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T A S K F O R C E

TESTIMONY ON THE NOMINATION OF
JUDGE DAVID SOUTER

Senate Judiciary Committee
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by
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Washington, D.C.

Mr. Chairman, members of the committee, my name is Urvashi Vaid and I am executive director of the National Gay & Lesbian Task Force. On behalf of millions of gay and lesbian Americans, I want to thank you for this opportunity to testify in opposition to the nomination of Judge David Souter to the U.S. Supreme Court. Founded in 1973, the National Gay & Lesbian Task Force is a membership organization whose mission is to educate, organize and advocate for full equality for the 10 percent of the American population that is lesbian and gay.

The gay and lesbian community seeks from a Supreme Court nominee nothing more or less than other Americans: we seek a nominee committed to the concept that the rights embodied in the Constitution are meant to be inclusive of all Americans.

Unfortunately, in recent years, the Supreme Court has taken an increasingly restrictive view of the Constitution's reach in protecting minorities. The Court today fails to countenance the claims of gay and lesbian Americans who seek basic equal rights which most Americans take for granted. The gay and lesbian plaintiffs who come before the Court bring stories of stark and unjust discrimination. They petition for justice, for freedom from unwarranted governmental intrusion into private, consensual adult sexual expression, for equal protection, due process, freedom of association, freedom of expression, privacy, and for the basic constitutional freedoms guaranteed to all other Americans.

Perhaps the most poignant question of constitutional equal protection the Court will confront in the near future involves the long-standing efforts of gay and lesbian veterans and members of the U.S. Armed Forces to end the unjust policy banning openly gay and lesbian people from serving our country. These courageous men and women are even today stationed on the front lines in the Middle East, yet they are hunted like criminals at their home bases; persecuted by their own country because an outdated and needless ban on service by gay and lesbian Americans forbids us from contributing our valor and talent.

With this backdrop of interests and concerns, we have considered Judge Souter's record in the hope of finding comfort that his definition of American society and the Constitution is inclusive and unbiased. We have listened expectantly to his testimony this past week to glean hope that the Constitutional rights of gay and lesbian Americans will be honored by the nominee. And we have come to the painful conclusion that Judge Souter's record indicates that his confirmation by this body will not only continue the shameful denial of equal justice under which gay and lesbian Americans live, but will do great harm by tilting the Court to the right in critical areas of civil rights and privacy.

In our written submission to this committee, we have addressed our concerns about privacy rights, and the impact of this nomination on the future Court's reconsideration of the anti-gay, Bowers v. Hardwick Georgia sodomy law decision. Hardwick constricted the freedom from inappropriate government regulation of private sexual and reproductive decisions which all Americans cherish.

Also in our written submission to this committee, we have drawn your attention to a New Hampshire case which gravely, and we believe unconstitutionally, restricted opportunities to qualified gay and lesbian applicants seeking to become parents through adoption or foster care. We have submitted for the record an analysis of the legal status of lesbian and gay families today

prepared by highly respected author and attorney, Roberta Achtenberg.

I want to focus my testimony today on the New Hampshire case in which Judge Souter, sadly, joined a majority in denying constitutional due process to gay and lesbian residents of the state of New Hampshire by upholding a law that barred gay and lesbian applicants from adopting or foster parenting in all circumstances. The case was entitled Opinion of the Justices, 525 A.2d 1095 (N.H. 1987).

In 1987, the New Hampshire legislature sought an advisory opinion from the state supreme court on the constitutionality of a bill that would have banned all lesbian and gay applicants from becoming adoptive or foster parents and from operating child care agencies. The majority of the state court, of which Judge Souter was a part, held that the exclusion of all gay and lesbian prospective parents from foster parentage and adoption programs was a reasonable legislative response to the bill's stated concern of providing "appropriate role models for children." Id., at 1099. While the Court struck down the portion of the law that would have forbidden gay or lesbian persons from operating child care agencies, the proposed ban on parenting options was subsequently passed by the legislature.

As dissenting Judge Batchelder noted, the majority opinion was reached despite the fact that there was no evidence in the record to support it. Indeed, there was evidence in the record which contradicted the majority's conclusion.

We are deeply concerned that Judge Souter participated in a holding based on no substantial record, but on prejudicial and stereotyped myths about gay men and lesbians. Significant court precedent from other jurisdictions in custody cases and other parenting cases involving foster care and adoption exists to challenge the legal reasoning and holding in the New Hampshire Supreme Court case.

In addition, Judge Souter's participation in a holding not based on the record leaves us uncomfortable with his repeated assertions during his testimony before this committee, assertions that he would be an open-minded judge, who will listen to both sides before he acts, and who will base his decisions on the facts and not on his personal views.

Finally, Judge Souter and the majority's holding in the case denied constitutional due process to gay and lesbian plaintiffs by upholding a law whose sole standard for allowing access to adoption or foster care rights was the applicant's sexual orientation.

The next two decades will witness the continued advancement towards equality of lesbian and gay Americans. We believe that we and all Americans will benefit from a Supreme Court committed to just and equitable application of basic Constitutional principle, a Court committed to extending the reach of the Constitution to encompass all segments of society.

In light of the record we have presented for you in our testimony, and in the absence of convincing evidence that he will equitably apply constitutional principles to gay and lesbian plaintiffs and respondents he would encounter as a Supreme Court justice, we respectfully urge you to vote against Judge Souter's confirmation.

Thank you for your consideration.