privacy, due process, and right of assembly. We are deeply concerned about a Supreme Court nominee who would rely on his own personal outmoded prejudice in order to uphold the state's rationale for treating gay people as a class different from others, thereby excluding them from parenting options.

We are deeply concerned about a judicial nominee who would accept the legislature's justification of this unequal treatment on the basis of Bowers v. Hardwick, the Supreme Court decision allowing states to criminalize homosexual sexual conduct. As pointed out by the dissent, New Hampshire does not even criminalize homosexual conduct, though it does outlaw heterosexual adultery. We are gravely concerned about a Supreme Court nominee who would deny an opportunity for an individual determination of fitness to parent in a state where the courts have found due process rights for high school students denied the chance to compete in the school sports program. We are concerned about a nominee who would not look behind an unsupported, and immediately disprovable, presumption that gay people are unfit to parent in order to allow at least an individual assessment within a foster care and adoption system which has already instituted a process for review of all applicants.

The majority opinion is unsettling, not simply because of its anti-gay result, but because of its blithe disregard of the evidence before the court in favor of hazy stereotypes and outright prejudice. Judge Souter and his colleagues opted not to follow the lead of the majority of other state courts which, like the dissent by Judge Batchelder, reject the use of sexual orientation as a factor in evaluating parental rights. In joining the opinion, or writing it if that is the case, Judge

Souter indicated his willingness to irrebuttably exclude an entire class of people from the rights, joys, and benefits based on nothing more than legislators' and individual justices' fears and stereotypes.

This kind of judicial reasoning does not just affect the 25 million gay men and lesbians in this country. It will harm all racial and ethnic minorities, women, and others who are alienated or meet with wide-spread social disapproval. These groups, who in combination represent the majority of people in this country, depend on the courts for protection and enforced fairness. If Judge Souter was willing to rely on his own stereotypes of gay people in this case, there is no assurance that he will not reject other evidence and rely again on prejudice or preconceptions when reviewing cases involving other groups of people.

If courts will not stand up to such state prejudice, and will not vindicate the rights of minorities and individuals, then the liberty of all is threatened. Certainly gay people need the protection of courts willing to give real scrutiny to anti-gay discrimination, rather than declining to apply the evidence and deferring instead to social hostility, ignorance, and bigotry.

Lambda Legal Defense believes that the indispensable qualification for an Associate Justice of the Supreme Court is a vigilance on behalf of individual rights and equal justice. Judge Souter's record makes clear that, by that basic standard, he is unqualified.

Lambda is the nation's oldest and largest lesbian and gay legal rights advocacy organization. Founded in 1973 as a not-for profit public interest law firm, Lambda works to establish legal rights and to promote justice and equality for lesbians and gay men through litigation and education. Lambda is based in New York, with a regional office in Los Angeles.