

A6-D36

IN THE SUPREME COURT
STATE OF GEORGIA

JUN 11 2002

APPEAL NO. S 02 A 1020

KIMBERLY A. ARNOLD,

Appellant,

v.

JULIAN T. ARNOLD,

Appellee.

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,
NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC., IN SUPPORT OF APPELLANT

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IDENTITIES AND INTERESTS OF THE AMICI

The **National Association of Counsel for Children (NACC)** is a nonprofit membership association of attorneys, judges and other professionals involved with children and the legal system. The mission of the NACC is to enhance the welfare of children by promoting excellence in the field of children's law. The NACC promotes quality representation of children and provides training and education of attorneys, judges and other professionals. The NACC also runs an *Amicus Curiae* Program through which the organization participates in appellate cases of particular importance to children.

The NACC was founded in 1977 and maintains membership in all 50 states, the District of Columbia and numerous foreign countries. NACC programs have received the support of the American Bar Association, the National Council of Juvenile and Family Court Judges, the American Academy of Pediatrics and the American Professional Society on the Abuse of Children. The NACC has appeared as *amicus curiae* in many state and federal appellate courts and the Supreme Court of the United States. The NACC enters a case only after careful review by the NACC *Amicus Curiae* Committee and its Board of Directors.

The **National Association of Social Workers ("NASW")** was established in 1955 as a nonprofit professional association dedicated to the practice and interests of the social work profession. It is the largest social work association in the world, with 150,000 members and chapters in every state, including Georgia with 2,400 members, the District of Columbia, and internationally. NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, NASW promulgates professional standards and criteria, conducts research, publishes studies of interest to the profession,

provides continuing education and enforces the *NASW Code of Ethics*.

NASW formally opposes discrimination based on sexual orientation and the *NASW Code of Ethics* prohibits social workers from discriminating on this basis in their professional roles. As noted in "Lesbian, Gay, and Bisexual Issues," published in *Social Work Speaks*, a collection of its 2000-2003 policy statements, the current NASW policy also affirms the association's commitment "to work toward full social and legal acceptance and recognition of lesbian, gay, and bisexual people."

Lambda Legal Defense and Education Fund, Inc. is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work. With offices in Atlanta, New York, Chicago, Los Angeles, and Dallas, Lambda has appeared as counsel or *amicus curiae* in hundreds of family law and other cases in state and federal courts to combat discrimination based on sexual orientation.

Lambda has consistently argued that judicial decisions about child custody and visitation arrangements must not be based on myths or stereotypes about lesbians or gay men, but instead on evidence relevant to the specific children or adults at issue. Recent child custody or visitation cases in which Lambda has participated include *Clark v. Wade*, 273 Ga. 587 (2001), *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001), *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000), and *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998). Lambda Legal files this brief to urge that Georgia's custody rules should not be altered because the parent in this case has a lesbian friend. The unsubstantiated ban on contact between the children and one specific adult is contrary to law and undermines the relationship between the custodial mother and her children.

STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the Appellant's Brief.

QUESTION AS TO WHICH APPEAL WAS GRANTED

"In light of *Brandenburg v. Brandenburg*, 274 Ga. 183, 184(1) (2001), did the trial court err in ordering that 'the children are to have no contact with TaVondria D. Battle and it will be the Defendant's [Mother's] responsibility to ensure that there is no contact between TaVondria D. Battle and the children'?"

– Order of November 15, 2001, granting discretionary review

SUMMARY OF ARGUMENT

Brandenburg v. Brandenburg, 274 Ga. 183 (2001), requires vacatur of a Superior Court order barring contact between the parties' children and a lesbian family friend, TaVondria Battle, because the record contains no evidence that the appellant mother's decision to allow the children to associate with Battle will have a negative effect on their welfare. Although the court below did not find that the appellant and Battle had a lesbian relationship, and the weight of evidence is that they did not, reversal would be required even if they had been sexually intimate unless association with Battle threatened the children's well-being in some way.

There was no basis for the trial judge's concern that contact with Battle would imperil the children's moral development. Association with gay men and lesbians does not carry any particular moral effect. Moreover, judicial decisions in other states have acknowledged, and social scientists have repeatedly found, that being raised by lesbians or gay men does not adversely affect minors' best interests. Consequently, restrictions like the one imposed in this case improperly thrust the hand of the state into parent-child relationships, undermining parental authority and sending stigmatizing

messages to the youth they are intended to protect. They are contrary to Georgia family law and to state and federal constitutional law.

ARGUMENT AND CITATIONS OF AUTHORITY

I. GEORGIA COURTS CANNOT SECOND-GUESS A PARENT'S DECISIONS ABOUT HER CHILDREN'S ASSOCIATES WITHOUT A SUFFICIENT EVIDENTIARY BASIS

This Court's order granting discretionary review asks whether the Superior Court's ban on contact between Ms. Battle and the appellant's children was erroneous under *Brandenburg v. Brandenburg*, 274 Ga. 183, 184(1) (2001). The answer is clearly "yes." *Brandenburg* teaches that parents generally are free to make decisions about their children's associates. This is so even when parents make choices that are different from those a judge would make, or that are unpopular in the community. And parental autonomy in this regard is not diminished just because the parent or, as in this case, a friend of the parent who has a role in the children's lives, is a lesbian or a gay man.

A. Settled Georgia Law Bars Custodial Restrictions on Children's Associates Unless the Record Establishes That Specified Persons Threaten the Minors' Welfare

Brandenburg involved a divorced father who was barred from exercising visitation with his children in the presence of his fiancée. He had begun his relationship with the woman while he was living in the marital home, and had moved her to Georgia while his wife was pregnant with his sixth child. 274 Ga. at 183. Despite the unorthodox nature of the arrangement, this Court found the record "devoid of any evidence that [the] relationship had or likely would have a deleterious effect on the children beyond that normally associated with divorce or a parent's remarriage." Nor was there any evidence that the father and his lover "engaged in inappropriate behavior in front of the children." *Id.* at 184. In light of this record, the Court unanimously found that restricting the father's visitation was an abuse of discretion. *Id.* The same result should obtain in this case, where the record is likewise

bare of evidence that exposure to Battle would be contrary to the children's best interests.

The *Brandenburg* court cited Georgia's policy, set forth by the General Assembly in 1991, of encouraging the sharing of parental rights and responsibilities after divorce. *Id.* at 184 (citing O.C.G.A. § 19-9-3(d)). Because this policy encourages a focus on the children in a divorcing family, rather than on the parents, courts should not use custody or visitation orders to punish litigants or to enforce community norms. *See Chandler v. Chandler*, 261 Ga. 598, 599 (1991) (past unauthorized removal of child from state did not warrant denial of visitation; lesser restrictions were available to address risk that parent would flee again); *In re R.E.W.*, 220 Ga. App. 861, 863 (1996). Instead, courts must determine the likely impact of a parent's decisions about associates on the children, asking "whether the child will somehow be harmed by the conduct of the parent." *Id.* Restrictions lacking an evidentiary basis in the record are invalid and are subject to reversal on appeal. *See, e.g., Woodruff v. Woodruff*, 272 Ga. 485, 488 (2000) (no-contact provision in divorce judgment vacated where record failed to support allegations of sexual abuse by children's father and grandfather); *Turman v. Boleman*, 235 Ga. App. 243 (1998) (striking broad, race-conscious visitation restriction).

In this case, it is abundantly clear that the Superior Court barred contact between TaVondria Battle and the appellant's children solely because Battle is a lesbian, not because of anyone's conduct. The court declared Battle anathema solely because of an unsubstantiated concern about "what is morally in the best interest of the children" (R. 103), as if any contact with a lesbian would somehow pollute their moral character. *See also* T. 69. The Superior Court made no finding that Battle and the appellant were involved in a sexual relationship, and at the hearing on the motion for new trial, the judge acknowledged the appellant mother's denial of lesbianism but defended the restriction by noting Battle's admission that she, the friend, is gay (T. 6). Inasmuch as the court's order was grounded in

its biases and presumptions about lesbians, and not in any evidence touching upon the children's welfare, the restriction on contact with Battle should be vacated under the settled Georgia law of which *Brandenburg* is only the most recent and forceful example.

B. Mere Disagreement With the Appellant's Decisions About Her Children's Associates Cannot Justify an Infringement of Her Constitutionally Protected Parental Autonomy

While non-constitutional rules provide a sufficient basis for reversal, the Superior Court's action also ran afoul of the appellant's constitutionally protected right to parental autonomy. The "interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). Over the past century the Court has turned away numerous attempts at state control over the activities of child-rearing, education, and relationship-building that properly rest with parents. *Id.* at 65-66 (collecting cases); see *Brooks v. Parkerson*, 265 Ga. 189, 191-92 (same), *cert. denied*, 516 U.S. 942 (1995). While the precise contours of the federal constitutional right have not been marked, recent precedent shows that courts may not merely second-guess parents in making decisions about their children's activities and associates.

At issue in *Troxel* was a Washington state statute permitting "any person" to petition for visitation with a child "at any time." The statute authorized the superior court to grant the request whenever "visitation may serve the best interest of the child," and that court ordered more visitation for the grandparents than the mother, a fit parent, desired. *Troxel*, 530 U.S. at 60 (plurality opinion) (internal quotation marks omitted). The mother prevailed when the state supreme court held the visitation statute unconstitutional.

The United States Supreme Court affirmed the judgment, holding that the Washington statute had been unconstitutionally applied because it

conduct or misconduct as the criterion for custody and visitation decisions. *See, e.g., Saxon v. Saxon*, 207 Ga. App. 471 (1993) (no evidence that mother's allegedly meretricious relationship resulted in abuse or neglect of child; change of custody to father reversed); *Hayes v. Hayes*, 199 Ga. App. 132 (1991) (denial of change of custody affirmed where evidence showed that both parents were engaged in discreet meretricious relationships; no material change of circumstances found). Very few reported cases have addressed the presence of lesbian or gay adults in children's lives, however, and Georgia courts have continued to impose broad restrictions on custody or visitation when such cases arise.³ Whatever the reason for these restrictions, they often appear inconsistent with *Brandenburg's* rigorous focus on the welfare of children. This Court should direct trial courts to apply *Brandenburg*, with its deference to fit parents's choices, equally to families that are headed by lesbian or gay parents or that associate with lesbian or gay friends.

Courts declining to restrict custody or visitation solely because of sexual orientation are on solid ground, for numerous studies have shown that children do not suffer any harm or deficit from being raised by lesbian mothers or gay fathers. A person's sexual orientation, by itself, provides a court with no information about her moral fitness or the likelihood that she will raise well adjusted children. *See* Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEVELOPMENT 1025, 1036 (1992) (concluding, based on comprehensive review of literature, that children of gay and lesbian parents suffer no detrimental developmental effect on account of their parents' sexuality); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994) (cataloging misconceptions used against gay parents and summarizing

³For example, Georgia courts have enforced bans on visitation during periods when a parent cohabits or has overnight stays with a same-sex partner. *See, e.g., Burns v. Burns*, 253 Ga. App. 600 (2002).

research showing equality of result, in terms of child development, for gay and non-gay parents). Studies find that lesbian mothers and gay fathers raise children who are as well adjusted as their peers with non-gay parents, both generally, in terms of happiness and emotional growth, and specifically, in terms of moral development. *See Flaks, supra*, at 357 (reporting study showing that lesbian mothers' children respond to hypothetical moral dilemmas in a way indistinguishable from other children's responses). A comprehensive review of the literature published last year found no differences in measures of self-esteem, anxiety, depression, behavioral problems, school performance, sports participation, friendships, use of counseling, unsociability or other emotional difficulties; its authors concluded that because no "differences of social concern" exist, parental sexual orientation should not be a factor in the analysis of the best interests of children. *See Judith Stacey and Timothy J. Biblarz, (How) Does Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 173-74, 176 (2001). Logic suggests that the same findings hold true with respect to children who associate in their daily lives with gay or lesbian family friends.

As Flaks points out, concerns voiced about children's "moral development," echoing the Superior Court's comments in this case, often mask a fear that children exposed to gay men or lesbians will themselves turn out to be gay or lesbian. *Flaks, supra*, at 357. Although *amici* reject the notion that there is anything wrong with being gay, studies reveal that being raised by a gay or lesbian parent does not affect one's sexual orientation. Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOLOGY 3 (1996). Nor does the sexual orientation of a parent appear to affect a child's gender identity (the child's self-image as male or female) or sex-typed behavior (how closely the child's behavior conforms to expectations about his or her sex). *Patterson, supra*, at 1030-34;

Beverly Hoefler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AMER. J. ORTHOPSYCHIATRY 536, 543 (1981) (more similarities than differences in behavior of "gay parent" and "non-gay parent" groups of children). The substantial body of research on the topic shows that the trial court could have found no reason to restrict contact between Ms. Battle and the appellant's children, had it relied on facts and evidence rather than indulging myths and presumptions about lesbians.

Fortunately, courts across the country have held with increasing frequency that one's lesbian or gay orientation is not a "marker" for an adverse effect on children's welfare. Most of these decisions involved gay parents, whose bond with, and effect on, children is stronger than that of the family friend in the instant case; yet courts have held that homosexuality standing alone does not justify limitations on custody. See *R.E.W.; Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000) (reversing initial custody award to father where stereotypes about lesbians invoked against mother); *In re Marriage of Pryor*, 714 N.E.2d 743, 745 (Ind. Ct. App. 1999) (evidence of homosexuality without proof of effect on children cannot justify finding of parental unfitness); *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (change of custody was impermissibly based on mother's sexual orientation). This rule applies even in the circumstance not present here: when a parent is involved in an intimate same-sex relationship. *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998), is a prominent example. *Boswell* involved a ban on visitation in the presence of a gay parent's "non-marital partner." 721 A.2d at 665-66. An intermediate appellate court struck the restriction, and Maryland's highest court affirmed. That court refused to allow negative inferences from the mere fact of a parent's homosexuality or same-sex relationship, noting that the "only relevance that a parent's sexual conduct or lifestyle has in the context of a visitation proceeding of this type is where that conduct or lifestyle

from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. *Pierce [v. Society of Sisters]*, 268 U.S. 510, 535 [(1925)] It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.

Troxel, 530 U.S. at 78-79 (Souter, J., concurring) (internal quotation omitted); see also *Wisconsin v. Yoder*, 406 U.S. 205, 229-34 (1972) (state could not force Amish parents to send their children to formal high school where attendance at such schools threatened sect's insular lifestyle); *Brooks*, 265 Ga. at 191-92 (collecting cases).² The error in this case arose in the very manner Justice Souter described: the trial judge restricted contact between Battle and the children, not on the basis of any evidence, but rather, and exclusively, because he believed himself more enlightened about the supposed moral danger of allowing contact with a lesbian. Given the mother's status as a fit parent, and the absence of any specific evidence that might call into question her decisions about the adults that are allowed into her children's lives, the moral call was for her, and not the court, to make. See *Troxel*, 530 U.S. at 68 (presumption exists that fit parents act in best interests of their children); *Clark v. Wade*, 273 Ga. 587, 593 (2001) (plurality opinion) (same).

II. THE SEXUAL ORIENTATION OF A PARENT OR FAMILY ASSOCIATE DOES NOT AFFECT THE SCOPE OF PARENTAL AUTHORITY

Brandenburg's clear and unanimous holding can be seen as the culmination of years of development in Georgia family law, in which a focus on children's welfare has replaced parental

²This Court has previously acknowledged the importance of parental autonomy in this area. One need look no further than *Brooks v. Parkerson*, where the majority found it necessary to strike down a statute granting grandparents visitation over parents' objection even as it recognized the "deep and significant bond" that many grandparents and grandchildren share. *Id.* at 194.

permit[ted] any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. . . . Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation . . . based solely on the judge's determination of the child's best interests.

Id. at 67. The problem, in the plurality's view, was "not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests." *Id.* at 69; *see id.* at 70 (court must give parent's decision about appropriateness of grandparent-grandchild relationship "at least some special weight"). In sum, a "simple disagreement" between a judge and a fit parent over what is best for children cannot justify a court's intrusion on the parent's constitutionally protected authority. *Id.* at 72.¹

Here the Superior Court committed the very mistake that the Court decried in *Troxel*: it second-guessed a mother because it "simply disagreed" with her decisions about whom her children would come to know in their daily lives. In doing so, the court substantially abridged parental autonomy, for as Justice Souter has explained:

The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different

¹Three Justices joined Justice O'Connor's opinion for the plurality, agreeing that the statute was unconstitutional as applied. Justice Souter would have affirmed the Washington Supreme Court's facial invalidation of the statute. *Troxel*, 530 U.S. at 75-76 (Souter, J., concurring in judgment). Justice O'Connor's opinion states the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

is clearly shown to be detrimental to the children's emotional and/or physical well-being." *Id.* at 678. Surveying cases from other jurisdictions in which trial courts unduly restricted lesbian or gay parents' visitation because of their relationships - including *R.E.W.* - the Maryland high court found a growing consensus that limiting a parent's contact with her children is not warranted absent evidence of harm to the children. *Id.* at 674-77; *see, e.g., In re Marriage of Walsh*, 451 N.W.2d 492 (Iowa 1990) (reversing requirement that "no unrelated adult" be present when gay father exercised visitation); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987) (same).

The trend in this direction has, moreover, continued in the South and elsewhere. *See, e.g., Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. App. 2002) (vacating restriction on overnight guests during visitation in case of lesbian mother, where there was no evidence of adverse effect on the children); *Dorworth v. Dorworth*, 33 P.3d 1260 (Colo. App. 2001) (vacating, *inter alia*, trial court order barring overnight guests in father's home while exercising visitation with daughter); *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) (unanimous state supreme court vacates ban on overnight visitation when mother's lesbian partner is in home); *Weigand v. Houghton*, 730 So. 2d 581, 587 (Miss. 1999) (vacating prohibition on visitation in presence of father's male partner because of "the need to maintain a healthy, loving relationship between the non-custodial parent and his child").

Vigilance in protecting children's best interests does not mean micromanaging children's lives and second-guessing their parents. Courts that are appropriately respectful of parental choices will avoid the subtle but significant harm that accompanies state interference in family relations: the undermining of parental authority and the implicit teaching that a child's family is somehow flawed or undesirable. As a Pennsylvania court has recognized, it is "[o]f primary importance to a child's well-being [to have] full and realistic knowledge of his parents. . . ." *Blew v. Verta*, 617 A.2d 31, 35

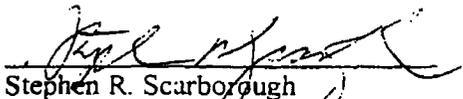
(Pa. Super. Ct. 1992). The same is true of family associates: the fewer the judicial orders screening children off from persons who have previously been important in their lives, the more they can rely on their own parents' judgments in selecting activities and associates for them, and the less the chance that they will receive a hurtful message of shame or unhealthy difference concerning their families or themselves.

In the end, onerous visitation restrictions are ill-advised for the simplest of reasons: the sons and daughters of divorcing parents, already acknowledged to be subject to "stress and discomfort," *Clark*, 273 Ga. at 598, should not have their relationships with their parents further strained by judicial interference unless their welfare requires it. Georgia has an interest that is "beyond the need for elaboration," *Phagan v. State*, 268 Ga. 272, 274 (1997), in the welfare of *all* children, regardless of the sexual orientation of their parents and family friends. To be concerned for all children means not drawing arbitrary lines; it means furthering robust parent-child relationships even when the decisions parents make on children's behalf prove to be different from the choices a court would make.

CONCLUSION

This Court should reverse the judgment below, striking the visitation restriction on contact between the appellant's children and TaVondria Battle. Such a disposition is appropriate in this case, where no evidence exists to support the restriction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served the within Brief of *Amicus Curiae* on the persons named below by placing copies in the United States Mail with adequate postage affixed thereto, this eleventh day of June, 2002.

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