

IN THE SUPREME COURT OF VIRGINIA

Record No. 94-1166

PAMELA KAY BOTTOMS,

Appellant,

v.

SHARON LYNNE BOTTOMS,

Appellee.

**BRIEF OF AMICI CURIAE
AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY,
AMERICAN PSYCHOLOGICAL ASSOCIATION,
NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.,
VIRGINIA CHAPTER OF THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS, INC., AND
VIRGINIA PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF APPELLEE**

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INTEREST OF AMICI CURIAE

The American Academy of Child and Adolescent Psychiatry ("AACAP") is a nonprofit professional organization representing over 6,000 child and adolescent psychiatrists. Its members are physicians with at least five years of additional training beyond medical school in general and child and adolescent psychiatry. Its members actively research, diagnose and treat psychiatric disorders affecting children, adolescents, and their families. AACAP is committed to protecting the well-being and rights of children and their families. It advocates for the best interests of the child or adolescent.

The American Psychological Association, a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The American Psychological Association has more than 120,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among the American Psychological Association's major functions are promoting psychological research and promulgating the results of this research as it applies to important human concerns. A substantial number of the American Psychological Association's members are concerned with research and the provision of psychological services pertaining to families and children, human sexuality, and attitudes toward stigmatized groups.

The American Psychological Association has submitted amicus briefs in important cases throughout the country that

raise issues to which psychological research and opinion are pertinent. The American Psychological Association's amicus briefs have been relied upon by the majority, as well as key concurring and dissenting opinions, in many cases of national significance. E.g., Maryland v. Craig, 497 U.S. 836, 855 (1990); Hodgson v. Minnesota, 497 U.S. 417, 437 n.24, 454 n.38 (1990) (plurality opinion); id. at 494 (Kennedy, J., concurring in part and dissenting in part); Bowers v. Hardwick, 478 U.S. 186, 199, 202 n.2, 208 n.3 (1986) (Blackmun, J., dissenting); Kentucky v. Wasson, 842 S.W.2d 487, 490 & n.1 (Ky. 1992).

The National Association of Social Workers, Inc. ("NASW"), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. The Virginia Chapter of the NASW has over 3,100 members. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing professional learning, and to improving the quality of life through the application of social work knowledge and skills. Through its Code of Ethics (NASW, 1993), the NASW bans discrimination on the basis of sexual orientation and encourages social workers to act to protect the rights and opportunities of oppressed groups, including lesbian and gay persons. In its Policy Statement on Lesbian and Gay Issues (August 1993), NASW encourages the recognition and protection of the rights of lesbians and gays to be granted

custody of their children and to provide foster and adoptive care where they are otherwise fit parents.

Amici believe that parent-child bonding, especially during the early months and years of life, is crucial to a child's development and well-being. Disruption of this relationship should be based only on compelling reasons, such as concern for the life, physical safety, and mental health of the child, certainly not on a parent's sexual orientation. The relevant social science research shows that an individual's sexual orientation does not correlate with the person's fitness as a parent.

Amici submit this brief to bring to this Court's attention the principal body of scientific knowledge pertinent to the questions posed in this case. It is particularly important that the Court consider such scientific research in view of the widespread prejudice and stereotyping that exists with respect to gay men, lesbians, and bisexual people in the United States.

STATEMENT OF THE CASE

Sharon Bottoms is the mother of two-year old Kenneth Tyler Doustou ("Tyler"). Pamela Kay Bottoms ("Kay Bottoms"), Tyler's maternal grandmother, instituted proceedings to obtain custody of Tyler. The juvenile court removed Tyler from Sharon's custody and awarded temporary custody to Kay Bottoms. Following a hearing, the Circuit Court held that Sharon Bottoms' lesbian

relationship with her partner, April Wade, rendered her an unfit parent and that she should therefore lose custody of Tyler. App. 196-99.

The Court of Appeals reversed the decision of the Circuit Court. Bottoms v. Bottoms, 444 S.E.2d 276 (Va. App. 1994). Because the social science evidence indicated that "a person's sexual orientation does not bear a relation to that person's fitness as a parent," and because the trial court had before it "[n]o evidence . . . that tended to prove that Sharon Bottoms' living arrangement with April Wade and their lesbian relationship have harmed or will harm Sharon Bottoms' son," the Court of Appeals reversed the trial court's ruling in favor of Kay Bottoms and ordered custody of Tyler restored to Sharon Bottoms. Id. at 283-84.

QUESTION PRESENTED

This Court granted review on the question whether the Court of Appeals "erred in deciding that the best interests of [Tyler] was to grant custody to his mother." Amici will address whether the Court of Appeals correctly concluded that a mother's involvement in a lesbian relationship does not render her an unfit parent, where psychological and social science research affords no basis to rebut the presumption of fitness of a natural parent and there is no evidence that the child has been or will be harmed while in the mother's custody.

STATEMENT OF FACTS

Sharon Bottoms gave birth to Tyler on July 5, 1991, and raised him until April 5, 1993, when the Juvenile Court awarded custody of Tyler to Sharon's mother. During the hearing in the Circuit Court, Sharon Bottoms testified that she and April Wade have made a lifetime commitment to each other. App. 41. Substantial evidence was submitted to demonstrate that there was no basis for a claim that Sharon Bottoms was an unfit parent. App. 136-43, 152-68.

Dr. Charlotte Patterson, an associate professor of psychology at the University of Virginia, testified on behalf of the court-appointed guardian in this case that she had reviewed the available research on how children who are raised by a lesbian or gay parent develop psychologically, and she had found that such children develop similarly to children raised by a heterosexual parent. App. 117-28. Dr. Patterson testified that there is no evidence in any of these studies that a child raised by a lesbian or gay parent will be disadvantaged relative to a child raised by a heterosexual parent. App. 127-28.

Dr. Rochelle L. Klinger, a practicing psychiatrist and an assistant professor of psychiatry at the Medical College of Virginia,¹ testified at trial that she had interviewed Sharon

¹ Dr. Klinger is chairperson of the American Psychiatric Association Committee on Gay, Lesbian, and Bisexual Issues. App. 205.

Bottoms and her partner and had concluded that they were a "healthy, well-functioning couple." App. 156.

ARGUMENT

Under Virginia law custody disputes are to be resolved by determining what will best serve the welfare of the child. Va. Code Ann. §§ 31-15 (Michie 1992); 20-107.2 (Michie Supp. 1994). Where the dispute is between a natural parent and a third party, "the law presumes that the child's best interests will be served when in the custody of its parent." Judd v. Van Horn, 195 Va. 988, 996, 81 S.E.2d 432, 436 (1954); see also Walker v. Brooks, 203 Va. 417, 421, 124 S.E.2d 195, 198 (1962) ("[T]he rights of the parent are, if at all possible, to be respected, such rights being founded upon natural justice and wisdom, and being essential to the peace, order, virtue and happiness of society."); Wilkerson v. Wilkerson, 214 Va. 395, 397-98, 200 S.E.2d 581, 583 (1973).

The trial court held (App. 198-99) that the presumption in favor of the natural parent should not apply in this case and that Sharon Bottoms should lose custody of Tyler based on her open lesbian relationship. In so holding, the trial court cited the assertion by the Virginia Supreme Court in Roe v. Roe, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985), that such a

relationship renders a parent unfit.² However, the trial court cited no evidence that Sharon Bottoms' lesbian relationship had any actual adverse effect on Tyler.

The Court of Appeals reversed, holding that "the Roe decision has little or no application to this case because Roe involved a dispute between two parents . . . [and therefore] the presumption of parental fitness had no application." Bottoms, 444 S.E.2d at 283. The court concluded that, where a natural parent's custody is challenged by a third party, "the evidence must show that the [natural] parent is unfit and that the child is subjected to conduct and behavior that will harm the child." Id. at 282. The court held that the psychological testimony presented in the trial court "was to the effect that a parent's homosexual relationship alone does not harm a child emotionally or psychologically or make the parent an unfit custodian." Id. at 283. The court further noted that the "social science evidence showed that a person's sexual orientation does not strongly correlate with that person's fitness as a parent." Id.

² The trial court cited also to the testimony of Kay Bottoms that the child cursed and was made to stand in the corner by his mother. App. 199. Such evidence standing alone would be clearly insufficient to support a transfer of custody from a parent to a third party and was not the basis for the trial court's decision. See Bottoms v. Bottoms, 444 S.E.2d at 281 ("[T]he open lesbian relationship and illegality of the mother's sexual activity are the only significant factors that the [trial] court considered in finding Sharon Bottoms to be an unfit parent.")

The Court of Appeals was correct in concluding that no social science research supports the proposition that lesbian mothers or gay fathers are unfit or that a parent's sexual orientation is a proper basis for disrupting the parent-child relationship through removal of custody from that parent.³ Indeed, the social science research indicates that there are no significant differences between children raised by lesbian mothers or gay fathers and those raised by heterosexual parents.

I. THE SOCIAL SCIENCE RESEARCH INDICATES THAT THERE ARE NO SIGNIFICANT DIFFERENCES BETWEEN CHILDREN RAISED BY LESBIAN MOTHERS OR GAY FATHERS AND THOSE RAISED BY HETEROSEXUAL PARENTS.

In deciding this case, this Court should be aware of the social science research addressing the effect on children of being raised by a lesbian mother or gay father. Almost all of this research has been done during the last twenty years, and

³ This brief reviews empirical research from the social and behavioral sciences pertaining to children and to sexual orientation. Amici describe data collected in studies that have been conducted using the "scientific method". This approach requires that data be collected through procedures that minimize the likelihood that a particular researcher's personal biases and values will influence the observations he or she makes. Thus, for example, in a valid study, research subjects should be unaware of the study's hypotheses because such knowledge might influence their responses or behavior. In addition, scientific studies typically are subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

Because any single empirical study inevitably has limitations, amici try in this review to describe overall trends and patterns in the research data that are evident from examining multiple studies that address a particular research question.

much of it has been published since Roe was decided in 1985. Both the pre-Roe studies and the substantial research completed since the Roe decision unanimously conclude that children raised by lesbian mothers or gay fathers do not differ significantly from those raised by heterosexual parents.⁴

⁴ This research is reviewed comprehensively in Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Dev. 1025 (1992) [hereinafter Children of Lesbian and Gay Parents], and Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 157-61 (1991) [hereinafter Myths].

The research results have been consistent regardless of the geographic region within the United States where the children were raised. See, e.g., Richard Green et al., Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children, 15 Archives of Sexual Behav. 167 (1986) [hereinafter Richard Green et al. (1986)] (parents and children studied were living in rural and urban areas in Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin); David K. Flaks et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 Dev. Psychol. (forthcoming Jan. 1995) (manuscript on file with Covington & Burling) (parents and children studied were from the Pennsylvania area); Sharon L. Huggins, A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers, in Homosexuality and the Family 123 (Frederick W. Bozett ed., 1989) (parents and children studied were from southern California); Judith A. Miller et al. The Child's Home Environment For Lesbian vs. Heterosexual Mothers: A Neglected Area of Research, 7 J. Homosexuality 49-56 (1981) (parents and children studied were from a "large western mountain city").

Several courts have found that the available research provides persuasive evidence that children raised in a gay or lesbian household are not disadvantaged relative to children raised in a heterosexual household. See, e.g., Bezio v. Patenaude, 410 N.E. 2d 1207, 1215-16 (Mass. 1980); Doe v. Doe, 452 N.E. 2d 293, 296 (Mass. Ct. App. 1983); In re Adoption of Evan, 583 N.Y.S.2d 997, 1001 n.1 (Sur. Ct. 1992).

A. The Social Science Research Indicates That the Overall Psychological Health of Children Raised by Lesbian Mothers or Gay Fathers Does Not Differ from That of Children Raised by Heterosexual Parents.

Scientific studies investigating the psychological effects on children of being raised by a lesbian or gay parent have concluded unanimously that there are no significant differences in the psychological health of these children and children raised by a heterosexual parent.

Studies comparing the level of psychological adjustment of children raised by a divorced lesbian mother and children raised by a divorced heterosexual mother indicate that there is no significant difference between the two groups.⁵ There are no statistically significant differences between the two groups for the presence of such behavioral and emotional problems as hyperactivity, unsociability, emotional difficulty and conduct problems.⁶ A study that traced such behavioral issues through to adulthood found no differences between individuals raised by a lesbian mother and those raised by a heterosexual mother.⁷

⁵ See, e.g., Martha Kirkpatrick et al., Lesbian Mothers and Their Children: A Comparative Study, 51 Am. J. Orthopsychiatry 545, 545-51 (1981); Susan Golombok et al., Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal, 24 J. Child Psychol. & Psychiatry 551 (1983).

⁷ Julie S. Gottman, Children of Gay and Lesbian Parents, in Homosexuality and Family Relations 177-96 (Frederick W. Bozett ed., 1990). Indeed, for the characteristic of "well-being," which measures the individual's sense of feeling secure in the world and in relationships, adult daughters of lesbians tended to have fewer worries and complaints and were freer of doubts and

Two of the more recent studies in this area have focused on children who have been raised since birth by a lesbian mother and who have never lived in a heterosexual household. One study found that the children of the lesbian mothers did not differ on social competence or behavioral problems compared with children from the general population.⁸ Another study found no differences in overall cognitive and behavioral functioning, social competence, school performance, or developmental progress between children raised by a lesbian mother and her same-sex partner and children raised by married heterosexual-parent families .⁹

Several studies have examined the self-esteem and self-concept of children raised by a lesbian mother and those raised by a heterosexual mother. A study of adolescents found no differences in self-esteem or self-concept between children of divorced mothers living with a same-sex partner and divorced mothers living with an opposite sex partner. The self-esteem and

disillusionment; the adult daughters raised by heterosexual mothers exhibited more awkwardness, cautiousness and apathy. Id. at 189-90.

⁸ Charlotte J. Patterson, Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex-Role Identity, in Lesbian and Gay Psychology: Theory, Research and Clinical Applications 156, 165-67 (Beverly Greene and Gregory M. Herek eds. 1994) [hereinafter Baby Boom].

⁹ Flaks et al., supra note 4, at 16-20, 24.

self-concept of both groups were within the normal range.¹⁰ Moreover, a study of children raised from birth by a lesbian mother in a lesbian household found no difference between those children and children raised by a heterosexual mother on self-concept scales that measure aggression, sociability, or desire to be the center of attention.¹¹ This same study found that children raised by a lesbian mother reported greater symptoms of stress but also greater feelings of joy, contentedness, and comfort with themselves than children raised by a heterosexual mother.¹²

Finally, the available evidence suggests that there is no difference in the overall level of intellectual development of children raised by a lesbian mother as compared with children raised by a heterosexual mother.¹³

B. No Differences Have Been Reported Between the Social Relationships of Children Raised by Lesbian Mothers or Gay Fathers and Children Raised by Heterosexual Parents.

The social relationships of children raised by a lesbian or gay parent appear to be of similar quality to those of children raised by a heterosexual parent. Moreover, the fear of the Roe Court that children of lesbian or gay parents would

¹⁰ Sharon L. Huggins, supra note 4, at 132-35.

¹¹ Baby Boom, supra note 8, at 167.

¹² Id. at 168, 169-70.

¹³ Richard Green et al. (1986), supra note 4, at 167-84.

suffer psychological trauma as a result of "social condemnation" is not borne out in the research.

1. Relationships with Peers and Adults

Research to date suggests that children raised by a lesbian mother have peer relationships that are substantially equivalent to those of children raised by a heterosexual mother. Studies have shown no significant differences between these two groups of children in terms of self-ratings of popularity, mothers' ratings of their children's popularity and leadership qualities, and overall social adjustment.¹⁴ Similarly, in the area of choice of friends, social science researchers have found little difference between children raised by a lesbian mother and children raised by a heterosexual mother. Before puberty, most children in both groups have same-sex best friends.¹⁵

Children of lesbian mothers are also likely to have healthy and positive relationships with adults. One study actually found that children raised by divorced lesbian mothers visit with their fathers more often than children raised by divorced heterosexual mothers.¹⁶ Another study found that, although the regularity of visits with fathers did not differ, lesbian mothers were more concerned as a group than heterosexual

¹⁴ Id. at 178; Susan Golombok et al., supra note 5, at 565-67.

¹⁵ Richard Green et al. (1986), supra note 4, at 178; Susan Golombok et al., supra note 5, at 564.

¹⁶ Susan Golombok et al., supra note 5, at 557, 561.

mothers as a group that their children have positive relationships with men. Accordingly, children of lesbians, especially children of lesbians who were sharing a household with their partner, were reported to be more likely to include male relatives in their activities on a regular basis and to have more men in their lives as family friends.¹⁷ Overall, there are no findings in the social science research to date that would provide any cause for concern about the relationships of children raised by lesbian or gay parents with adults.

2. "Social Condemnation"

In concluding that a parent in a gay relationship was unfit, the Roe Court expressed particular concern about the social stigma it believed the child would suffer as a result of living with that parent. Although there was apparently no record evidence on this subject, the Court asserted that the child would suffer an "intolerable burden . . . by reason of the social condemnation" associated with living in such a household, "which will inevitably afflict her relationships with . . . peers and with the community at large." Roe, 228 Va. at 726, 324 S.E.2d at 694.

The social science research does not substantiate the fear expressed by the Roe Court. One study showed that only about five percent of the children studied who had lived with an openly lesbian or gay parent experienced harassment by other

¹⁷ Martha Kirkpatrick et al., supra note 5, at 549.

children.¹⁸ Another study suggested that if children of a lesbian mother believe that they may face social stigma, they will exercise discretion in revealing the sexual orientation of their parents,¹⁹ presumably resulting in fewer instances of stigma.

In cases where children do experience harassment relating to a parent's sexual orientation, the incidents generally are infrequent and consist of relatively minor verbal teasing, such as name-calling.²⁰ Such experience has not been shown to have had any significant impact on the children involved.²¹ On the other hand, the harmful effects suffered by

¹⁸ Brian Miller, Gay Fathers and Their Children, 28 Fam. Coordinator 544, 548 (1979). See also Richard Green, Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents, 135 Am. J. Psychiatry 692, 695-96 (1978) [hereinafter Richard Green (1978)] (limited data showed that for seven lesbian mother families in which subject of teasing was reported on, three children reported being teased and 18 children did not experience teasing; in all three cases, the teasing was minor and transitory).

¹⁹ Karen G. Lewis, Children of Lesbians: Their Point of View, 25 Soc. Work 198, 199 (1980).

²⁰ See Frederick W. Bozett, Gay Fathers: A Review of the Literature, in Homosexuality and the Family 137, 143, 144, 148 (Frederick W. Bozett ed., 1989); Brian Miller, supra note 18, at 548.

²¹ See, e.g. Richard Green (1978), supra note 18, at 695 (children's reactions to name calling directed at mothers were rather matter-of-fact and ranged from defensiveness to obliviousness); Donna J. Hitchens and Martha J. Kirkpatrick, Lesbian Mothers/Gay Fathers, in Emerging Issues in Child Psychiatry and the Law (Diane H. Schetky and Elissa P. Benedek eds., 1985); Steve Susoeff, Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852, 877-80 (1985).

a child when he or she is removed from his or her primary caregiver are well documented.²² Thus, the social science research strongly suggests that a court does far more harm than good when it removes the child from his or her gay or lesbian parent to "protect" the child from the possibility of future taunting.

Of course, many children are teased because of some way in which they or their families are different from the norm. Teasing may be based on a child's or the parent's physical appearance, race, religion, economic status, or any number of other factors. Dr. Charlotte Patterson, who testified below on behalf of the court-appointed guardian, pointed out that the important issue for children's development is not whether teasing occurs, but "whether the child has the support of the loving parent in learning to deal with it." App. 125.²³

²² See Michael Rutter, Maternal Deprivation, 1972-1978: New Findings, New Concepts, New Approaches, 50 Child Dev. 283 (1979). See also part III, infra.

²³ See also M.P. v. S.P., 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979) ("Of overriding importance is that within the context of a loving and supportive relationship there is no reason to think that the girls will be unable to manage whatever anxieties may flow from the community's disapproval of their mother."). In rejecting the claim that social condemnation of gay men and lesbians would negatively impact the development of their children, the court in M.P. v. S.P. similarly noted:

It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of

C. **The Research Does Not Suggest That A Parent's Sexual Orientation Influences the Gender Identity, Gender Role Behavior or Sexual Orientation of His or Her Child.**

There is no evidence that a parent's sexual orientation influences the sexual identity of a child. Sexual identity is a broad term that encompasses an individual's gender identity, gender role behavior, and sexual orientation. Gender identity concerns an individual's psychological sense of being principally male or female; gender role behavior relates to an individual's adherence to cultural norms for feminine and masculine attitudes and behavior; and sexual orientation relates to an enduring erotic, affectional, or romantic attraction to individuals of a particular gender.²⁴

reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Taking the children from [their lesbian mother] . . . will foster in them a sense of shame. . . . Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience.

Id. at 1263. See also S.N.E. v. R.L.E., 699 P.2d 875, 879 (Alaska 1985) ("Simply put, it is impermissible to rely on any real or imagined social stigma attaching to the Mother's status as a lesbian.") (citing Palmore v. Sidoti, 466 U.S. 429 (1984)); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio App. 1987) ("This court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.").

²⁴ Gregory M. Herek, Sexual Orientation, in 1 Women's Studies Encyclopedia 344-46 (H. Tierney ed., 1989). Sexual orientation usually is characterized as either homosexual (a primary or exclusive attraction to individuals of one's own gender), heterosexual (a primary or exclusive attraction to individuals of the other gender), or bisexual (significant

Research comparing the gender identity of children raised by a lesbian mother with the gender identity of children raised by a heterosexual mother has found that the two groups do not differ.²⁵ These studies typically attempt to determine whether the child identifies psychologically as a male or female and whether the child is happy with the biological sex to which he or she belongs.²⁶ The children of lesbian mothers are as likely as the children of heterosexual mothers to identify psychologically as members of their biological sex and to be content with that status.²⁷

Research has also found that a parent's sexual orientation does not significantly influence a child's gender role behavior. Most boys raised by a lesbian mother show gender role behavior ordinarily regarded as characteristically masculine, and most girls raised by a lesbian mother show gender role behavior ordinarily regarded as feminine.²⁸ Further, attractions to members of both genders).

²⁵ Susan Golombok et al., supra note 5, at 568; Julie S. Gottman, supra note 7, at 189; Kirkpatrick et al., supra note 5, at 551; Richard Green, The Best Interests of the Child with a Lesbian Mother, 10 Bull. AAPL 7, 14 (1982) [hereinafter Green (1982)].

²⁶ Richard Green et al. (1986), supra note 5, at 176.

²⁷ See, e.g., id. at 176 (comparing the children of lesbian mothers and children of heterosexual mothers from rural and urban areas in ten states).

²⁸ See, e.g., Susan Golombok et al., supra note 5, at 562; Julie S. Gottman, supra note 7, at 181; Beverly Hoeffler, Children's Acquisition of Sex-Role Behavior in Lesbian-Mother

children raised by a lesbian mother show no significant differences in gender role behavior when compared with children raised by a heterosexual mother.²⁹

Finally, the belief that a child raised in a household with a lesbian or gay parent is more likely to become lesbian or gay is without any basis in fact.³⁰ There is no evidence that children develop their sexual orientation by emulating their parents. Numerous studies indicate that children who are raised in a lesbian household do not differ in any significant way with

Families, 51 Am. J. Orthopsychiatry 536, 542 (1981); Baby Boom, supra note 8, at 18-19.

²⁹ Baby Boom, supra note 8, at 168-69; Susan Golombok et al., supra note 5, at 568; Julie S. Gottman, supra note 7, at 189; Martha Kirkpatrick et al., supra note 5, at 551; Beverly Hoeffler, supra note 28, at 542; Richard Green (1982), supra note 25, at 14; Richard Green et al. (1986), supra note 4, at 176, 179-83 (finding that the daughters of lesbians were more likely to prefer less sex-typed activities and to express an interest in becoming a lawyer, doctor, engineer, or astronaut than daughters of heterosexual mothers, but concluding that gender role behavior of the daughters of lesbians fell within normal limits).

Scientists have replicated this finding in numerous studies, using a variety of measures to assess gender role behavior. The measures used include sex-typed play activities, toy preferences, choice of television programs, peer relationship choices, garment preferences, and child, parent, and teacher interviews. Julie S. Gottman, supra note 7, at 180 (summarizing the research).

³⁰ Some courts have denied custody to a lesbian or gay parent based on a fear that a child in that parent's custody would be more likely to become gay or lesbian. See J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 872 (Mo. App. 1982); Jacobson v. Jacobson, 314 N.W.2d 78, 81-82 (N.D. 1981); Dailey v. Dailey, 635 S.W.2d 391, 394-96 (Tenn. Ct. App. 1981). Such a rationale is factually flawed, as shown in the text; in addition, it is irrelevant.

respect to their sexual orientation as compared with children who are raised in a heterosexual household.³¹

II. THE SOCIAL SCIENCE RESEARCH DOES NOT SUGGEST THAT LESBIAN MOTHERS AND GAY FATHERS ARE LIKELY TO BE UNFIT PARENTS.

The social science research also does not indicate that lesbians and gay men are inherently likely to be unfit parents. Indeed, the research suggests that any presumption of unfitness rests on prejudice and false stereotypes and that lesbians and gay men in fact have parenting skills comparable to those of heterosexual parents.

A. Professional Social Science Organizations Have Rejected the View that Lesbians and Gay Men as a Group Are Dysfunctional.

Any suggestion that lesbian mothers and gay fathers are unfit because they necessarily suffer from some psychological dysfunction is entirely unfounded. The American Psychiatric Association declared in 1973 that "homosexuality per se implies no impairment in judgment, stability, reliability or general

³¹ Susan Golombok et al., supra note 5, at 564; Julie S. Gottman, supra note 7, at 189; Richard Green (1982), supra note 25, at 13-14. For example, in a study of the sexual orientation of the adult daughters of lesbian mothers, the research showed that these daughters did not differ significantly in sexual orientation from the daughters of heterosexual mothers. Julie S. Gottman, supra note 7 at 189. The two groups also did not differ significantly in gender identity or gender role behavior. See also J. Michael Bailey et al., Sexual Orientation of Adult Sons of Gay Fathers at 3 (forthcoming in 31 Dev. Psychol. (Jan. 1995)) (manuscript on file with Covington & Burling) (time spent living with homosexual father not related to child's sexual orientation).

social or vocational capabilities."³² Amicus the American Psychological Association adopted a similar position in 1975, following a review of the scientific evidence.³³ The American Psychological Association has passed a series of resolutions urging that lesbians and gay men not be discriminated against in child custody matters, as well as employment, housing, licensing, and public accommodation.³⁴

³² Resolution of the American Psychiatric Association, December 15, 1973 ("In the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease"). Scientists recognize that decisions often are flawed when they are based on subjective judgments rather than a thorough review of objective data. When the assumptions underlying the earlier classification of homosexuality as an illness--which were based on professional judgment and biased observations--were tested empirically, they were found to be invalid. John C. Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy 115-36 (John C. Gonsiorek and James D. Weinrich eds., 1991) [hereinafter Research Implications].

³³ American Psychological Association, Minutes of the Council of Representatives, 30 Am. Psychologist 633 (1975).

³⁴ Id.; American Psychological Association, Minutes of the Council of Representatives, 32 Am. Psychologist 532 (1977); American Psychological Association, Minutes of the Council of Representatives, 36 Am. Psychologist 581 (1981); American Psychological Association, Policy Statements on Lesbian and Gay Issues (1987). See also American Medical Association, Resolution 12, Annual Meeting of the House of Delegates 322 (1989).

Amicus NASW has issued similar policy statements, as has the American Psychiatric Association. National Association of Social Workers, Delegate Assembly, Policy Statement on Lesbian and Gay Issues (August 1993) ("NASW affirms its commitment to work toward full social and legal acceptance and recognition of lesbian and gay people. To this end, NASW shall support legislation, regulation, policies, judicial review, political action, . . . and any other means necessary to establish and protect the equal rights of all people without regard to their

B. The Social Science Research Indicates that Lesbian Mothers and Gay Fathers Have Parenting Skills Comparable to Those of Heterosexual Parents.

Although lesbians and gay men historically have been discriminated against in custody matters,³⁵ there is no evidence to support the conclusion that as a group they do not make good parents. The belief held by some that lesbians and gay men are unfit parents is grounded not in facts, but in false stereotypes. Social science researchers have found that anti-gay prejudice manifests the same social psychological dynamics as racial and other ethnic prejudice.³⁶ People holding negative attitudes are less likely to have had personal contact with lesbians or gay men and, hence, are basing their attitudes on popular beliefs and

sexual orientation. Specific activities include, but are not limited to, working for the adoption of policies and legislation to end all forms of discrimination based on homophobia at the federal, state, and local levels; in all institutions; and in both the public and private sectors."); American Psychiatric Association, Position Statement on Homosexuality (April 1993).

³⁵ See Editors of the Harvard Law Review, Sexual Orientation and the Law, 102 Harv. L. Rev. 1584, 1629-42 (1989).

³⁶ See, e.g., Gregory M. Herek, Stigma, Prejudice and Violence Against Lesbians and Gay Men [hereinafter Stigma], in Research Implications, supra note 32, at 60-80; Margaret M. Bierly, Prejudice Towards Contemporary Out Groups as a Generalized Attitude, 15 J. Applied Soc. Psychol. 189, 189-99 (1985); Gregory M. Herek, Religious Orientation and Prejudice: A Comparison of Racial and Sexual Attitudes, 13 Personality and Soc. Psychol. Bull. 34 (1987).

misconceptions, not on accurate information or personal experience.³⁷

The social science research does not indicate that lesbians and gay men are likely to have traits that would diminish their effectiveness as parents. Research over three decades has failed to find any relationship between homosexual orientation and psychological adjustment or maladjustment.³⁸ In general, lesbians and gay men are as highly diverse a group as are heterosexuals and are indistinguishable from the heterosexual majority with respect to the nonsexual aspects of their lives.³⁹ Lesbians and gay men are employed productively in all occupations

³⁷ Gregory M. Herek, Assessing Heterosexuals' Attitudes Toward Lesbians and Gay Men: A Review of Empirical Research With the ATLG Scale, in Lesbian and Gay Psychology: Theory, Research, and Clinical Applications 206, 219 (Beverly Greene and Gregory M. Herek eds., 1994); Gregory M. Herek and Eric K. Glunt, Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results From A National Survey, 30 J. Sex Res. 239-44 (1993) ("Heterosexual men and women who report knowing someone who is gay express generally more positive attitudes toward lesbians and gay men than do heterosexuals who lack contact experiences."); Gregory M. Herek, Stigma, supra note 36 (summarizing the research).

³⁸ See John C. Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Research Implications, supra note 32, at 115-36; John C. Gonsiorek, Results of Psychological Testing on Homosexual Populations, 25 Am. Behav. Scientist 385, 394 (1982); Bernard F. Reiss, Psychological Tests in Homosexuality, in Homosexual Behavior: A Modern Reappraisal 296-311 (Judd Marmor ed., 1980); Maureen Hart et al., Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature, 39 J. Clinical Psychiatry 604 (1978).

³⁹ Alan P. Bell and Martin S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 229-31 (1978).

and professions⁴⁰ and have an overall potential to contribute to society similar to that of heterosexuals.⁴¹

Indeed, the research suggests that lesbian mothers have parenting skills that are equivalent to or better than those of heterosexual parents.⁴² This research demonstrates a "remarkable absence of distinguishing features between the lifestyles, child-rearing practices, and general demographic data of" lesbian mothers and heterosexual mothers.⁴³ One study found lesbian and heterosexual mothers to be similar in maternal interest, current lifestyles, and child rearing practices.⁴⁴ Another concluded that the majority of the lesbian mothers studied saw themselves as intimately involved in parenting and that the lesbian mothers as a group appeared more concerned for

⁴⁰ Id.

⁴¹ See, e.g., id. at 141-48 ("for the majority of our homosexual respondents, male and female, the fact that they happened to be homosexual had little to do with their experiences at work or the satisfaction they derived from them").

⁴² Flaks et al. have found that lesbian mothers score significantly higher than heterosexual parents on the Parent Awareness Skills Survey ("PASS"), which measures the sensitivity and effectiveness with which a parent responds to typical child-care situations. Flaks et al., supra note 4, at 15, 20.

⁴³ Beverly Hoeffler, supra note 28, at 537; Martha Kirkpatrick et al., supra note 5.

⁴⁴ Martha Kirkpatrick et al., supra note 5, at 546. See also id. at 549 ("the lesbian mothers tended to be more concerned with providing male figures for their children than were the comparison mothers").

their children's long-range development than the heterosexual mothers as a group.⁴⁵

III. A NATURAL PARENT IN AN OPENLY LESBIAN OR GAY RELATIONSHIP IS ENTITLED TO THE PRESUMPTION OF PARENTAL FITNESS.

The Court of Appeals correctly stated the long-established Virginia precedent that, "when a third party attempts to divest custody of a child from a natural parent, the presumption of parental fitness must be rebutted before a court may consider whether a third party would be a fit or proper custodian." Bottoms, 444 S.E.2d at 280 (citing Wilkerson v. Wilkerson, 214 Va. 395, 397-98, 200 S.E.2d 581, 583 (1973)). There is no basis for declining to apply the presumption in a case like this one, where the natural parent is involved in an openly lesbian or gay relationship.

There are important reasons why a natural parent should be presumed fit when custody is sought by a third party. Most natural parents develop a close bond with their child beginning

⁴⁵ Judith A. Miller et al., supra note 4, at 49-56. Also, there is no social science evidence that even suggests that lesbian or gay parents are more likely to sexually abuse their children, or to allow them to be molested by others. A. Nicholas Groth, Patterns of Sexual Assault Against Children and Adolescents, in Sexual Assault of Children and Adolescents 4-5 (Ann Wolbert Burgess et al. eds., 1978) ("[T]he belief that homosexuals are particularly attracted to children is completely unsupported by our data."); see also Gregory M. Herek, Myths, supra note 4, at 156 (reviewing the research relating to adult sexual orientation and molestation of children and concluding that gay men are not more likely than heterosexual men to molest children).

in the early months of the child's life. Parent-child bonding is crucial to a child's development and well being, particularly in infancy and early childhood.⁴⁶ In many cases, this will be the most important psychological bond in the child's life.

Separation from a parent to whom a child has developed an attachment can have a significant negative effect on a child's psychological adjustment and emotional well-being.⁴⁷ Disruption of this important attachment relationship is justified only when there are clear and compelling reasons, such as concern for the physical or mental health of the child.

There is no basis for declining to apply the presumption in favor of the natural parent in this case, where the established body of social science research indicates, unanimously, that there are no significant differences between children raised by heterosexuals and children raised by gay men or lesbians. The Court of Appeals properly concluded that the

⁴⁶ See John Bowlby, A Secure Base 119-36 (1988).

⁴⁷ See Paul R. Amato and Bruce Keith, Parental Divorce and the Well-Being of Children: A Meta-Analysis, 110 Psychol. Bull. 26, 37 (1991) (children who lose a parent through death or divorce exhibit a lower level of well-being); Judith S. Wallerstein and Joan B. Kelly, Surviving the Breakup 132-46, 170-72, 217-20 (1980); John Bowlby, Separation xi (1973) ("[M]any forms of psychoneurosis and character disorder are to be attributed either to deprivation of maternal care or to discontinuities in a child's relationship with his mother figure."); Eileen M. Hetherington et al., The Aftermath of Divorce, in Mother/child, Father/child Relationships (Joseph H. Stevens and Marilyn Mathews eds., 1978); Lawrence A. Kurdek and B. Berg, Correlates of Children's Adjustments to Their Parents' Divorce, in Children and Divorce (Lawrence A. Kurdek ed., 1983).

presumption of the natural parent's fitness is rebutted only by "clear and convincing" evidence that the parent's sexual conduct "poses a substantial threat of harm to a child's emotional, psychological, or physical well-being." Bottoms, 444 S.E.2d at 280, 282. No general social science or psychological evidence supports a rebuttal of the presumption in this case, where the research has unanimously concluded that there is no evidence of harmful effects on children raised by lesbians or gay men. As the Court of Appeals noted in this case, the unchallenged psychological evidence indicates a healthy, nurturing relationship between Sharon and Tyler. Bottoms, 444 S.E.2d at 278, 281.

The assertion of the Court nearly ten years ago in Roe v. Roe -- that a parent in an openly gay relationship is unfit -- should not have been applied by the trial court in this case. Because this per se rule is wholly unsupported by social science research, its application undermines the statutory mandate that custody determinations be based on the best interests of the child. In any event, Roe is distinguishable and should not be extended to a case like this one, involving a dispute between a natural parent and a third party.

A. The Roe Rule Undermines Virginia's Statutory Mandate That Custody Determinations Be Based on the Child's Best Interests.

As shown above, the relevant social science research provides no support for the statement in Roe that a parent in an

openly gay relationship is an unfit custodian. To the contrary, the research suggests that there is no significant difference in overall psychological health of children raised by lesbian or gay parents and children raised by heterosexual parents. Moreover, the research fails to support the Roe Court's assumption about the potential effect of "social condemnation" on a child raised by a lesbian or gay parent. In sum, the available social science research does not support the conclusion that a parent's sexual orientation has a necessary relationship to his or her fitness as a custodian. A number of the relevant studies have been completed since Roe was decided, and the research conclusions are now far more definitive than they were at the time Roe was decided.

Application of a per se conclusion of unfitness that has no basis in fact precludes consideration of a potential custodian's parental abilities and relationship with the child. The Roe approach prevents a full evaluation of a child's best interests by automatically disqualifying a lesbian or gay parent from custody even if the child's best interests would be served by an award of custody to that parent. Thus, it flies in the face of Virginia statutory law, which requires that custody determinations be based on the child's best interests.⁴⁸

⁴⁸ Compare Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993) (a rule of law that would prevent an adoption by a lesbian co-parent of her partner's natural child would be "inconsistent with the children's best interests and therefore with the public policy of [Vermont], as expressed in

There can be little doubt that on a number of occasions application of Roe will result in a custody award that is against a child's best interests. Under Roe, a parent who has been the primary caretaker, who has provided a stable home environment, and who has developed a warm and caring relationship with the child could lose custody to an alternate custodian who never has developed a significant relationship with the child, based solely on the fact that the parent has a same-sex partner. Such custody determinations would be flatly contrary to the best interests of children in Virginia.

B. Roe Should Not Be Extended To Parent/Non-Parent Custody Disputes.

Roe involved a dispute between two natural parents. For the reasons stated above, amici believe that the per se rule articulated in Roe that a gay parent is unfit should be discarded in its entirety. At a minimum, such a rule should not be extended to a case like this one, involving a dispute between a parent and a third party. The Court of Appeals ruled correctly that the Roe statement concerning parental unfitness has no application in this case, and that Sharon Bottoms is entitled to a presumption of fitness when, as here, custody is sought by a third party.

Extension of Roe to cases such as the present one would often lead to a custody decision that deprives the child of

[Vermont's] statutes affecting children").

the person with whom he or she shares the most important bond in his or her life, with significant negative psychological effects on the child. Because the social science research indicates that a parent's same-sex relationship does not adversely affect a child's psychological well-being, the existence of such a relationship clearly does not present a compelling justification for disrupting a parent-child attachment.

Application of Roe in parent/non-parent custody cases unquestionably would be contrary to the best interests of children in Virginia. This case should be decided without reference to Roe.

C. The Fact That Sodomy Continues to be Punishable as a Felony Under Virginia Law Is Not Grounds for Depriving a Lesbian or Gay Parent of Custody.

The Roe Court based its conclusion that custody should not be awarded to a gay parent in part on the fact that sodomy is a Class 6 felony under Virginia law, see Va. Code Ann. § 18.2-361 (Michie 1988). Roe, 228 Va. at 727-28, 324 S.E.2d at 694. The trial court below similarly cited Virginia's sodomy law to justify application of Roe in this case. App. 198. However, the existence of the sodomy statute does not provide a basis for presuming that a lesbian or gay parent is unfit. As an initial matter, alternative legal forms of intimate sexual contact are available to same-sex partners. Thus, it cannot be assumed that all persons in a lesbian or gay relationship will engage in illegal conduct.

Moreover, there is no reason to single out lesbian mothers and gay fathers on this point. Virginia's sodomy law applies to consensual sexual conduct between both homosexuals and heterosexuals. Studies indicate that a significant majority of heterosexuals have engaged in conduct prohibited by Virginia's sodomy statute.⁴⁹ The Virginia courts presumably do not inquire into such practices where a heterosexual parent seeks custody, and have never enforced a presumption against awarding custody to heterosexual parents on the assumption that those parents regularly violate the sodomy statute. Other sexual offenses such as fornication and lascivious cohabitation are also common, and are not the subject of a disqualifying presumption in custody cases.⁵⁰ See, e.g., Sutherland v. Sutherland, 414 S.E.2d 617

⁴⁹ See Edward O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 98, 101-07 (1994) (statistics showing that approximately 70 percent of heterosexual respondents had engaged in oral sex at some point during their lives and that nearly 20 percent of the heterosexual female respondents and over 25 percent of the heterosexual male respondents had engaged in oral sex during their most recent sexual experience). Editors of the Harvard Law Review, supra note 35, 102 Harv. L. Rev. at 1640 & n.85. The Laumann study was based on a survey of a representative sample of American adults between the ages of 18 and 60 and was conducted by the National Opinion Research Center at the University of Chicago.

⁵⁰ See Va. Code Ann. § 18.2-344 (Michie 1988) (prohibiting sexual intercourse between two persons who are not married to each other); Va. Code Ann. § 18.2-345 (Michie 1988) (prohibiting lewd and lascivious cohabitation). Kay Bottoms testified at trial that she had cohabited with a man to whom she was not married for seventeen years while her children were in the household. App. 64. Appropriately, the Circuit Court did not find that Kay's apparently illegal behavior rendered her an unfit custodian. The rule should be the same for Sharon Bottoms.

(Va. App. 1992) (mother's commission of adultery did not require award of custody to father).⁵¹

Of course, in some cases (e.g., assault directed against family members) a parent's criminal activity could provide substantial evidence of unfitness for custody. It is unlikely, however, that a parent's sexual practices in a relationship with an adult partner would affect the interests of the child. Most parents seek privacy in their intimate sexual acts and do not tell their children about their sexual practices.⁵² Thus, whether the parent is in a same-sex relationship or in a heterosexual relationship, a child will usually be unaware that a parent is engaging in conduct prohibited under Virginia's sodomy statute. If the conduct

⁵¹ The Roe Court attempted to distinguish custody disputes involving a parent engaging in adultery and a parent engaging in homosexual sodomy by arguing that adultery is "seldom prosecuted," while sodomy "is prosecuted with considerable frequency and vigor, as evidenced by the decided cases annotated under [the] respective sections in the Code." Roe, 324 S.E.2d at 694. To the contrary, a review of the annotations reveals no convictions for consensual sodomy since at least 1923. The few sodomy convictions referenced concern prosecutions for forcible sodomy or sodomy committed against children. See Stephen B. Pershing, "Entreat Me Not To Leave Thee": Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents, 3 Wm. & Mary Bill of Rts. J. 289, 296 n.26 (1994).

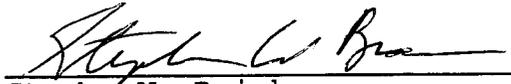
⁵² See, e.g., Stroman v. Williams, 353 S.E. 2d 704, 705 (S.C. App. 1987) (no evidence that daughter was exposed to sexual acts while in custody of mother who was living in a lesbian relationship with another woman). In this case Sharon Bottoms activity in Stroman's presence, entreat me not to leave thee with anybody." App. 15, 16.

cannot be shown to have an actual harmful effect on the child, it should not affect the outcome of a custody determination.

CONCLUSION

Any presumption that a parent in an openly gay or lesbian relationship is an unfit custodian has no basis in the social science research. Application of such a presumption precludes a full evaluation of the best interests of the child. A parent's sexual orientation should not, absent specific evidence of harm to the child, be considered a factor weighing against an award of custody to that parent.

Respectfully submitted,


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December 27, 1994

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 1994, I caused the original and four copies of the foregoing Motion for Leave to File Brief Amici Curiae and the original and 20 copies of the foregoing Brief of Amici Curiae to be mailed postage prepaid to the Clerk of the Court by certified mail.

In addition, I hereby certify that on this 27th day of December, 1994, I caused three copies of the foregoing Motion for Leave to File Brief Amici Curiae and Brief of Amici Curiae to be mailed by first class mail to each of the following:

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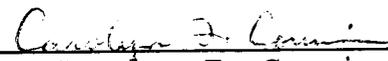
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