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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

FILED

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AUG 29 1994

JAMES W. COX,
Petitioner,

vs.

CASE NO. 82,967

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

DELORES DRY, DISTRICT
ADMINISTRATOR, DISTRICT 8,
STATE OF FLORIDA, DEPARTMENT
OF HEALTH AND REHABILITATIVE
SERVICES,

Respondent.

_____ /

PETITIONER'S REPLY TO THE AMICI
CURIAE BRIEFS OF THE RUTHERFORD INSTITUTE AND
FLORIDA CATHOLIC CONFERENCE, INC.

On Review from the District Court
of Appeal, Second District
State of Florida

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INTRODUCTION

This Court must determine whether there is a compelling state interest, or at a minimum a rational basis, for the challenged statute, Fla. Stat. § 63.042. As petitioner has demonstrated in his Opening Brief and Reply Brief, none exists. The amicus brief of the Florida Psychological Association, the National Association of Social Workers and fourteen academics provided additional support confirming the evidence already contained in the record. The Respondent has never disputed this record evidence with anything to the contrary and certainly has never relied on anything contained in the briefs of the Rutherford Institute and Catholic Conference.

Nothing in the briefs of the Rutherford Institute or Catholic Conference provides a reason for the Court to find a compelling interest or rational basis for the statute. The Rutherford Institute brief presents self-proclaimed "unbiased scientific research" and "impartial statistical evidence" which it contends establish conclusively that "homosexual households present an unhealthy, insecure environment for children." Nothing could be further from the truth: as demonstrated below, the "evidence" offered by the Rutherford Institute is neither scientific nor impartial. Rather, the arguments presented by the Rutherford Institute illustrate the irrational fears and prejudices which underlie Fla. Stat. § 63.042(3) and which cannot be allowed to displace reliable scientific data.

Similarly, the Florida Catholic Conference, Inc. has

presented to this Court its religious views regarding adoption by lesbian and gay people. Because a particular religious group's views cannot mandate secular law, the Catholic Conference's brief must also be disregarded.

ARGUMENT

I. THE UNSUPPORTED ASSERTIONS OF THE RUTHERFORD INSTITUTE DO NOT SUPPORT THE CONSTITUTIONALITY OF THE STATUTE

The brief of the Rutherford Institute is fundamentally flawed because it is based on: (1) assertions lacking any citation whatsoever; (2) misrepresentations of research conducted by legitimate social scientists which contradict the conclusions of the very scientists cited; and (3) "experts" who have been criticized and reprimanded by their social scientists and the courts.

A. The Rutherford Institute Brief Relies On Assertions Made Without Any Citation

The Rutherford Institute Brief relies on heinous allegations against gay and lesbian people without providing any citation whatsoever. For example, the Rutherford Institute purports to dispel the "Myths of Homosexual Adoption" without providing a single citation. Rutherford Institute Brief ("R.I. Brief") at 12-14. Similarly, the Rutherford Institute asserts that "most scientists feel that placing a child in a homosexual household is an unwarranted risk, and they would not do so willingly for the sake of scientific experimentation" yet again fails to provide a single citation for this claim. R.I. Brief at 13.

The following are other examples of assertions made in the

Rutherford Institute Brief without any citation whatsoever:

- ◆ "Twenty nine per cent of children raised by a homosexual parent reported sex with the homosexual parent" (R.I. Brief at 11);
- ◆ "[H]omosexuals are twice as likely to be arrested for a non-sexual crime and about eight times more apt to have been arrested for a sexual crime" (R.I. Brief at 39);
- ◆ "The average male homosexual has fifty sex partners each year" (R.I. Brief at 9);
- ◆ "[H]omosexuals are about five times more apt to have tried to deliberately infect another with an STD" (R.I. Brief at 39-40);
- ◆ "Masters and Johnson report a seventy one percent success rate in therapy for homosexuals wanting to change their orientation, and thousands of homosexuals have been freed through therapy" (R.I. Brief at 18);
- ◆ "[Homosexuals] provoke attacks against themselves and then count these 'attacks' as injustices they have suffered" (R.I. Brief at 38).

Where the Rutherford Institute has attempted to document its assertions through citation, it has done so in a manner that deprives this Court, and counsel for the petitioner, of the ability to locate and evaluate the document purportedly cited. Many of the citations are to "books" without any publisher listed and which cannot be located through computer or interlibrary databases and are therefore unavailable to the public.¹ The Rutherford Institute also cites to affidavits, interviews or "books in press" that are unavailable.²

¹ Examples are the "books" cited in footnotes 5, 6, 7, 8, 14, 15, 17, 20, 25, 29, 30, 34, 35, 46, 47, 48, 49, 51, 97, and 100 to the R.I. Brief.

² Footnotes 3, 13, 33, 37, 38, 40, 41, 42, 43, 44, 45, 52, 56, 96 and 104 to the R.I. Brief cite unavailable materials.

B. The Rutherford Institute Brief Misrepresents The Only Social Science Data That It Does Rely On

When it does rely on social science data, the Rutherford Institute Brief misrepresents it. Some of the most egregious examples include the allegations that:

- ◆ "[T]hirty one percent of child abuse victims were homosexually attacked" (R.I. Brief n.94).

In fact, of the two articles cited, one states that only four percent of all male perpetrators were known homosexuals and the other article does not even discuss homosexual attacks;

- ◆ "4 out of every 10 molestations in this survey were homosexual" (R.I. Brief n.99).

In fact, this statistic does not appear anywhere in the article. Only one percent involved sodomy (no gender given) while fifty-five percent involved sexual intercourse;³

- ◆ "[F]orty-three percent of all reported cases of Hepatitis B occurred in homosexuals" (R.I. Brief n.66).

In fact, the article states that only eight percent of Hepatitis B patients reported homosexual activity (while twenty-five percent resulted from heterosexual contact);

- ◆ "The major international resource for disease information, the INTERNATIONAL CLASSIFICATION OF DISEASES (9th ed.) lists homosexuality with the code number 302.0 as a sexual deviation or disorder" (R.I. Brief n.39).

In fact, the current edition of the International Classification of Diseases (10th ed., vol. 1 at 367) does not identify homosexuality as any sort of disorder

³ A 1993 study by the University of Colorado Health Sciences Center investigated similar claims that "people living the homosexual lifestyle were responsible for 50% of child molestation." The study found that only .7% were abused by someone identifiable as potentially homosexual. C. Perry, Are Children at Risk for Sexual Abuse by Homosexuals?, Pediatrics (1994).

or impairment.

Similar distortions and misrepresentations are present in footnotes 12⁴, 102, 105 and 106 of the Rutherford Institute Brief.

C. The Rutherford Institute Brief Relies On "Experts" Who Have Been Criticized And Reprimanded By Social Scientists And The Courts

The Rutherford Institute invites the Court to consider the "research" of discredited researchers who have been ignored and reprimanded by both the courts and the general scientific community. Most notable is Dr. Paul Cameron on whom the Rutherford Institute relies extensively.⁵

Dr. Cameron's exploits are well documented. For example, in Baker v. Wade, 106 F.R.D. 526 (N.D. Tex. 1985), Dr. Cameron testified under oath that "homosexuals are approximately 43 times more apt to commit crimes than is the general population" and that "homosexuals abuse children at a proportionately greater incident than do heterosexuals," -- nearly identical assertions to those made in the Rutherford Brief to this Court. Id. at 536, R.I. Brief at 34, 35 & 39. The Baker court held that Dr.

⁴ In stating that "five out of nine daughters of divorced lesbians had 'felt negatively about their mothers' lesbianism'", the Rutherford Institute fails to reveal that the Huggins study concluded that "the assumption that children of lesbian mothers are socially stigmatized by their mothers' sexual choice is not borne out by this study." Huggins, Sharon L., "A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers," Homosexuality and the Family (The Haworth Press, Inc. 1989) p. 132 (emphasis added).

⁵ Citations to Dr. Cameron can be found in the R.I. Brief footnotes 6, 7, 8, 13, 14, 30, 78, 79, 81, 82 93, 95, 96, 97, and 100.

Cameron's testimony was "a total distortion" of the data relied on, and that Dr. Cameron's misrepresentations were a fraud perpetrated against the court. Id. at 536.⁶ In another case, the Fifth Circuit Court of Appeals similarly reprimanded Dr. Cameron when holding that there was "no historical or empirical basis" for Dr. Cameron's "speculative evidence." Gay Student Services v. Texas A & M University, 737 F.2d 1317, 1330 (5th Cir. 1984); see also, Baker v. Wade, 106 F.R.D. at 536 n.30.

Not only have the courts criticized Dr. Cameron's unfounded assertions, the scientific community has exiled Dr. Cameron from its ranks. Dr. Cameron

resigned from the American Psychological Association to avoid an investigation into charges of his unethical conduct as a psychologist. The charges against Dr. Cameron included his continuing misrepresentations of Kinsey data and other research sources on homosexuality; inflammatory and inaccurate public statements about homosexuals; and his fabrications to a Nebraska newspaper about the supposed sexual mutilation of a four year old boy by a homosexual.

Baker v. Wade, 106 F.R.D. at 537 n.31.⁷

⁶ The court remarked that in the future parties would be better served by not calling Dr. Cameron as a witness. Baker v. Wade, 106 F.R.D. at 538.

⁷ Dr. Cameron was also censured by the American Sociological Association which adopted a resolution charging him with "consistently misinterpret[ing] and misrepresent[ing] sociological research on sexuality, homosexuality, and lesbianism." See G. Herek, Myths About Sexual Orientation: A Lawyer's Guide To Social Science Research, 1 Law & Sexuality 133, 152-156 (1991); D. Colker, Statistics in "Gay Agenda" Questioned, Los Angeles Times, Feb. 22, 1993. Also, in 1984 the Nebraska Psychological Association "formally disassociat[ed] itself from the representations and interpretation of scientific literature

II. THE PARTICULAR RELIGIOUS VIEWS OF THE CATHOLIC CONFERENCE, INC. DO NOT SUPPORT THE CONSTITUTIONALITY OF THE STATUTE

The points raised by the Catholic Conference Inc. have been addressed in Petitioners' Opening and Reply briefs, but two issues are noteworthy. First, the positions of the Catholic Conference are based on the unsupported factual assertions made by the Rutherford Institute. See Brief of Catholic Conference, Inc. at 10 and n.17 & 26. Because these assertions are without basis in fact, as discussed above, the assertions made by the Catholic Conference are merely unempirical views of a group of Catholic organizations.

Second, the Catholic Conference suggests that its particular religious views as to what will be in the best interests of all children be substituted for the individualized best interests determination that the Florida Constitution and Florida adoption law generally require. While not disputing that the primary consideration in the placement of children for adoption is the best interests of the child, the Catholic Conference argues that no best interests determination should ever be made when the prospective parent is gay or lesbian because it does not believe that it can ever be in the best interests of a child to be adopted by a gay or lesbian person. Similarly, the Catholic Conference suggests that its particular religious views as to adoption by lesbian or gay people must be the law of this State; otherwise, it argues, Catholic agencies that contract with the

offered by Dr. Paul Cameron in his writings and public statements on sexuality." Id.

State for adoption services might be required to consider lesbian or gay people as prospective adoptive parents. However, the issue in this case is not whether a religious group that goes into the business of contracting with the State for adoption services could be exempt from laws requiring that all prospective parents be considered for adoption; the issue is whether the Catholic Conference's particular religious views can dictate whether the State may constitutionally prohibit any adoption agency, secular or religious, from considering whether adoption by a lesbian or gay parent is in the best interests of an individual child. Because a particular religious group's views cannot mandate the law applicable to everyone (see, e.g., Stone v. Graham, 449 U.S. 39, 40-43 (1980); McGowan v. Maryland, 366 U.S. 420, 429-53 (1961)), the Catholic Conference's arguments must be rejected.⁸

CONCLUSION

The evidence in the record in this case shows that having a parent who is lesbian or gay does not harm a child. Respondent has offered no opposition to this evidence. The amicus brief of the psychological association, social work association and academics further confirms this evidence. There is, therefore,

⁸ In addition to unconstitutionally establishing one group's religious beliefs as secular law, following the Catholic Conference's argument would lead to absurd and intolerable results. For example, any law requiring that children in foster care be given medication when necessary would have to be stricken if a Christian Scientist foster care agency's religious view indicated otherwise, and no foster care agency would be permitted to provide medication to a sick child.

no compelling interest or even rational basis for the statute barring adoption by lesbian or gay people. Neither the unsupported assertions of the Rutherford Institute nor the religious views of a group of Catholic organizations provides a reason for the Court to find otherwise.

For all of the foregoing reasons, as well as the reasons set forth in the Initial Brief of Petitioner and the Reply Brief of Petitioner, petitioner James W. Cox respectfully requests that this Court enter an order reversing the order of the district court and declaring § 63.042(3), Fla. Stat., unconstitutional as violative of the Florida Constitution's guarantees of the rights of privacy, equal protection and due process of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply to the Amici Curiae Briefs of the Rutherford Institute and Florida Catholic Conference, Inc. has been furnished by U.S. mail this 26th day of August, 1994, to Anthony N. DeLuccia, Jr., District Legal Counsel, Department of Health and Rehabilitative Services, Post Office Box 60085, Fort Myers, FL 33906 and Linda K. Harris, Department of Health and Rehabilitative Services, 1323 Winewood Blvd., Building 1, Room 407, Tallahassee, FL 32399-0700, attorneys for respondent; Maria Rodriguez and Bruce Deming, Farella, Braun & Martel, 235 Montgomery Street, San Francisco, CA 94104, and Ira J. Kurzban, Kurzban, Kurzban & Weinger, P.A., Plaza 2650, 2650 S.W. 27th Avenue, 2nd floor, Miami, FL 33133, attorneys for amici Florida Psychological Association, et al.; William E. Adams, Jr., NOVA Southeastern University, Shepard Broad Law Center, Civil Law Clinic, 3305 College Avenue, Ft. Lauderdale, FL 33134, attorney for amicus Gay and Lesbian Lawyers Association; Kenneth L. Connor, 119 East Park Avenue, Tallahassee, FL 32301, attorney for amicus Rutherford Institute; Robert M. Brake, Eileen M. Brake, and William Sanchez, 1830 Ponce de Leon Blvd., Coral Gables, FL 33134, and Thomas Horkan, 315 South Calhoun Street, Suite 314, Tallahassee, FL 32301, attorney for amicus Florida Catholic Conference, Inc.



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