

NATIONAL COMMITTEE
FOR
SEXUAL CIVIL LIBERTIES

Thomas F. Coleman, Esq.
Co-Chairman

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September 13, 1979

Ms. Mary Dunlap
Visiting Professor
University of Texas School of Law
2500 Red River
Austin, Texas 78705

Dear Mary,

I am enclosing an original and seven copies of the amicus brief which you prepared. I suppose that you can take care of filing it with the court and having copies served on the appropriate parties. Thank you very much for doing this on behalf of the Committee. We all feel that your brief was excellently written.

I suppose that you are aware by now that you are under consideration for a judicial appointment to the Municipal Court in San Francisco. For whatever it's worth, I highly praised you and recommended that you be given priority in terms of such an appointment in San Francisco because of your scholarship and past achievements. This was communicated to Tony Kline on more than one occasion. I'm wondering if you have actually applied for a judgeship and if, indeed, you are interested?

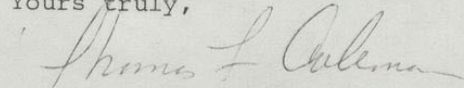
I am setting up a meeting with Governor Brown to be held in Los Angeles probably in late October or early November. I will be inviting approximately twelve people to attend that meeting. The purpose of the meeting is to acquaint Governor Brown with the legal issues which need to be addressed in the coming years and to place some demands on him for the immediate future. Would you be interested in attending that meeting? I realize that you are in Texas now and that traveling to Los Angeles for a meeting which will only last an hour and a half may be an inconvenience. However, it might be helpful to your chances to being appointed if the Governor were able to see you in person and to see how other members of the gay community and the community at large are supportive of you and feel highly enough of you to have you at such a meeting. Please let me

Ms. Mary Dunlap
September 13, 1979
Page 2

know whether you would like to attend. In the meantime I am going to suggest your name as a person I would like to have attend.

Please let me know if there is anything else we need to do with respect to the amicus brief. Again, thanks for putting your energies into this project.

Yours truly,



Thomas F. Coleman

/psp

cc: Arthur Warner

Enclosures

1 UNITED STATES COURT OF APPEALS
2 FOR THE FIFTH CIRCUIT
3
4

5 _____
6 No. 77-3395
7 _____

8 GAY STUDENT SERVICES et al.,
9

10 Plaintiffs-Appellants,
11 versus

12 TEXAS A & M UNIVERSITY et al.,
13

14 Defendants-Appellees.
15
16 _____

17 Appeal from the United States District Court
18 for the Southern District of Texas
19
20 _____

21 MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
22 NATIONAL COMMITTEE FOR SEXUAL CIVIL LIBERTIES
23 AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS
24 _____

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1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE FIFTH CIRCUIT
3

4 GAY STUDENT SERVICES et al.,)
5 Plaintiff-Appellants,) Case No. 77-3395
6 versus) MOTION FOR LEAVE TO FILE BRIEF
7 TEXAS A & M UNIVERSITY et al.,) OF NATIONAL COMMITTEE FOR
8 Defendant-Appellees.) SEXUAL CIVIL LIBERTIES AS
9 AMICUS CURIAE IN SUPPORT OF
10 PLAINTIFFS-APPELLANTS
11

12 To: The Honorable Judges of the above-captioned Court:
13

14 Counsel for amicus curiae, National Committee for Sexual Civil
15 Liberties, hereby respectfully move this Court for an order granting
16 leave to file the annexed Brief amicus curiae in support of
17 plaintiff-appellants, Gay Student Services et al., in the above-
18 captioned appeal.

19 The reasons for the proposed filing are set forth in the an-
20 nexed Statement of Interest of movant, National Committee for Sexual
21 Civil Liberties; the consent of counsel for the parties and the
22 reasons for the lateness of the proposed filing are set forth in the
23 Declaration of Mary C. Dunlap in support of this motion, attached.
24 Counsel for movant urge that leave be granted because of the impor-
25 tance of this appeal, and because the Brief of amicus curiae,
26 National Committee for Sexual Civil Liberties is addressed to issues
27 not already briefed to this Court.
28

29 By: _____
30 Mary C. Dunlap
31 Co-counsel for Amicus
32 Curiae-Movant
33 National Committee for
34 Sexual Civil Liberties
35
36

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE FIFTH CIRCUIT
3

4 GAY STUDENT SERVICES et al.,)
5 Plaintiffs-Appellants,) Case No. 77-3395
6 versus)
7) DECLARATION OF MARY C. DUNLAP
8 TEXAS A & M UNIVERSITY et al.,) IN SUPPORT OF MOTION FOR LEAVE
9 Defendants-Appellees.) TO NATIONAL COMMITTEE FOR
10) SEXUAL CIVIL LIBERTIES TO FILE
11) BRIEF OF AMICUS CURIAE IN
12) SUPPORT OF PLAINTIFFS-
13) APPELLENTS

12 I, Mary C. Dunlap, do hereby declare:
13

14 1. I am a member in good standing of the Bar of the above-
15 captioned Court, and I am co-counsel for amicus curiae-movant,
16 National Committee for Sexual Civil Liberties.

17 2. I have requested and received consent for the making of this
18 motion, from attorneys for both plaintiffs-appellants and
19 defendants-appellees hereto. Letters embodying those consents are
20 appended to this Declaration.

21 3. The proposed Brief amicus curiae is presented to this Court
22 at this time because of problems as to time, distance and
23 information-gathered encountered by counsel for amicus curiae.
24

25 DATED: _____

26 Mary C. Dunlap
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GAY STUDENT SERVICES et al.,)	
)	Case No. 77-3395
Plaintiffs-Appellants,)	
)	STATEMENT OF INTEREST OF
versus)	THE NATIONAL COMMITTEE FOR
)	SEXUAL CIVIL LIBERTIES
TEXAS A & M UNIVERSITY et al.,)	
)	
Defendants-Appellees.)	

The National Committee for Sexual Civil Liberties is a group of some 30 professional persons from various parts of the United States who are committed to the fair and equitable development of sexually-oriented law in this country. The members of the National Committee, through their work with courts, legislators, and administrators of law, seek to ensure that the constitutional principles of Due Process, Equal Protection, Separation of Church and State, Freedom of Speech, Freedom of Press, and Freedom of Association, among other traditional constitutional mandates, are fairly and intelligently applied to laws and cases involving sexually-oriented speech, conduct, association, or material.

Members of the National Committee come from such fields as sociology, psychology, history, english, and theology, as well as the study, practice, and teaching of law.

The very first case the National Committee entered as Amicus Curiae (under its former name of the legal committee of the North American Conference of Homophile Organizations) was Buchanan v. Batchelor, 308 F. Supp. 729, in which a three-judge court in the Northern District of Texas declared the then Texas sodomy law to be unconstitutional.

In 1974, the National Committee, through its Denver attorney, handled the case of People v. Gibson, 521 P.2d 774, in which the Colorado Supreme Court declared that state's sexual solicitation statute unconstitutional. That case involved First Amendment issues.

1 In 1978, the National Committee, through its Columbus, Ohio
2 attorney, entered as Amicus Curiae the case of State v. Phipps, 58
3 Ohio St. 2d 271. On June 6, 1979, the Ohio Supreme Court limited
4 the scope of the Ohio homosexual solicitation statute to a "fighting
5 words" statute.

6 In 1978, attorney Thomas F. Coleman, as attorney of record for
7 the petitioner, and the National Committee, as Amicus Curiae, were
8 granted permission by the California Supreme Court to brief and
9 argue the constitutionality of the lewd conduct and sexual sollicita-
10 tion statute in that state in the case of Pryor v. Municipal Court
11 of the Los Angeles Judicial District, Supreme Court No. L.A. 30901
12 (decided Sept. 7, 1979), which resulted in a complete overhaul of
13 that statute by the Supreme Court.

14 In 1979, the Oklahoma Court of Criminal Appeals granted permis-
15 sion to the National Committee to enter a case in that jurisdiction
16 as Amicus Curiae. On First Amendment and other grounds, the Com-
17 mittee urged that court to declare unconstitutional or to narrowly
18 interpret a Tulsa solicitation ordinance. That case, City of Tulsa
19 v. Carmack et al., No. 0-79-58, is presently under submission to
20 that court.

21 In 1979, the National Committee entered a case in New York in
22 which the New York sodomy law is under constitutional attack in the
23 case of People v. Ronald E. Onofre. Briefs are being submitted this
24 month on that case to the Supreme Court, Appellate Division, Fourth
25 Department. That case involves Privacy and Equal Protection issues.
26 The New York sodomy law prohibits consenting sodomy in private if
27 the participants are not married to each other.

28 In July of this year, our Washington, D.C. attorney secured a
29 favorable ruling from the United States District Court for the
30 District of Columbia in the case of Gay Activists Alliance v.
31 W.M.A.T.A., CA Number 78-2217. The G.A.A. requested permission from
32 the local transit authority to place ads on the buses that would
33 have read, "Someone in your life is gay." The transit authority
34 refused to allow the ads, and the District Court granted a summary
35 judgment for the plaintiffs on First Amendment grounds.

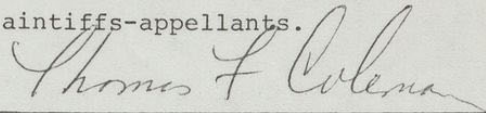
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1 Members of the National Committee include gay students,
2 especially gay law students. Some of them are members and founders
3 of gay student organizations. Some have been members of groups
4 that have been denied official recognition by private universities.
5 This is one reason the National Committee is interested in entering
6 this case, even though involving a public university.

7 We therefore will respectfully ask this Court to allow the
8 National Committee for Sexual Civil Liberties to enter this case
9 as Amicus Curiae in support of plaintiffs-appellants.

10
11 DATED: 9-5-79



12 Thomas F. Coleman
13 Co-chairperson
14 National Committee for
15 Sexual Civil Liberties

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The Attorney General of Texas

MARK WHITE
Attorney General

July 26, 1978

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An Equal Opportunity/
Affirmative Action Employer

Ms. Mary C. Dunlap
Visiting Faculty
University of Texas
School of Law
2500 Red River
Austin, Texas 78705

Re: No. 77-3395; Gay Student Services,
et al vs. Texas A&M University,
et al

Dear Ms. Dunlap:

Appellees will not oppose your motion to
file an amicus brief in the above captioned cause.

Yours very truly,

Nathan Johnson
Assistant Attorney General
Austin Division

NJ/ss

PAPE & MALLET
ATTORNEYS AND COUNSELLORS
SUITE 600 1929 ALLEN PARKWAY
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August 1, 1979

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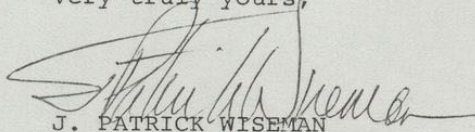
Re: Cause No. 77-3395, Gay Students Services, et al,
vs. Texas A & M University, et al

Dear Mr. Dunlap:

I am acknowledging your letter of July 25, 1979 reference to the above styled cause of action and your request for Plaintiff-Appellants agreement for your filing of a brief amicus curiae by the National Committee for Sexual Civil Liberties. Plaintiff-Appellants have no opposition to the filing of such brief and hereby consent to same.

I will be happy to file an appropriate request with Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit should that become necessary or advisable.

Very truly yours,


J. PATRICK WISEMAN

JPW:bsm

TABLE OF AUTHORITIES
TO BRIEF OF NATIONAL COMMITTEE

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1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE FIFTH CIRCUIT

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4 GAY STUDENT SERVICES et al.,)
5 Plaintiff-Appellants,) Case No. 77-3395
6 versus)
7) BRIEF OF NATIONAL COMMITTEE
8 TEXAS A & M UNIVERSITY et al.,) FOR SEXUAL CIVIL LIBERTIES AS
9 Defendant-Appellees.) AMICUS CURIAE IN SUPPORT OF
10) PLAINTIFFS-APPELLANTS
11)

12 Introduction

13
14 The central controversy presented in this case consists of the
15 extent of First Amendment protection to be afforded to students of
16 Texas A & M University, in regard to speech and association con-
17 cerning gay and lesbian people. In all of the diverse theories of
18 First Amendment values, one essential principle emerges that fully
19 applies to the instant appeal:

20 "A right to know at times means nothing more than a mirror
21 of . . . [the] right to speak, a listener's right that govern-
22 ment not interfere with a willing speaker's liberty. (footnote
23 omitted)."---Laurence Tribe, American Constitutional Law 12-19,
p. 675 (Foundation Press), 1978).

24 In this Brief, amicus curiae, National Committee for Sexual Civil
25 Liberties, respectfully contends that the actions of defendant-
26 appellees, Texas A & M University et al., constitute precisely the
27 sort of unwarranted and impermissible interference with rights of
28 speech, association, and public information that are supposed to be
29 guaranteed and protected by the First Amendment to the United States
30 Constitution.

31
32 Statement of Facts

33
34 Amicus curiae, National Committee, respectfully adopts the
35 statement of facts presented in the Brief of National Gay Task Force

36 ///

///

1 as Amicus Curiae in Support of Plaintiffs-Appellants, filed in this
2 Court in June 1979.

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5 Statement of Issues
6

7
8 This Brief addresses only the chief substantive issue posed by
9 the instant appeal, to wit., May a State, by the agents and offi-
10 cials of one of its universities, seek to prohibit speech and asso-
11 ciation regarding gay and lesbian people by denying recognition,
12 benefits, services, and uses of facilities to a duly constituted
13 student organization?^{1/}
14

15
16 Proceedings Below
17

18
19 Amicus curiae, National Committee, respectfully adopts the
20 statement of proceedings below presented in the Brief of National
21 Gay Task Force as Amicus Curiae in Support of Plaintiffs-Appellants,
22 filed in this Court in June 1979.
23
24

25 ^{1/} The record in this action shows that plaintiffs-appellants
26 rested upon their complaint filed below, and filed no addi-
27 tional written opposition to defendants-appellees' motion to
28 dismiss. (Appendix, pp. 2-3). Amicus curiae, National
29 Committee, supports the contention of plaintiffs-appellants
30 that their reliance upon the sufficiency of their complaint
31 below was proper under Rule 12(b) (6) (Brief of Appellant, pp.
32 4-6), and, further, that the failure of defendant-appellee to
33 argue the procedural point to this Court "waives" that argument
34 (Reply Brief of Appellant, p. 2). Moreover, amicus curiae,
35 National Committee, expects and urges that any lack of dili-
36 gence and astute strategy on the part of the attorneys for
plaintiffs-appellants below should not be held fatal to the
interests of their clients, Gay Student Services et al. Ac-
cordingly, amicus curiae, National Committee, does not seek to
brief the procedural issue.

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1 (opponents of military draft). Defendants-appellees provided the
2 lower court with no reason whatsoever to ignore that basic premise
3 of the First Amendment guarantee; rather, they urge that court,
4 and this Court on appeal, to indulge in exactly the sort of
5 pejorative emotional decision-making, about gay and lesbian people,
6 that would gut the First Amendment if it were permitted to substi-
7 tute for the rule of law.

8 II. There is no evidence whatsoever that any of plaintiffs-
9 appellants seek to incite lawless conduct.

10 In the letter denying recognition to Gay Student Services,
11 Vice President Koldus stated in relevant part:

12 "Homosexual conduct is illegal in Texas and, therefore, it
13 would be most appropriate for a state institution officially
14 to support a student organization which is likely to incite,
15 promote and result in acts contrary to and in violation of
16 the Penal Code of the State of Texas."
17 (App. 9) (emphasis added).

18 The letter expressly, and without a scintilla of factual
19 material, assumes that the existence of Gay Student Services will
20 "incite, promote and result in" the commission of criminal acts.

21 Let us assume arguendo that a central purpose of the organi-
22 zation is to seek to educate and enlighten students and other
23 participants in the University community about the injustice of
24 Texas' anti-sodomy law, cf. Buchanan v. Batchelor, 308 F. Supp.
25 729 (N.D. Tex. 1970), vacated, 401 U.S. 989 (1971), and thereby to
26 encourage legislative repeal of that law in Texas. The "reasoning"
27 of Vice President Koldus would hold that an organization opposed
28 to a particular criminal law cannot receive First Amendment pro-
29 tection, because the speech and association incident to said
30 organization must be assumed to encourage law-breaking. By this
31 approach to the First Amendment, only organizations that support
32 existing criminal laws --- and that do not seek change in any such
33 laws --- can be afforded First Amendment protection. Among the
34 organizations that would lose First Amendment protection, under
35 Koldus formula, are, for example, every major U.S. political party,
36 advocates of decriminalization of marijuana use and prostitution,
and opponents of gun control.

In the only reported case in which evidence of the "incite-

1 ment" potential of a homophile organization was proffered, the
2 Court of Appeals for the Eighth Circuit nonetheless found said
3 evidence to be based upon "conclusory 'inference' and... 'belief',
4 for which no historical or empirical basis is disclosed." Gay
5 Lib v. University of Missouri, 558 F.2d 848, 854 (8th Cir. 1977),
6 cert. denied, 98 S.Ct. 1276 (1978). Yet, upon no proffered
7 evidence whatsoever, the lower court accepted defendants-appellees'
8 invitation in the case at bar to assume the criminality of the
9 plaintiff organization and members, and to punish both for the
10 status of homosexuality of some members.

11 In the case of Stanley v. Georgia, 394 U.S. 557 (1969), the
12 Supreme Court held that the First and Fourteenth Amendments pro-
13 hibit criminal punishment for "mere private possession of obscene
14 material", stating in pertinent part that:

15 "[g]iven the present state of knowledge, the State may no
16 more prohibit mere possession of obscene material on the
17 ground that it may lead to antisocial conduct than it may
18 prohibit possession of chemistry books on the ground that
they may lead to the manufacture of homemade spirits."

19 The Court specifically noted that there was "little empirical
20 evidence" in support of Georgia's theory that pornography promotes
21 "deviant sexual behavior", and observed that the precision of the
22 First Amendment guarantee overrode such a theory. In the instant
23 appeal, amicus curiae would urge that the defendants-appellants
24 adaptation of the State of Georgia's logic in Stanley v. Georgia,
25 rejected by the U.S. Supreme Court, is of even more dubious weight
26 here, where it is attached to no evidence of any sort whatsoever.

27 III. Defendants-appellees have completely misstated the
28 federal decisions concerning gay and lesbian military
service members.

29 One of the arguments urged by defendants-appellees to this
30 Court maintains that Texas A & M University, as an educator of
31 military officers, should be permitted to prohibit recognition of
32 Gay Student Services because "[m]ilitary regulations require that
33 practicing homosexuals be discharged from military service." (Brief
34 of Appellees, pp. 6-7). Of the two cases cited for that proposi-
35 tion, one stood for a contrary proposition at the time defendants-
36 appellees cited it to this Court, Saal v. Middendorf, 427 F. Supp.

1 192 (N.D. Cal. 1977) (Held: Plaintiff lesbian cannot be conclu-
2 sively presumed "unfit" for Naval service), and the other since
3 was reversed on the merits, Matlovich v. Secretary of the Air Force,
4 591 F.2d 852 (D.C. Cir. 1978) (Held: Gay Air Force member's dis-
5 charge failed to comport with service's own requirement that reason
6 for discharge be proved).

7 More important, the argument of defendants-appellees about
8 Texas A & M University's relation to military service, if accepted,
9 would cut severely into free speech and association in American
10 higher education. If the standards for First Amendment exercises
11 that have been applied to military bases were imposed upon public
12 universities having military contacts and programs, then partisan
13 political activities could be prohibited outright, on campuses
14 such as Texas A & M Cf. Greer v. Spock, 424 U.S. 828 (1976).
15 Speech and association, occurring on college and university
16 campuses through the 1960's and early 1970's, aimed at ending
17 the Indochina War, could have been prohibited outright, by defen-
18 dants-appellees' approach. Clearly the First Amendment then
19 required and now still requires strict avoidance of such broaden-
20 ing of military prohibitions to encompass the educational contri-
21 butors to the U.S. "marketplace of ideas". See, e.g., Hess v.
22 Indiana, 414 U.S. 105 (per curiam), Healy v. James, cited supra.

23 IV. Defendants-appellees' reliance upon public employment
24 decisions confuses amorphous due process and equal protection
25 standards with the clearer and more rigorous First Amendment
26 guarantees as to speech and association.

27 In the course of their Brief on appeal, defendants-appellees
28 cite cases addressed to the due process and equal protection
29 guarantees as applied to public employment cases, including
30 McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971) and Hollenbaugh
31 v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977) cert.
32 denied, 99 Sup Ct. 734 (1978).

33 Both of these decisions fail utterly to follow the main lines
34 of Fourteenth Amendment interpretation drawn by the Supreme Court
35 in and since Board of Regents v. Roth, 408 U.S. 564 (1972); in both
36 cases, the deciding courts choose to "moralize" about the public
employees concerned rather than to apply well-developed tests for

1 fundamental fairness to those employees. Compare, e.g., Mindel v.
2 U.S. Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970)
3 (Held: firing of male postal clerk for living with a woman out of
4 wedlock violated due process and privacy interests); Norton v. Macy,
5 rational nexus between employee's homosexual acts and fitness to
6 justify discharge). Moreover, the Court of Appeals in McConnell v.
7 Anderson, supra, paid no attention whatsoever to the First Amend-
8 ment implications of its decision. Compare Aumiller v. University
9 of Delaware, 434 F. Supp. 1273 (D.Del. 19-7); Acanfora v. Board
10 of Education of Montgomery County, 491 F.2d 498 (4th Cir. 1974).

11 The primary error of defendants-appellees' reliance upon these
12 public employment decisions, however, does not tie in the dubious
13 precedential force of these decisions. Rather, that primary error
14 consists in the mis-alloying of ambiguous Fourteenth Amendment
15 standards with the clear requirement of the First Amendment,
16 represented by an unbroken line of decisions upholding the right
17 of sexual minority student organizations for university recognition,
18 that speech and association not be "balanced" against considerations
19 such as "social repugnance", community disapproval and related
20 notions that would undermine the First Amendment's precious guar-
21 antees of speech and association, free of majoritarian prescriptions
22 and inhibitions. See L. Wilson & R. Shannon, "Homosexual Organi-
23 zations and the Right of Association", 30 Hast. L.J. 1029 (March
24 1979).

25
26 Conclusion
27

28 The First Amendment freedoms of Gay Student Services and its
29 members have been stolen by the actions of defendants-appellees;
30 that theft of rights was reinforced by the judgment of dismissal
31 entered below. Amicus curiae, National Committee for Sexual Civil
32 Liberties, respectfully urges this Court to restore to plaintiffs-
33 appellants the only means by which their rights can be regained,

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1 by reversing the judgment of the District Court and remanding
2 the case for all further necessary proceedings under law.

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Respectfully submitted,

By: _____
Mary C. Dunlap

For: Mary C. Dunlap
Thomas F. Coleman
Arthur Warner

Attorneys for Amicus Curiae