No. 83-2030

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

vs.

THE NATIONAL GAY TASK FORCE,

Appellee.

ON APPEAL
FROM THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION FOR PERSONAL PRIVACY; FEDERATION OF PARENTS AND FRIENDS OF LESBIANS AND GAYS, INC.; AND LOS ANGELES LAWYERS FOR HUMAN RIGHTS IN SUPPORT OF APPELLEE

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QUESTION ADDRESSED

Did the Court of Appeals properly invalidate on First Amendment (facial overbreadth) grounds the "advocacy" portion of the Oklahoma homosexual teacher statute?

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Interest of Amici

THE AMERICAN ASSOCIATION FOR PERSONAL PRIVACY (AAPP) is a non-profit California corporation that promotes, within the legal profession, education with regard to the right of privacy and, particularly, its application to sexual civil liberties.

The AAPP operates through its various functions, including the National Committee for Sexual Civil Liberties, the Academic Union, and the Sexual Law Reporter. Members of the AAPP reside in many jurisdictions throughout the United States and are chosen on an invitational basis because of their professional or scholarly achievements. Members are scholars and practitioners in the fields of law, history, sociology, psychology, and theology, among others.

Through its legal periodical, the Sexual Law Reporter, the AAPP monitored the most significant legal developments affecting sexual civil liberties in the United States from 1974 through 1980, the era in which the statute under scrutiny was adopted by the Oklahoma Legislature.

The AAPP is alarmed by the encroachment on the personal privacy and free

speech rights of Oklahoma teachers which the invalidated portion of the statute represents. The AAPP has an ongoing interest in protecting the civil rights of homosexuals in Oklahoma. Through the National Committee for Sexual Civil Liberties, the AAPP previously has involved itself in litigation involving the constitutional rights of homosexuals in Oklahoma.[1/]

It is the position of the AAPP that cases involving the civil rights of homosexuals should not be decided out of context. Accordingly, the AAPP, through the National Committee for Sexual Civil Liberties, has filed amicus curiae briefs in a number of such cases, providing the court with the national and historical context

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1 "Repressive Sexual Regulations in Oklahoma: An Analysis," 5 Sex.L.Rptr. 1 (1979).

of laws under judicial scrutiny.[2/]

It is the general policy of the AAPP that, wherever feasible, state courts and state constitutions should be utilized in challenging discriminatory or oppressive laws.[3/] However, resort to the federal

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2 For example, see: Warner, "Non-Commercial Sexual Solicitation," 4 Sex.L.Rptr. 1 (1978) -- a reprint of an amicus curiae brief filed by the National Committee for Sexual Civil Liberties in Pryor v. Municipal Court, 25 Cal.3d 238 (1979).

3 The following cases in which the AAPP has participated through its committees or members reflects this general policy: State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977), (challenge to fornication law); Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex. 1970), rev. on procedural grounds, Wade v. Buchanan, 401 U.S. 989 (1971); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), cert. den., 451 U.S. 987 (1981) (challenges to sodomy laws); Pryor v. Municipal Court, 25 Cal.3d 238 (1979); State v. Phipps, 58 Ohio State 2d 271, 389 N.E.2d 1128 (1979); State v. Tusek, 630 P.2d 892 (Ore. App. 1981); Commonwealth v. Sefranka, 414 N.E.2d 602 (Mass. 1980) (challenges to non-commercial sexual soli-

(footnote continues)

courts or to the federal Constitution is sometimes essential. It is the position of the AAPP that federal litigation was appropriate in the instant case.

Furthermore, the AAPP has ascertained that the statute under scrutiny was part and parcel of the national "Save Our Children Campaign," instigated by Anita Bryant in early 1977.[4] As it spread across the nation, this crusade manifested itself in two forms -- attempted repeals of gay rights ordinances which had been adopted

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(footnote 3 continued)
citation laws); State v. Uplinger, __ U.S. __, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984); People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974); People v. Ledenbach, 61 Cal.App.3d Supp. 2 (1976) (challenges to loitering laws); Gay Student Services v. Texas A & M, 612 F.2d 160 (5th Cir. 1980); Gay Law Students Association v. Pacific Telephone, 25 Cal.3d 458 (1979) (sexual orientation discrimination).

4 "Gay Rights Defeat in Dade County Has National Implications," 3 Sex.L.Rptr. 25 (1977).

by municipalities,[5] and introduction of legislation calling for dismissal of homosexual teachers. As demonstrated within, the Oklahoma statute under strutiny in this case was related to and patterned after California's so-called "Briggs Initiative."[6]

The AAPP submits that the arguments contained within demonstrate that the Court of Appeals properly invalidated that portion of the statute which punishes teachers for expressing a non-condemnatory viewpoint on the subject of homosexuality.

THE FEDERATION OF PARENTS AND FRIENDS OF LESBIANS AND GAYS, INC. is a non-pro-

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5 Sullivan, "Attempted Repeals of Gay Rights Ordinances: The Facts," 4 Sex.L.Rptr. 61 (1978).

6 "California'a Homosexual Teacher Initiative Receives a Major Set-Back; Is Withdrawn," 3 Sex.L.Rptr. 63 (1977); see Statutory Provisions, infra; "Complete Text of Senator John Briggs Initiative," 3 Sex.L.Rptr. 64 (1977).

fit, tax-exempt, all volunteer organization of parents and friends groups throughout the United States. The Federation includes and represents individual parent members in Oklahoma. The purpose of the Federation and its member groups include supporting the full human rights and civil rights of lesbians and gays, assisting parents in the effort to understand, accept, and support their children with love and pride, and providing education for individuals and the community on the nature of homosexuality so that many of the myths and stereotypes which cause fear and discrimination may be dispelled. The Federation filed an amicus curiae brief in State v. Uplinger, fn. 3, supra.

The Federation perceives the invalidated portion of the statute as a form of viewpoint discrimination. Because of society's historical intolerance to homo-

sexuality, misinformation on this subject is the rule rather than the exception. The Federation believes that the invalidated portion of the statute was a legislative attempt to insure that teachers would only make derogatory comments on the subject of homosexuality, thus reinforcing existing misinformation about lesbians and gay men.

The Federation's parent members fear that such reinforcement of misinformation on the subject of homosexuality will continue to result in harassment of, and violence toward, their lesbian daughters and gay sons. Such violence is already too prevalent in our society.[7/]

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7 For example, see: "Violence Against Gays and Lesbians: America's Best Kept Secret," L.I. Connection, February 2, 1983; "Tampa Gays Fear 'Open Season'," Tampa Tribune, Sunday, September 5, 1982; "Violence Rife, Gays Tell Panel," The Milwaukee Journal, Sunday, June 3, 1984;
(footnote continues)

The Federation fears that a reversal of the Court of Appeals opinion could trigger an increase in anti-gay violence in the United States. As the Federation argues within, the invalidated portion of the statute requires lesbian and gay teachers to remain silent for fear of reprisal. Revitalizing the invalidated provision could be misinterpreted as

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(footnote 7 continued)
"'Gay Bashing' Emerges As Vicious Crime of Hard Times," The Oregonian, Sunday, February 8, 1981; "Just a Prank, Youth Says of 'Gay Bashing,'" San Francisco Chronicle, Thursday, September 6, 1984; "Gay Attacked by Four Youths On Polk Street Dies of Injuries," San Francisco Chronicle, Thursday, August 2, 1984; "Slaying of Homosexual Stirs Quiet Maine City," The Los Angeles Times, Sunday, August 12, 1984; "Tracing Violence Against Gays," Newsday, Sunday, November 28, 1982; J. Harry, "Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men," 19 Criminology 546 (1982); "Gay Rights Advocate Questions Sentence," Bakersfield Californian, October 11, 1984; "California Needs Stronger Laws Against Bigots Who Resort to Violence," Los Angeles Herald Examiner, Sept. 12, 1984, p. A16.

official approval of reprisals against homosexuals who refuse to hide in fear.

THE LOS ANGELES LAWYERS FOR HUMAN RIGHTS (LHR) is an affiliate of the Los Angeles County Bar Association. LHR was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. LHR is made up of judges, attorneys and law students from diverse backgrounds. LHR participated as amicus curiae in State v. Uplinger, supra.

LHR has information to show that the statute under scrutiny was modeled after California's so-called "Briggs Initiative." A comparison of the "Invalidated Oklahoma Provision" and the "Defeated California Initiative" indicates that the two measures were cut from the same pat-

tern.[8/] In August 1977, Senator Briggs submitted a "California Save Our Children Initiative" to the California Attorney General.[9/] This was the first in a series of steps necessary to qualify the initiative for the ballot.

Because little, if any, information is available on the scope and meaning of the Oklahoma statute, and since that statute was patterned after the California "Save Our Children Initiative," LHR believes that information disclosing the legislative intent behind the California initiative is relevant to show the true meaning and scope of the Oklahoma law. An analysis of the ballot arguments in favor of the California initiative reveals the intended breadth and scope of these legis-

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8 See "Statutory Provisions," infra and fn. 6, supra.

9 See fn. 6, supra.

lative measures. As LHR argues within, these measures were intended to permit school districts to remove from the classroom any teacher who discloses his or her sexual orientation to anyone -- either on or off campus -- if such disclosure comes to the attention of school children or school employees.

With that legislative intent in mind, LHR is concerned about the impact such a law has on the ability of a teacher to engage in a wide range of protected speech. If the invalidated portion of the law were allowed to remain in force, a gay teacher could face dismissal for engaging in any of the following forms of protected speech: seeking inclusion of a sexual orientation non-discrimination clause in a union contract with a school district; speaking out on behalf of a gay student being harassed by his or her peers; ap-

pearing on a radio or television talk show dealing with the subject of homosexuality; seeking inclusion of a gay rights plank in the platform of a political party, even if no media attention is sought; filing a lawsuit against a landlord who evicted the teacher because of his or her sexual orientation; defending the morality of gay relationships in a church debate; lobbying for repeal of sodomy laws or passage of a non-discrimination law; or, honest dialogue between a gay teacher and his or her own school-age child.

Being an organization of lawyers, LHR recognizes the "chilling effect" the invalidated portion of the statute has on the right of individuals to defend themselves against verbal abuse and unjust discrimination. LHR believes that the invalidated provision was intended to prevent teachers from defending themselves

or others as illustrated above.

Amici have received written consent from both appellant and appellee to file an amicus curiae brief in this case, and copies of said written consent accompany this brief.

Preliminary Statement

The Oklahoma statute under scrutiny has its origins in the national "Save Our Children" campaign initiated by Anita Bryant in early 1977. As will be demonstrated within, the Oklahoma statute was patterned after a "California Save Our Children Initiative." Accordingly, a summary of the national campaign and the California initiative are relevant as a backdrop to an analysis of the Oklahoma statute.

In early 1977, Anita Bryant's "Save Our Children From Homosexuality" organi-

zation spearheaded an effort resulting in the repeal of a gay rights ordinance in Dade County, Florida. The Florida Legislature followed this lead by passing legislation prohibiting same sex marriages and preventing homosexuals from adopting children. With these victories in hand, Anita Bryant announced that she was waging a national campaign.10/

Bryant enlisted California State Senator John Briggs to carry the "Save Our Children" banner on the California battlefront. On June 14, 1977, Briggs introduced Senate Bill 1253.11/ Although private adult homosexual conduct had been decriminalized in California the previous

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10 See fn. 4, supra.

11 California Legislature, Senate, Final History, Regular Session 1977-1978, at 695.

year,[12] SB 1253 would have authorized dismissal of teachers who engaged in such private lawful conduct. As introduced, the bill would have allowed school districts to require applicants to furnish a statement that they had not engaged in homosexual activity. The California Attorney General stated publicly that SB 1253 was probably unconstitutional. The Mayor of San Francisco attacked Briggs and Anita Bryant for their anti-gay positions and blamed them for contributing to the death of a gay man in San Francisco. The incident spurring the mayor's comments involved a group of knife-wielding youths who stabbed a gay man to death as they shouted "faggot, faggot," and "here's one for Anita Bryant."[13]

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12 Pryor v. Municipal Court, 25 Cal.3d 238, 254 (1979).

13 See fn. 4, supra.

In August 1977, the California State Senate refused to pass SB 1253.[14] That same month, Briggs submitted a "California Save Our Children Initiative" to the California Attorney General -- the first step necessary to qualify the measure for the ballot.[15]

The so-called "Briggs Initiative" stated that "[T]he commission of 'public homosexual activity' or 'public homosexual conduct' by an employee shall subject the employee to dismissal upon determination by the board that said activity or conduct renders the employee unfit for service."[16] "Public homosexual activity" was defined as an act defined in subdivision (a) of Section 286 of the Penal Code

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14 See fn. 11, supra.

15 See fn. 6, supra.

16 Id.

(sodomy) or in subdivision (a) of Section 288(a) of the Penal Code (oral copulation), upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such an act, at the time of its commission, constituted a crime. "Public homosexual conduct" was defined as "advocating, soliciting, imposing, encouraging, or promoting private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees.17/

The "Briggs Initiative" was placed before the voters at the 1978 November elections as "Proposition 6." Nearly 60 percent of those who went to the polls that election voted against the mea-

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17 Id.

sure.[18]

In 1978, Oklahoma enacted a statute apparently patterned after the "California Save Our Children Initiative."

This year, the "advocacy" portion of the Oklahoma statute was declared unconstitutional.[19] This appeal followed.

Statutory Provisions

Invalidated Oklahoma Provision

[A] teacher, student teacher or a teacher's aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teacher's aide has . . . engaged in public

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18 Report of the California Commission on Personal Privacy, State of California (1982), hereinafter "California Privacy Report."

19 National Gay Task Force v. Board of Education of the City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984).

homosexual conduct . . . .

"Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.20/

Defeated California Initiative

The governing board of a school district shall refuse to hire as an employee any person who has engaged in public homosexual activity or public homosexual conduct should the board determine that said activity or conduct renders the person unfit for service.

"Public homosexual conduct" means the advocating, soliciting, imposing, en-

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20 Okla. Stat., tit. 70, Sec. 6-103.15.

couraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees. . . ."[21]/

Summary of Argument

It is especially dangerous to a free society for a statute to create such an environment of fear that people are inhibited from speaking and are put in jeopardy for being who they are. Such laws are indicative of many societies other than our own, societies in which the people perceive the United States as the protector and defender of individual freedom and the right to autonomy.

Unfortunately, our own society, out of suspicion and fear, has occasionally had its McCarthy eras. But the accumu-

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21 California Voters Pamphlet, General Election, November 7, 1978, at 29.

lated wisdom of the nation has ensured that such times are short-lived.

The statute in question represents one of those forays away from our fundamental principles, based upon suspicion and fear. Its very existence -- as any statute having an impact on the First Amendment -- has great significance and grave consequences independent of its actual use by state authorities. Some of those consequences are explored herein.

A determination of the issues before this court, including both the substantive question of whether the statute is facially overbroad and the procedural question of whether this court should defer to the judgment and interpretation of the Oklahoma State Supreme Court through abstention and certification, must necessarily be based upon an evaluation of the scope and application of the statute.

Because the statute in question has never before been interpreted and because a statute which chills the exercise of First Amendment rights is considered so dangerous to a free society, the Court should look especially circumspectly at the statute's intended scope and application.

In determining legislative "intent" when there is nothing explicit in the record, the social and political environment which gave rise to the legislation, as well as the explicit "intent" of analogous statutory language in other states may be important factors to consider.22/ The purpose of this brief is to provide information to the court which may be helpful in making that determination.

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22 See United States v. Wise, 370 U.S. 405, 411 (1962); Maryland Casualty Company v. Figueroa, 358 F.2d 817, 820 (1st Cir. 1966).

As set forth herein, the statute in question arose within the environment of the national "Save Our Children" campaign, which was aimed at homosexuals in general and homosexual teachers specifically. The intent of such legislation, as discussed in section II of this brief, was to remove from their teaching posts persons whose homosexuality was found out.

The words of the statute are consonant with the intent established by extrinsic evidence. The statute, in pertinent part, mandates refusal of employment or dismissal after "a finding" of the teacher's having advocated, encouraged, or promoted "private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." The statute would effectively preclude a teacher's participation in the

growth and evolution of society's social conscience and consciousness[23] relating to sexual orientation discrimination in all areas, from labor negotiations, work on political party platforms, church policy-making, anti-discrimination litigation, and legislative reform, to interpersonal and professional relationships and intra-family communications. The statute undermines teacher authority by putting homosexual teachers in fear of accusations by disgruntled students. In addition, one's very personality and basis for

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23 See California Privacy Report, supra, at 79. At least half the states, through penal law reform or by state supreme court decision, have participated in this evolution to the extent that Judge Barrett's comment (729 F.2d 1270, 1277 (10th Cir. 1984)), quoted on page 33 of Appellant's Brief, labeling sodomy as a crime of universal condemnation, is no longer accurate. Much of the sodomy law reform was prompted by the work of the American Law Institute in the 1950's. See Model Penal Code and Comment, American Law Institute (1980).

familial relationships is difficult if not unwholesome to hide out of fear.

The statute also fails to take into account the fact that we live in an era of electronic communications media which make it totally fortuitous whether information about one's labor union negotiations, political lobbying, or church activities are exposed to public scrutiny, including the scrutiny of students and colleagues. Certainly, the First Amendment would not permit a denial of access to these fora for either a homosexual teacher or a member of the media.

In addition, the statute caters to the biases and prejudices of students and colleagues based upon preconceived myths and stereotypes, i.e., the worst rather than the best aspects of the human personality, aspects which it is the very purpose of education to dispell through

knowledge.

All of these problems, it is submitted, can not be interpreted away, but require a wholesale rewrite of the statute, including striking portions of the language, in contravention of the original purpose of the law. For the federal or state courts to attempt such a diversion from the original and plain intent of the statute would be contrary to both the state and federal Separation of Powers doctrines, to say nothing of the extent to which such action would be inconsistent with the presently expanding doctrines of Judicial Restraint and Abstention. Accordingly, abstention and certification under such circumstances is inappropriate. The statute is facially overbroad.

* * *

ARGUMENT

POINT I

THE OKLAHOMA STATUTE WAS ENACTED IN A CONTEXT OF SOCIAL HOSTILITY TO HOMOSEXUALS

The Court of Appeals sustained a facial challenge to the "advocacy" portion of the Oklahoma statute, holding that it was substantially overbroad and not readily subject to a narrowing construction by the state courts.[24] The Court of Appeals correctly observed that in order to protect their jobs, teachers must restrict their expression. The Court of Appeals further noted that the "advocacy" portion of the statute could be used to dismiss teachers making statements "which are aimed at legal and social change."[25]

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24 729 F.2d 1270, 1274.

25 Id.

Appellant has objected to the Court of Appeals' interpretation of the "advocacy" portion of the statute. Appellant argues that the statute has never been invoked by a school board in any manner and has never been interpreted by the Oklahoma courts.[26]

Amici believe that the Court of Appeals accurately assessed the intended scope and application of the "advocacy" portion of the statute. As will be demonstrated in the section of this brief entitled "Construction of the 'Advocacy' Portion of the Statute," the Oklahoma statute was intended to apply to any teacher who discloses his or her homosexuality, whether such disclosure comes as a response to an official interrogation triggered by a rumor, or whether it is

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26 Appellant's Brief, at 14.

necessitated by self defense or as a method of creating social or political change.

However, since the statute apparently has never been interpreted by the Oklahoma state courts, it is appropriate to resort to extrinsic aids in interpreting the intended scope and application of the statute. Assessing the intended scope and purpose of the statute, if possible, is important in order to determine whether a limiting construction by the state court would have been possible. If such limiting construction might have created a valid and constitutionally unobjectionable statute only at the expense of the original constitutionally objectionable legislative intent, however, then deference to the state court would be misplaced and a useless, expensive, and time-consuming exercise having only the potential for

encouraging the state court to violate its Separation of Powers doctrine by judicially legislating a new intent into the statute.

Statutes are to be construed by the courts with reference to the circumstances existing at the time of their passage.27/ Thus, Amici suggest that the social attitudes in Oklahoma at the time of this statute's passage are relevant to a proper interpretation of the statute.

A government agency in Oklahoma developed and conducted a survey with the purpose of documenting and preserving information which reflected the social environment in that state during the era in which this statute was enacted.28/

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27 United States v. Wise, 370 U.S. 405, 411 (1962).

28 "Community Attitudes on Homosexuality and About Homosexuals -- A report on

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The purpose of the Oklahoma Survey was to determine the attitudes held by various components of an Oklahoma community toward homosexuals.29/ The survey noted: "Although this survey was intended to study only the City of Norman, it may be helpful to establish the social environment of both the state and the nation while this project was in progress."30/

Commenting on the social environment during the study period, the Human Rights Commission remarked:31/

(footnote 28 continued)
the environment in Norman, Oklahoma," Norman Human Rights Cokmmission (1978), hereinafter "Oklahoma Survey." The research published in the survey was authorized by the Norman Human Rights Commission on June 23, 1977, and publication of the report was authorized by the Commission on April 27, 1978.

29 Id.

30 Id., at 1.

31 Id.

> Numerous reports about homosexuality appeared in the media. The campaign of the "Save Our Children" organization, spearheaded by Anita Bryant, to repeal a recently enacted ordinance protecting homosexuals in Dade County, Florida, received widespread coverage from the newspapers and broadcast media serving Norman.

The survey's results indicate that the environment in Oklahoma in 1977 was extremely hostile to homosexuals.[32] Forty-eight percent of landlords surveyed stated that they would refuse to rent to a homosexual couple.[33] Twenty-three percent said they would evict an individual believed to be a homosexual.[34]

Of the employers participating in the survey, forty-four percent believed an employer should discharge an employee

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32 California Privacy Report, at 10.

33 Oklahoma Survey, at 8.

34 Id.

believed to be a homosexual.[35] Two-thirds expressed reservations about promoting homosexuals from staff positions into supervisory or management-level ones.[36]

Of the householders surveyed, three-fourths stated they would oppose living in the same neighborhood as a homosexual couple.[37] Two-thirds of householders polled believed that employers should discharge persons believed to be homosexuals.[38] Eighty-eight percent of householders believed homosexuals should not be allowed to work as school teachers.[39]

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35 Id., at 10.

36 Id.

37 Id., at 13.

38 Id.

39 Id., at 14.

The report concluded: Norman citizens have strong, negative attitudes toward homosexuals; their strongest objections were associated with employment.40/

The Oklahoma Survey also noted that, in early 1977, the Oklahoma State Senate passed a resolution in favor of Anita Bryant's "Save Our Children" campaign.41/ This fact indicates that at least some of the sentiment expressed in the Oklahoma Survey existed in the state legislature near the time of the enactment of the statute in question.

The survey reproduced "representative" comments of those polled. The comments of employers surveyed included: "I'll be the first to invite Anita Bryant and pay all her expenses if such a [non-discrimina-

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40 Id., at 16.

41 "Readers' Forum," The Norman Transcript, May 11, 1977.

tion] law is ever considered in Norman," and "We have never hired one and will not if we know about it." Representative comments from local homosexuals included: "The real problem is keeping our gay orientation secret," and "My question is: does the City have the right to make you lie in your life?" 42/

POINT II

THE "ADVOCACY" PORTION OF THE OKLAHOMA STATUTE WAS DESIGNED TO REMOVE AS A TEACHER ANYONE FOUND TO BE A HOMOSEXUAL

The Court of Appeals concluded that the deterrent effect of the "advocacy" portion of the statute on legitimate expression was both real and substantial.43/

The Court further concluded that the

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42 Id.

43 729 F.2d 1270, 1274.

invalidated provision was not readily subject to a narrowing construction by the state courts.44/

Since these constitutional conclusions are premised, in part, on the legislatively intended scope and application of the statute, a further analysis of legislative intent precedes Amici's argument that the Court of Appeals' constitutional conclusions were accurate.

A comparison of the "Invalidated Oklahoma Provision" and the "Defeated California Initiative," supra, demonstrates that the "advocacy" provisions in the two measures are virtually identical. Although construction of similar legislation in other jurisdictions is not controlling, in the absence of a contrary Oklahoma construction, an examination of

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44 Id.

the construction placed upon California's initiative is relevant to an inquiry regarding the statute's intended scope and application.[45] As argued within, evidence does exist to show the intended scope and application of the Oklahoma statute's counterpart in California, known as the "Briggs Initiative" or "Proposition 6."

To ascertain the meaning of an initiative, courts may look to the published arguments made in connection with the vote upon the measure. Both federal and state courts have used this approach to determine the intent of an initiative.[46]

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45 Maryland Casualty Company v. Figueroa, 358 F.2d 817, 820 (1st Cir. 1966).

46 Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Las Vegas-Tonopah-Reno Stage Line, Inc. 202 F.Supp. 726, 736 (U.S.D.C., D. Nev. 1962); White v. Davis 13 Cal.3d 757, 775, fn. 11, 533 P.2d 222 (1975).

Reference to the ballot argument in favor of the "Briggs Initiative" reveals the intended scope and application of the "advocacy" portion of the measure.[47] The "Argument in Favor of Proposition 6" stated:[48]

> This measure will provide for the removal of any teacher, teacher's aide, school administrator or counselor who advocates, solicits, encourages, or promotes homosexual behavior. In the case is Gaylord v. Tacoma 1977, the Supreme Court of the United States upheld the right of a local school board to dismiss a homosexual teacher by refusing to review the case.

Apparently, the "advocacy" portion of the homosexual teacher initiative was intended to apply to situations similar to the circumstances in Gaylord v. Tacoma School District, 559 P.2d 1346 (Wash.

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47 California Voters Pamphlet, General Election, November 7, 1978, at 30.

48 Id.

1977), cert. den., 98 S.Ct. 234.

The type of "advocacy" involved in Gaylord, supra, gives a clue as to the intended scope of the proposed California law and its Oklahoma clone. Gaylord was discharged from his teaching position at Wilson High School because he was a "known homosexual." When the vice-principal at Wilson High heard a rumor that Gaylord was homosexual, he confronted the teacher at his home, demanding a response to the allegation. Gaylord admitted he was a homosexual and attempted unsuccessfully to have the vice-principal drop the matter. Gaylord was suspended and ultimately dismissed. The Washington Supreme Court upheld the dismissal despite "uncontroverted evidence" that Gaylord was "a competent and intelligent teacher." Gaylord, supra.

Amici submit that the true intent of

these homosexual teacher measures is to remove from teaching positions any teacher who dares to admit his or her homosexuality, even if such admission occurs in the teacher's home after being confronted with a rumor.

POINT III

THE "ADVOCACY" PORTION OF THE STATUTE IS FACIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT

Amici submit that the Court of Appeals correctly concluded the "advocacy" portion of the statute is facially overbroad in violation of the First Amendment.[49]

Invalidation of that portion was appropriate because it was "not readily subject to a narrowing construction by the state courts," and "its deterrent effect on legitimate expression is both real and

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49 729 F.2d 1270, 1274.

substantial."50/

A. The Deterrent Effect of the "Advocacy" Provision on Legitimate Expression is Both Real and Substantial

This issue is most appropriately discussed with reference to the procedural contexts in which dismissal proceedings are likely to arise in Oklahoma.

Many legitimate forms of expressions appear to fall within the ambit of the "advocacy" portion of the Oklahoma Statute: seeking inclusion of a sexual orientation non-discrimination clause in a union contract with a school district; speaking out on behalf of a gay student being harassed by his or her peers; appearing on a radio or television talk show dealing with the subject of homosexuality;

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50 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

seeking inclusion of gay rights plank in the platform of a political party; filing a lawsuit against a landlord who evicted the teacher because of his or her sexual orientation; defending the morality of gay relationships in a church debate; lobbying for repeal of sodomy laws or passage of a non-discrimination law; or, honest dialogue between a gay teacher and his or her own school-age child.

The difficulties with these scenarios is exacerbated by the fortuitous nature of whether information about a homosexual teacher's participation in any of the mentioned activities is somehow conveyed to students and colleagues. Such uncertainty produces fear of media coverage, although such coverage can not be predicted with much certainty. The obvious remedy to the media foreseeability problem is an exercise of "prior re-

straint."

Although each of these scenarios could be discussed at some length, three examples will be used to illustrate the fact that the "advocacy" portion of the statute has a deterrent effect on legitimate expression.

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Whenever a school principal believes that it is necessary to admonish a teacher "for a reason he believes may lead to the teacher's dismissal or nonreemployment," the principal shall bring the matter to the attention of the teacher in writing. If the teacher does not correct the cause for potential dismissal or non-reemployment, the principal shall make recommendation to the superintendent of the school district for the dismissal or non-reemployment of the teacher.[51]/ Thus, dismis-

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51 Okla. Stat., tit. 70, Sec. 6-103.2.

sal proceedings may be triggered by a principal's mere "belief" that a teacher has violated the "advocacy" portion of the statute. What factual circumstances might give rise to such a belief?

The first overbreath example involves a principal and a teacher who are members of the same church congregation. The congregation discovers that a candidate for the ministry is a homosexual.[52] Various members of the church are asked to participate on a committee whose purpose is to develop a position paper regarding the ordination of known homosexuals. A high school teacher is asked to serve on the committee. Unbeknownst to the church hierarchy, the teacher is a homosexual. The committee's report recommends against

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52 For example, see: "Seminarian sues for degree in Kentucky," 5 Sex.L.Rptr. 20 (1979).

ordination. However, a minority report is authored by the teacher. Rumors spread that the teacher must be a "closet" homosexual. The principal confronts the teacher in church and suggests that the teacher should put the rumors to rest by publicly affirming that he is a heterosexual. The teacher refuses. The principal forms the belief that by refusing to deny the truth of the rumors, the teacher has violated the "advocacy" portion of the dismissal statute. The matter is thus referred to the superintendent with a recommendation that dismissal proceedings be instituted.

As this example demonstrates, the deterrent effect of the "advocacy" portion of the statute on First Amendment rights is both real and substantial. The teacher's activity must be considered a form of "legitimate expression" under

Oklahoma law.[53]/

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Whenever a superintendent of a school district has reason to believe that cause exists for the dismissal of a teacher, and when he is of the opinion that the immediate suspension of a teacher is necessary in the best interests of the children of the district, the superintendent may suspend the teacher without notice or hearing.[54]/

The second overbreadth example involves a labor contract between a local teacher's union and a school district. The existing contract does not contain a

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53 Okla. Const., Art. I, Sec. 2: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights."

54 Okla. Stat., tit. 70, Sec. 6-103.3.

non-discrimination clause. Two "activist" teachers volunteer to serve on a five-member teacher committee which is drafting proposals for use in upcoming contract negotiations between the teachers' union and the school district. The activist teachers submit a proposal which includes "sexual orientation" among the various forms of discrimination prohibited by the proposed contract. A heated debate within the union ensues. Word gets back to the superintendent that a proposal prohibiting discrimination against homosexuals is being considered by the union. Before long, the whole school district is aware of the proposal. A number of concerned parents meet with the superintendent and demand that the instigators be suspended immediately or they will withdraw their children from school. The superintendent decides that he "has reason to believe"

that cause exists for dismissal of the teacher who drafted the proposal because, in the superintendent's opinion, the proposal constitutes "advocacy" of public or private homosexual activity. The superintendent suspends the two teachers without notice or hearing in an attempt to placate the disgruntled parents.

As this example shows, the "advocacy" portion of the statute infringes on the teachers' First Amendment right to petition the government for redress of grievances. Again, the teachers' activity is a form of "legitimate expression" under both state and federal law.55/

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55 Federal labor law articulates a public policy against interference or restraint in labor negotiations. (29 U.S.C.A., Sec. 102). State law recognizes the rights to apply to those vested with powers of government for redress of grievances (Okla. Const., Art. 2, Sec. 3), to engage in collective bargaining for the purpose of mutual aid or protection (Okla.

(footnote continues)

It should also be noted that it is not inappropriate to seek official protection against sexual orientation discrimination, including protection against employment discrimination, nothwithstanding the present existence of sodomy laws in the state penal code.56/

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(footnote 55 continued)
Stat., tit. 21, Sec. 1265.11), and, for a teacher, to participate in collective bargaining without fear of discrimination (Okla. Stat., tit. 70, Sec. 509.9).

56 Developments in Pennsylvania and Wisconsin illustrate this point. On April 23, 1975, the Governor of Pennsylvania issued an executive order prohibiting discrimination by state agencies on the basis of sexual orientation. (See: California Privacy Report, at 8). A lawsuit was filed challenging the Governor's authority to issue such an order. The legality of the order was affirmed by an intermediate appellate court, notwithstanding the existence of a sodomy law in Pennsylvania at the time the Governor issued his order. Robinson v. Shapp, 350 A.2d 464 (1975). The Pennsylvania Supreme Court, in a per curiam order, affirmed the lower court's order without issuing an
(footnote continues)

The third example involves a classroom situation. A junior high school student is harassed by two of his classmates. The classmates tease the student, using epithets such as "fag" and "queer." The teacher overhears the confrontation. He ponders what approach to take in dealing with the problem. The teacher remembers a similar episode which occurred in an adjoining classroom the previous month. In that previous situation, a teacher had scolded the name callers, told them that whether the victimized student was gay or not was none of their business, and lectured them that gay people have a right to be treated with respect and dignity. The

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(footnote 56 continued)
opinion. (See: "Governor's protection of Pennsylvania gays upheld," 3 Sex.L.Rptr. 43 (1977)). Wisconsin enacted a state law prohibiting discrimination on the basis of sexual orientation a year before sodomy was decriminalized. (See: California Privacy Report, at 308-309).

name callers started a rumor that the teacher who scolded them was homosexual. The teacher in the most recent incident is afraid to reprimand the name callers for fear that they will spread a rumor which will result in an investigation of his sexual orientation. To play it safe, the teacher pretends he did not overhear the name calling.

* * *

The Court of Appeals was concerned with the probable application of the "advocacy" portion of the statute to teachers who appeared before the Oklahoma Legislature or appeared on television to urge repeal of the state sodomy law.[57] As the examples cited above illustrate, the fact situation described in the Court of Appeals' opinion was only the tip of the

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57 729 F.2d 1270, 1274.

"overbreadth" iceberg.

That the statute's deterrent effect on legitimate speech is "real" is not subject to dispute. Reference to the social environment in Oklahoma illustrates this point. Eighty-eight percent of householders surveyed in the Oklahoma Survey stated that homosexuals should not be allowed to work as school teachers.58/ Although questionaires were distributed to members of the gay community, the survey did not tabulate results from this group because of the extremely low rate of return (6%).59/ The lack of response from homosexuals was attributed to fear of reprisals.60/

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58 Oklahoma Survey, at 14.

59 Id., at 5 and 16.

60 Id.

Amici suggest that the Oklahoma homosexual teacher statute has reinforced the fear experienced by lesbian and gay teachers prior to adoption of that law. A teacher's fear of reprisals -- even for constitutionally protected communications -- is not an insignificant overbreath evil of the present statute. Evidently, the effect this law has on the free speech rights of Oklahoma teachers is exceedingly "real and substantial." Apparently, no teacher in Oklahoma has been willing to risk dismissal by admitting his or her sexual orientation in any public context. As a result, the statute has never been tested or construed by the state courts.

Under these circumstances, amici submit that the Court of Appeals properly invalidated the "advocacy" portion of the statute on facial overbreadth grounds.

B. The "Advocacy" Portion of the Statute is Not Readily Subject to a Narrowing Construction by the State Courts

Amici believe they have demonstrated that the deterrent effect of the "advocacy" provision on legitimate expression is both real and substantial. Amici submit that the invalidated provision is not "readily subject" to a narrowing construction by state courts in Oklahoma.[61]

Although courts should construe statutes whenever possible so as to avoid constitutional problems,[62] they should not construe legislation in a manner which contravenes lesiglative intent.[63]

The legislatively intended scope of

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61 Erznoznik v. City of Jacksonville, supra, at 216.

62 Pryor v. Municipal Court, 25 Cal.3d 238, 253 (1979).

63 People v. Gibson, 184 Colo. 444, 521 P.2d 774, 775 (1974).

the "advocacy" portion of the statute is clear. The national "Save Our Children" campaign wanted homosexual teachers removed from the schools. The ballot argument in favor of the proposed California initiative demostrates that a teacher's mere admission of his or her homosexuality to a student or to another school employee would be considered a violation the "advocacy" provision.64/

If this is the legislatively intended scope of the "advocacy" provision -- and all extrinsic evidence supports that conclusion -- then amici suggest that the Oklahoma courts would have to resort to "judicial legislation" in order to narrowly construe the statute to avoid conflict with the First Amendment, thus violating the state Constitution's mandate on sepa-

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64 California Voters Pamphlet, General Election, November 7, 1978, at 30.

ration of powers.[65]/

Although the Oklahoma Supreme Court might have invalidated the "advocacy" provision on First Amendment grounds,[66]/ or under the free speech provision of the state Constitution,[67]/ amici submit that Oklahoma's highest court would not have found that section of the statute "readily subject" to a narrowing construction.

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65 Okla. Const., Art. IV, Sec. 1. Courts must give a statute that construction which the legislature intended at the time it was enacted. City of Brostow ex rel. Hedges v. Brown, 151 P.2d 936, 942 (Okla. 1944).

66 Gay Activists Alliance v. Board of Regents of the University of Oklahoma, 638 P.2d 1116 (Okla. 1981).

67 Okla. Const., Art 2, Sec. 22.

CONCLUSION

As the Court of Appeals noted, "[a] statute is saved from a challenge to its overbreadth only if it is 'readily subject' to a narrowing construction."[68] In this case, invalidation -- not construction -- is the only viable method of curing the constitutional defect.[69] The decision of the Court of Appeals should be affirmed.

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68 729 F.2d 1270, 1275.

69 Similarly, abstention and certification are not appropriate unless the statute to be certified is susceptible of a construction or interpretation which would obviate or limit the need to decide the federal constitutional issues. Belloti v. Baird, 428 U.S. 132, 147 (1976); Vinyard v. King, 655 F.2d 1016, 1018 (10th Cir. 1981), citing Railroad Commission of Texas v. Pullman Co. 312 U.S. 496, 61 S.Ct. 643. Again, as argued earlier in this brief, both the intent behind and the meaning of the words within the "advocacy" portion of the statute mandate invalidation, not interpretation or a new construction. Therefore certification would not be appropriate in this case.

Respectfully submitted,

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