IN THE SUPREME COURT

STATE OF GEORGIA

ERIC DUANE MONGERSON, Appellant, v. SANDY KAY EHLERS MONGERSON, Appellee.	)	APPEAL NO. S09F0132

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND AND CHILDREN OF LESBIANS AND GAYS EVERYWHERE

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INTEREST OF *AMICI CURIAE*

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

Lambda Legal consistently has maintained that judicial decisions about child custody and visitation arrangements must not be based on myths or stereotypes about lesbians or gay men, but instead on evidence relevant to the specific children or adults at issue. Child custody or visitation cases in which Lambda Legal has participated include *Arnold v. Arnold*, 275 Ga. 354, 566 S.E.2d 679 (2002), *Moses v. King* 281 Ga. App. 687, 637 S.E.2d. 97 (2006), *Clark v. Wade*, 273 Ga. 587, 544 S.E. 2d 99 (2001), *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001), and *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 661 S.E.2d 822 (Va. 2008).

Amicus Curiae, Children of Lesbians and Gays Everywhere ("COLAGE"), is a national non-profit organization comprised of children,

youth, and adults with one or more lesbian, gay, bisexual, transgender and/or queer (LGBTQ) parents that works toward creating a world in which people with one or more lesbian, gay, bisexual, transgender and/or queer parents or families are recognized as the authority of their experiences, belong to respected and valued family structures, and have the tools and support to create and maintain a just society.

As this appeal contains myriad enumerations of error on which *amici* have no particular expertise or opinion, this brief is submitted in support of neither party. Rather, *amici curiae* respectfully submit this brief to provide the Court with information and authority on the discrete issue of whether a visitation restriction prohibiting "exposure" of Appellant's children to gay people he knows is an abuse of discretion where no evidence exists that such contact is harmful. Lambda Legal and COLAGE file this *amicus* brief to urge that the unsubstantiated ban on contact between the children and one subset of the father's friends, as well as wholesale prohibition on introduction of his children to any future committed life partner of the same sex, is contrary to law and undermines the relationship between the father and his children.

INTRODUCTION AND ARGUMENT

The trial court erred in imposing a restriction on a father's visitation by forbidding him to "expose" his children to any current and future non-heterosexual friends and partners. Such a blanket visitation restriction violates solidly entrenched Georgia law that requires proof of a nexus between a visitation restriction and evidence of harm to the children. Because there is no evidence in the record showing that Appellant's children were or would be harmed by the presence of gay and lesbian people in general, or all of the father's current and future lesbian and gay acquaintances in particular – nor could there ever be such a showing -- , this restriction should be stricken. *See Turman v. Boleman*, 235 Ga. App. 243, 510 S.E.2d 532 (1998) (striking down provision in a couple's voluntary settlement agreement, incorporated in a court order, that forbade the mother from allowing the child any contact with any African-American male).

The law of this state is clear that "a trial court abuses its discretion when it places an unnecessarily burdensome limitation on the exercise of a parent's right of visitation." *Brandenburg v. Brandenburg*, 274 Ga. 183 , 184, 551 S.E.2d 721, 722 (2001). No party contends that the *Brandenburg* standard is met based on evidence that the presence of gay men and lesbians is inherently harmful to these or any other children; indeed, the mother

specifically disclaims such a notion. Brief of Appellee at 12-13. Additionally, the fact that the provision operates against only the father confirms that the children's exposure to gay men and lesbians is not a problem in and of itself. Indeed, this restriction harkens back to a less enlightened time when some courts presumptively would deny or severely restrict a gay parent's visitation. Today, nobody doubts that this Court, with its insistence on evidentiary support for visitation restrictions, would not tolerate the routine prohibition on a parent's association with gay people during visitation. *See, e.g., In Interest of R.E.W.*, 220 Ga.App. 861, 863, 471 S.E.2d 6, 9 (1996) ("Visitation rights must be determined with reference to the needs of the child rather than the sexual peferences of the parent. The best interests of the child remain paramount.'"); *In re E.C.*, 271 Ga. App. 133, 136, 609 S.E.2d 381, 384 (2004) (rejecting relevance of mother's lesbian relationship to deprivation inquiry in absence of any showing of harm to the child).

Nor can the restriction rest upon a child's reaction to a parent's infidelity such that courts could impose blanket restrictions on "exposure" to all members of the sex with whom the parent committed adultery. Indeed, one could scarcely imagine a trial court, in a case involving infidelity between members of different sexes, banning an offending father from

exposing children to any heterosexual female friends and partners. Moreover, it cannot possibly serve the professed desire of the trial court and the mother that the children maintain their relationship with their gay father when he is under a court order to treat other gay people as pariahs based solely on their sexual orientation.

Although the clarity of Georgia law on visitation restrictions makes further analysis unnecessary, it is clear that the restriction also runs afoul of the federal constitution. The restriction not only violates equal protection principles in irrationally stigmatizing certain mere acquaintances of the father based on their sexual orientation, but it also interferes with the father's fundamental right to parental autonomy which, although yielding to the best interests of the child, cannot be infringed by a restriction unrelated to promoting those interests. *Amici* respectfully request that the Court strike the offensive and unsupported blanket restriction on "exposure to [Appellant's] homosexual friends and partners."

RECORD EVIDENCE RELEVANT TO THE BLANKET RESTRICTION

Appellee offers the following support for the restriction: (1) the father had extramarital affairs with men; (2) the discovery of the father's

infidelity has been emotionally difficult for the children;[1] (3) the father has engaged in inappropriate acts, unrelated to his sexual orientation, that have strained his relationship with the children; and (4) one child found a gay pornographic magazine at the father's house. This brief will analyze both cases examining restrictions on extramarital paramours and cases where courts have extrapolated the purported harm posed by one individual to ban an entire demographic group. *Amici* know of no support in the law or in logic for the position that a parent's possession of adult pornography supports a ban on the presence of a demographic group depicted in the pornography (to say nothing of banning people, *i.e.*, lesbians, not depicted). *See, generally, Petty v. Petty*, 2005 WL 1183149 (Tenn. Ct. App., 2005) (court erred in requiring supervised visitation because of father's "penchant for pornography"); *Schiff v. Schiff*, 611 N.W.2d 191, 195-96 (N.D., 2000) (no error in granting the father extended, unsupervised visitation despite mother's concerns about pornography in his home). If this Court were to rule that allegations of emotional harm resulting from a child's exposure to a

[1] It should be noted that Appellee's brief states that the children "continue to go to counseling as a result" of their emotional upset at the father's infidelity, yet Appellee cites only to page 16 of the trial transcript of July 20, 2007, where the mother testified that "*Because of the incidents last summer*, I have taken the children to therapy . . ." (emphasis added). The record reflects that "incidents last summer" refers to summer occurrences set forth in the children's affidavits of August 2006, and not any extramarital conduct by the father. The Complaint for Divorce alleging infidelity during the marriage had been filed months previous, in November 2005.

parent's pornography are sufficient support for a blanket visitation restriction on a category of people, then this could allow every divorce to result in the complete prohibition of visitation around all heterosexual people if a child inadvertently found his or her father's *Playboy* magazine. Neither common sense nor the common law of Georgia allows such a result.

ARGUMENT AND AUTHORITY

I. VISITATION RESTRICTIONS ARE INAPPROPRIATE UNLESS THERE IS EVIDENCE THAT A PARTICULAR PERSON HAS, OR WILL, CAUSE HARM TO THE CHILD.

The Georgia Legislature has decreed it to be the "express policy of this state to encourage that a child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated or dissolved their marriage or relationship." O.C.G.A. § 19-9-3(d). This Court and the Georgia Court of Appeals repeatedly have cited this provision in striking down undue restrictions placed on a parent's visitation rights. *Brandenburg v. Brandenburg*, 274 Ga. 183, 551 S.E.2d 721 (2001); *Woodruff v. Woodruff*, 272 Ga. 485, 531 S.E.2d 714 (2000); *Stewart v. Stewart*, 245 Ga.App. 20, 537 S.E.2d 157 (2000); *Turman v. Boleman*, 235 Ga. App. 243, 510 S.E.2d 532 (1998); *In Interest of R.E.W.*, 220 Ga. App. 861, 471 S.E.2d 6 (1996).

In the specific context of a provision requiring a parent to shield his visiting children from certain individuals, this Court has admonished courts that any such restriction must be based on evidence: "[I]t is an abuse of discretion to restrict visitation rights by prohibiting their exercise in the presence of a certain person unless the evidence demonstrates that exposure to that individual would adversely affect the children." *Patel v. Patel*, 276 Ga. 266, 267, 577 S.E.2d 587, 589 (2003); *Brandenburg*, 274 Ga. at 184 ("a trial court abuses its discretion when it places an unnecessarily burdensome limitation on the exercise of a parent's right of visitation."); *accord Durham v. Gipson*, 261 Ga.App. 602, 606(2), 583 S.E.2d 254, 258(2) (2003).

Georgia case law is clear that a trial court, before a fit parent is ordered to police the presence of individuals during visitation periods, must make evidence-based findings about how that additional person's presence harms the child. *See Brandenburg, supra*; *see also Arnold v. Arnold*, 275 Ga. 354, 566 S.E.2d 679, 680 (2002). In *Brandenburg*, this Court struck down a restriction precluding visitation in the presence of the woman with whom the father had an affair leading to the divorce: "Absent any evidence that exposure to [the girlfriend] would adversely affect the best interests of the children, we find the trial court abused its discretion in prohibiting

appellant from exercising his visitation rights in [the girlfriend's] presence." 274 Ga. at 184.

In 2002, this Court applied and solidified this principle in striking down a restriction precluding visitation in the presence of the mother's lesbian friend. *Arnold, supra* . In *Arnold*, the husband/father filed for divorce and sought custody of the minor children. The trial court awarded primary physical custody to the mother, but prohibited the children from any contact "with a certain named friend of Wife," who was a lesbian.[2] *Id.* This court reversed, citing *Brandenburg*, and ruled that "[i]n the absence of any evidence that exposure to a third party will have an adverse effect on the best interests of the children, a trial court abuses its discretion by prohibiting a parent from exercising his or her custodial rights in that person's presence." *Id.*; *see also Simmons v. Williams,* 290 Ga. App. 644, 648-649, 660 S.E.2d 435, 438 (2008) (upholding a "more narrowly drawn" provision regarding overnight stays, distinguishing the trial court's order in *Arnold* as

[2] While the language of the opinion does not specifically identify the "certain named friend of the Wife" the briefs and record make it clear that the restricted person was a lesbian. *See Arnold*, 275 Ga. at 354 ("Here, there is no evidence that the relationship between Wife and her friend was or will be harmful to the children, or that they ever engaged in any inappropriate conduct in the presence of the children. Thus, the trial court abused its discretion by placing an unauthorized restriction on Wife's exercise of her rights as a custodial parent.") (emphasis added). Counsel for *Amicus*, Lambda Legal, also served as amicus in *Arnold* and is familiar with facts of that case. *See* Brief of *Amici Curiae* National Association of Counsel for Children, National Association of Social Workers, and Lambda Legal Defense and Education Fund, Inc. at 2002 WL 32334756.

an abuse of discretion because it prohibited "the children from *any contact* with a certain named friend of" the wife, without any evidence that mere exposure to the third party would have an adverse effect on the children.") (emphasis supplied by the court).[3]

Georgia is far from unique in requiring evidence showing that a particular restriction on visitation is necessary to avoid harm to a child before a court may properly impose the restriction. *See, e.g., Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998) (order requiring that father's partner be absent when father was exercising his visitation rights was improper in absence of factual findings regarding likelihood of harm to children); *Trylko v. Trylko,* 392 So.2d 1034 (Fla. Dist. Ct. App.1981) (trial court abused its discretion in restricting a mother's visitation with her children to times when her male paramour was not present, where no evidence existed that presence of mother's partner caused harm); *Hummel v. Hummel*, 595 N.Y.S.2d 37, 191 A.D.2d 296 (App. Div. 1993) (same); *Dilworth v. Dilworth*, 115 Ohio App. 3d 537, 685 N.E.2d 847 (Ct. App. 1996) (same); *Kelly v. Kelly*, 217 N.J. Super. 147, 524 A.2d 1330 (Super. Ct.

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[3] *Amici* cite this decision to support the principle that a visitation restriction must be narrowly drawn; however, *amicus* submits that the court misapplied the principle in upholding the overnight paramour restriction without the requisite evidence of harm. *See Simmons*, 290 Ga.App. 644 at 649, 660 S.E. 2d 435, 439 (J. Bernes concurring specially) ("Because this prohibition is unenforceable under binding precedent of the Supreme Court of Georgia and this Court, I believe we are constrained to conclude that the trial court abused its discretion in imposing it upon the parties.")

Ch. Div. 1986) (same); *Jones v. Haraway*, 537 So. 2d 946 (Ala. Civ. App. 1988) (same); *Elizabeth A. S. v. Anthony M. S.*, 435 A.2d 721 (Del. 1981) (same).

II. THE VISITATION RESTRICTION FAILS THE *BRANDENBURG* STANDARD.

Under the principle set forth in *Brandenburg*, a restriction that Appellant's children must be shielded from all gay men and lesbians must be based on evidence that the presence of any gay man or lesbian would cause harm. Because no such showing could ever be made, the restriction is invalid on its face and must be stricken.

Brandenburg establishes a rule against presumptions that certain people's presences are inherently harmful, and that principle applies forcefully here in the face of the trial court's attempt to stigmatize all gay people as harmful to these children through their mere presence. Additionally, the policy of this state as clarified in *Brandenburg* -- that parents fulfilling their duties to their children will not face judicial interference unnecessarily -- is flouted when a court requires a father to shield his children from an entire category of people, in the absence of any deleterious behavior toward the children or demonstrated negative effect upon them.

Nor may a court impose a blanket visitation restriction prohibiting introduction of a class of persons based on a desire to shield children from a non-criminal aspect of their parent's life, without a showing of harm. Indeed, to hold otherwise would condone a broad restriction where this Court has already held a narrower one would constitute an abuse of discretion. *Brandenburg, supra.* By logical implication, allowing this blanket restriction to stand would allow courts to impose a heretofore legally unacceptable restriction that included a paramour by simply broadening the net of restricted persons to *all* paramours or all, *e.g.*, women. Such a holding would contravene both the letter and spirit of this Court's prior rulings.[4]

Georgia law resoundingly rejects any suggestion that the sexual orientation of the parent and his or her acquaintances is in and of itself germane to custody and visitation issues. *Arnold, supra*; *Moses v. King* 281 Ga. App. 687, 691, 637 S.E.2d. 97, 101 (2006) ("Georgia's appellate courts have held that a parent's cohabitation with someone, regardless of that

[4] To the extent Apellee's relies on the argument that Appellant needs to "repair" a relationship with his kids without distraction to justify a broad restriction where a narrow one would not be justified, she does so without citation to, or basis in, the facts. Moreover, assuming *arguendo* that a court may impose an affirmative obligation on a parent deemed to be in the child's best interest in improving their relationship with a parent, carving out and restricting a sub-category of people in order to avoid "distraction" during visitation is both overly broad, in that it excludes a class of persons without a showing of harm, and too narrow in that allows all manner of distractions from other people, including, presumably heterosexual partners and bisexual friends.

person's gender, is not a basis for denying custody or visitation absent evidence that the child was harmed or exposed to inappropriate conduct."); *In re E.C., supra,* 271 Ga. App. at 136 (rejecting relevance of mother's lesbian relationship to deprivation inquiry in absence of any showing of harm to the child); *R.E.W., supra,* 220 Ga.App. at 863 ("Visitation rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent. The best interests of the child remain paramount.'") (quoting *Birdsall v. Birdsall,* 197 Cal.App.3d 1024, 1029, 243 Cal.Rptr. 287, 290 (Ct. App. 1988) and citing *In the Matter of the Marriage of Ashling,* 42 Or.App. 47, 49, 599 P.2d 475, 476 (1979); and citing *In re the Marriage of Walsh,* 451 N.W.2d 492, 493 (Iowa 1990) (invalidating restriction of a gay father's visitation to times when "no unrelated adult" was present because "[t]his unusual provision was obviously imposed on account of [the father's] homosexual lifestyle."); *see also Conkel v. Conkel,* 31 Ohio App.3d 169, 171-172, 509 N.E.2d 983, 985-986 (Ct. App. 1987); *see generally Hogue v. Hogue*, 147 S.W.3d 245, 252, 253 (Tenn. Ct. App., 2004) (court struck down provision preventing father "from exposing the child to his 'gay lifestyle'; court stated that "it is not necessary to create new and different visitation rules and restraints depending on sexual orientation.").

Additionally, *Brandenburg* rejects the notion that the "guilt" of an extramarital paramour allows a court to affix a "Scarlet A" to all members of that paramour's demographic group. Indeed, *Brandenburg*'s basic holding is that even the paramour cannot be assumed to be a harmful presence during visitations. 274 Ga. at 184. The fact that the father in *R.E.W.* had had an extramarital affair with a man did not justify the visitation restriction imposed by the trial court there. 220 Ga. App. at 863. Similarly, in *Harrington v. Harrington*, 648 So.2d 543 (Miss. 1994), the Mississippi Supreme Court struck down a visitation restriction on exposure to a parent's girlfriend even though the restriction was based on evidence that one of the children was "upset" that the couple was living together without benefit of marriage and that the children were "confused" by the father's Catholic beliefs and his actions in cohabitating. As the court in *Harrington* aptly observed, with reasoning that applies here, "even if [the child] is confused, or does not like her father living with [the paramour], this is not the type of harm that rises to the level necessary to overcome the presumption that a non-custodial parent is entitled to [unrestricted] visitation." 648 So. 2d at 547; *see also Higgins v. Higgins*, 194 Ariz. 266, 271, 981 P.2d 134, 139 (Ct. App. 1999) (reversing visitation restriction in presence of mother's boyfriend, noting that "[f]ather's mother is entitled to her belief that Mother

should not be living and sleeping with another man, and the court is entitled to that belief, but such personal belief is not competent evidence about the effects of that relationship on these children").

As discussed in Section III, *infra*, Georgia law casts serious doubt on whether the restriction here would be valid even if the children had testified that they wanted all gay people excluded from visitations. Of course, no such testimony, nor any evidence whatsoever, was presented that any harm would result. *Amici* respectfully submit that the Appellee has ignored Georgia case law regarding visitation restrictions,[5] thus leading to the misguided argument that the trial court could impose this sweeping restriction based apparently upon guesswork that the children would react negatively to any gay person. *See* Brief of Appellee at 11-12 (arguing that restriction is valid if the court had "grounds to believe" that the visitation time "should not be disrupted by reminders of the Appellant's infidelity"; or thought the visitation "would be unduly complicated" by the presence of gay people; or "could have reasonably so concluded" that the presence of gay people would "re-open[]" an emotional "wound"). The *Brandenburg* Court was unwilling to presume harm flowing from the presence of the paramour

[5] Appellee cites one case that concerns visitation restrictions and cites that case for the irrelevant proposition that "denial of visitation rights to a parent is appropriate if 'there is probative evidence that he or she is morally unfit.'" Brief of Appellee at 12 and n.28, *quoting Patel v. Patel*, 276 Ga. 266, 267, 577 S.E. 2d 587, 589 (2003). Appellant was not found to be unfit.

whose longstanding relationship with the father ended that marriage; *a fortiori*, the notion that the trial court here was entitled to presume harm caused by the presence of the father's gay friends is completely untenable.

III. EVEN BEFORE *BRANDENBURG*, GEORGIA LAW REJECTED THE CONCEPT OF DEEMING CERTAIN DEMOGRAPHIC GROUPS "OFF-LIMITS" DURING VISITATIONS.

Even before *Brandenburg* clarified that a court cannot order the exclusion of a person from visitation without evidence of harm, Georgia law rejected visitation restrictions based on demographic criteria as discriminatory and unduly burdening the parent's right to enjoy visitation with his or her children without just cause. In *Turman, supra*, the court struck down a provision in a couple's voluntary settlement agreement, incorporated in a court order, that forbade the mother from allowing the child any contact with any African-American male. The court held that the provision violated not only equal protection principles but also "the public policy encouraging a child's contact with his noncustodial parent" set forth in O.C.G.A. §19-3-3(d) by "prevent[ing] the child from having contact with his natural mother solely on the basis of an arbitrary racial classification." 235 Ga. App. at 244. The court articulated the commonsense principle that, while restrictions against an individual whose presence may harm the child

are permissible, forbidding contact with an entire demographic group is not. 235 Ga. App. at 244. ("Although a court may validly provide, under appropriate circumstances, that a child is to have no contact with particular individuals who are deemed harmful to the child, such provision cannot be based solely upon racial considerations, as such ruling violates the public policy of the State of Georgia."). This holding is in keeping with this Court's precedent that a visitation restriction should not be broader than is necessary to address a specific concern. *E.g., Maloof v. Maloof*, 231 Ga. 811, 811(6), 204 S.E.2d 162, 163 (1974) (while a provision prohibiting derogatory comments about the other parent may be acceptable, court abused its discretion by prohibiting parents from any discussion of the other parent in front of children).

Apparently because it found the restriction so utterly indefensible, the *Turman* court never mentioned what prompted the couple to agree to it, although its language suggests that the mother may have had some relationship with a specified African-American man.[6] It would be easy to

[6] The challenged provision allowed the mother visitation "'on the condition [that] at no time shall [the child] be in the presence of William "Larry" Little or any other African-American male.'" The father invoked the provision when the mother married not Little, but a different African-American male. *Turman, supra*.. At a minimum, the mention of Little by name in the restriction, and the fact that the mother married a different African-American man shortly after the November 13, 1996 divorce, suggests that the provision was not the result of mere bigotry by both parties.

see why the court would reject outright an argument that a party's extramarital conduct with one person justifies a ban on the presence of that person's entire demographic group. Even if the court in *Turman*, decided prior to *Brandenburg*,[7] made an assumption that the child would react negatively to the presence of any African-American man based on the actions of a particular African-American man, it certainly would have been wrong to provide legal enforcement to that generalization. Thus, although cited for a different point, *Turman*'s invocation of *Palmore v. Sidoti* is particularly apt: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Turman*, 235 Ga. App. at 244 , *quoting Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882 (1984).

Cases from other jurisdictions also reject the approach of unnecessarily placing visitation restrictions on entire categories of people. The court in *In the Matter of Marriage of Ashling,* 42 Or.App. 47, 50, 599 P.2d 475, 476 (Ct. App. 1979), held that a mother's visitation rights could not be limited by requiring that she not allow any lesbians in her home or around her children during their visits. ("We find nothing in the present

[7] *Amici* should point out that, while *Brandenburg* is the landmark case regarding visitation restrictions, in that this Court unanimously articulated the clear requirement that restrictions on the presence of others be justified by evidence of harm, that basic principle was not unknown in Georgia law prior to that, as the *R.E.W.* case demonstrates.

record to justify such a restrictive provision.") (cited with approval in *R.E.W.*, *supra,* 220 Ga.App. at 863). In *Gallo v. Gallo*, the Connecticut Supreme Court upheld the portion of a provision restricting the location where overnight visitation could occur that was directed at the specific woman with whom the father had been cohabitating, based on the child's resulting emotional and academic difficulties. *Gallo v. Gallo*, 184 Conn. 36, 45, 440 A.2d 782, 787 (1981). However, the court held the provision to be "overly broad in its application to any place 'where the defendant is living with another woman without the benefit of wedlock.'" *Id.* The court held that the restriction could be only so broad as the harm about which evidence was presented. *Id.* ("The testimony before the trial court concerned only the woman with whom the defendant was cohabiting at the time of the hearing. Thus there is no basis in the evidence for the trial court to extend the restriction to any other woman.").

A Pennsylvania appellate court, in reversing a trial court order premised on societal rejection of a mother's interracial relationship, proclaimed that "[a] court must never *yield* to prejudice because it cannot *prevent* prejudice." *In re Custody of Temos*, 304 Pa. Super. 82, 100, 450 A.2d 111, 120 (Super. Ct. 1982). A decade later, the same court repeated those words in striking down a visitation restriction against the presence of

the mother's lesbian partner. *Blew v. Verta,* 420 Pa.Super. 528, 536-537, 617 A.2d 31, 35-36 (Super. Ct. 1992).

The principle of refusing to accede to a private bias applies with perhaps greatest force when the person who has the reaction is a child -- who should be guided as to proper values by parents and the courts. The restriction at issue would cause the father to plan his visitation to avoid certain friends, and, in the inevitable situation where a chance encounter occurs, to make the interaction as perfunctory as possible. As the *R.E.W.* court recognized, a child often picks up on such machinations. 220 Ga.App. at 864. ("[W]e agree with the father that continued restricted visitation will probably raise more questions than the alternative in the mind of this very bright child who will undoubtedly begin to question the restricted nature of her relationship with her father."). In a situation where the children would benefit by coming to terms emotionally with their father's orientation as soon as possible, it is difficult to conceive of a more harmful provision than one that treats all gay people as pariahs.

Indeed, the trial judge spoke eloquently at the trial, expressing understanding for the emotions of the mother and children at coming to terms with the father's orientation, while stressing that they would reconcile eventually with this reality, and that it was in their best interest to do so as

soon as possible. Trial Transcript Day 2, p. 37 *et seq*. As one court has aptly noted, in overturning a visitation restriction on exposure to a parent's sexual orientation:

> Courts ought not to impose restrictions which unnecessarily shield children from the true nature of their parents unless it can be shown that some detrimental impact will flow from the specific behavior of the parent. The process of children's maturation requires that they view and evaluate their parents in the bright light of reality. ... In Nicholas' case, one of life's realities is that one of his parents is homosexual. In the absence of evidence that the homosexuality in some way harms the boy, limiting Nicholas' relationship with that parent fails to permit him to confront his life situation, however unconventional it may be.... Nicholas' best interest is served by exposing him to reality and not fostering in him shame or abhorrence for his mother's nontraditional commitment.

Blew, *supra*, 420 Pa. Super. at 537-538, 617 A.2d at 35-36 (citations omitted); *see also R.E.W.*, *supra*, 220 Ga.App. at 863 (citing the likely suspicion of the child about "the restricted nature of her relationship with her father"); *Conkel v. Conkel*, 31 Ohio App. 3d. 169, 173, 509 N.E.2d 983, 987 (App. Ct. 1987) (stating "[t]he children will have to come to terms with the fact that their father is homosexual") (cited with approval in *R.E.W.*, 220 Ga. App. at 864); *M.P. v. S.P.*, 169 N.J.Super. 425, 436, 404 A.2d 1256, 1262 (Super. Ct. App. Div. 1979) (declaring "[h]ard facts must be faced.... [T]here is little to gain by creating an artificial world where the children may dream that life is different than it is.").

IV. WHILE THIS COURT NEED NOT REACH THE ISSUE, THE RESTRICTION ON THE PRESENCE OF ANY GAY PERSON IS UNCONSTITUTIONAL.

While this Court need not reach a constitutional question if the appeal can be decided upon other grounds, *see, e.g. Martin v. State*, 284 Ga. 504, 505, 668 S.E.2d 685, 687 (2008), it is worth noting that a court risks violating constitutional principles of due process and equal protection where it imposes a blanket restriction based solely on a characteristic and/or classification where there is no evidence that exposure to the members of the class would be detrimental to a child. In such a circumstance, as was the case in *Romer v. Evans*, the classification can be explained only by animus and would fail rational-basis scrutiny. 517 U.S. 620, 632, 116 S.Ct. 1620, 1627 (1996) (striking constitutional amendment prohibiting protections against discrimination based on sexual orientation because the law "seems inexplicable by anything but animus toward the class it affects; it [therefore] lacks a rational relationship to legitimate state interests.").

As set out above, *Turman* held that a visitation provision forbidding the child to be in the presence of African-American men to be "in violation of the Equal Protection Clause of the state and federal constitutions," citing *Palmore v. Sidoti, supra,* which invalidated a change of custody based on the mother's interracial cohabitation. While both *Turman* and *Palmore* involved

offensive racial classifications, which would implicate strict scrutiny, both are instructive here. In *Turman*, the court never mentions a level of scrutiny, and indeed it could not be contended seriously that restricting the child from the presence of any African-American male would pass any level of scrutiny. One year after *Palmore*, the Court applied that precedent in a case involving a *rational basis* classification to hold that societal biases against mentally disabled people cannot be the basis of the state's decisions. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–49, 105 S.Ct. 3249, 3258-59 (1985); *see also Romer v. Evans,* 517 U.S. 620, 635, 116 S.Ct. 1620, 1628-29 (1996) (holding that the private moral views of landlords and others did not supply a rational basis for treating gay and lesbian people unequally). Many courts have held that *Palmore* prevents the consideration of societal disapproval of homosexuality in family law and relationship matters. *Jacoby v. Jacoby*, 763 So.2d 410, 413 (Fla. Dist. Ct. App. 2000); *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985); *Inscoe v. Inscoe*, 121 Ohio App.3d 396, 416, 700 N.E.2d 70, 83 (Ct. App. 1997); *Conkel v. Conkel*, 31 Ohio App.3d 169, 173, 509 N.E.2d 983, 987 (Ct. App. 1987); *M.A.B. v. R.B.*, 134 Misc.2d 317, 324, 510 N.Y.S.2d 960, 964 (Sup. Ct. 1986); *See also McGriff v. McGriff*, 140 Idaho 642, 648, 99 P.3d 111, 117 (2004); *Campbell v. Sundquist*, 926 S.W.2d 250, 263 (Tenn. Ct. App. 1996).

The restriction also violates the father's constitutional right to "direct the upbringing and education of [his] children," which includes making decisions regarding with whom their children associate. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000) (invalidating court-ordered visitation with grandparents over parent's objection). Thus, the government and its courts must give deference to the judgment of a parent who has not been judged unfit. *Id.*, at 69-70. A court may not simply substitute its own judgment about what is best for a child. *Id.*, at 72-73. Because a parent has a fundamental right to the care, custody and management of his or her child, which right has been repeatedly acknowledged and upheld by the United States Supreme Court,[8] restrictions on exercising visitation may not be based on notions of morality where no harm has or can be shown.

The courts also must be mindful that it is presumptively in the best interest of children to have maximum opportunity to develop a close and loving relationship with each parent, and must refrain from improperly interfering with a parent's right to intimate association. In *Lawrence v. Texas*, the Supreme Court recognized that gay people have the right to form

[8] *See e.g., Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208 (1972)(discussing the right of parents to raise their children); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944)(observing that "the custody, care, and nurture of the child reside first in the parents"); *Skinner v. Oklahoma,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942)(stating the right to rear a child is encompassed within a parent's "basic civil rights").

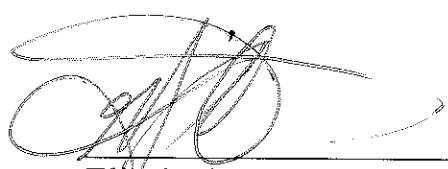
intimate relationships just as heterosexuals do. 539 U.S. 558, 567, 123 S.Ct. 2472, 2478 (2003) (recognizing that sexual intimacy for gay people, like heterosexuals, is "but one element in a personal bond that is more enduring."). Thus, this "right to liberty under the Due Process Clause gives [gay people] the full right to engage in their conduct without intervention of the government," *id.* at 578, and a court order that a parent may never introduce their children to their committed life partner based on that partner's sexual orientation would infringe upon the parent's constitutionally protected right to form and maintain an intimate relationship. Intrusion on that right could only be justified by a showing that the partner's presence is harmful to the child (or by showing some other compelling government interest). Here, there is no such showing.

CONCLUSION

For all of the foregoing reasons, the sweeping anti-gay visitation restriction imposed here simply cannot stand under constitutional principles or current, and well-reasoned, Georgia law and should be stricken.

This the 17th day of February, 2009.

Respectfully submitted,



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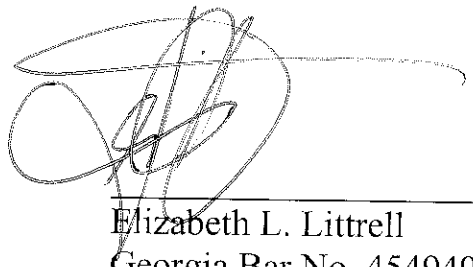
IN THE SUPREME COURT

STATE OF GEORGIA

ERIC DUANE MONGERSON, Appellant, v. SANDY KAY EHLERS MONGERSON, Appellee.	)	APPEAL NO. S09F0132

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of February, 2009, a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL EDUCATION AND DEFENSE FUND was served by United States Mail, postage prepaid, upon Lance P. McMillian, *Counsel for Appellee*, Atlanta's John Marshall Law School, P.O. Box 282, Tyrone, GA 30290 and on Kimberli J. Reagin, Hannibal F. Heredia, *Counsel for Appellant*, Hedgepeth & Heredia, L.L.C., Buckhead Centre, 2964 Peachtree Road, Suite 450, Atlanta, GA 30305.



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