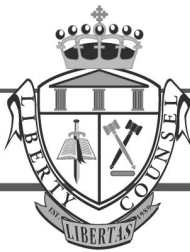


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Reply to: Florida

February 9, 2009

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RE: Board of Governors Vote Approving Amicus Curiae Brief To Support Invalidation of Florida Stat. §63.042(3).

Gentlemen:

As the Founder and Chairman of Liberty Counsel, I am writing to you on behalf of myself, the Florida Bar members of our public interest law firm listed below, and the many Florida Bar affiliate attorneys of Liberty Counsel. Speaking on behalf of these many attorneys, we were shocked by the actions of the Board of Governors' vote approving the Family Law Section's request to file an amicus brief supporting the invalidation of Florida Stat. §63.042(3), which excludes practicing homosexuals from adopting Florida's children. This action by the Board of Governors violates our First Amendment rights and the First Amendment rights of hundreds of other bar members, and we ask that the Board immediately rescind the action.

As you are no doubt aware, the United States Supreme Court has determined that mandatory integrated bars, such as the Florida Bar, cannot use members' dues to support ideological causes which are not germane to the goals of regulating the legal profession and improving the quality of legal services. *Keller v. State Bar of California* 496 U.S. 1, 15-16 (1990). We understand that Board members have attempted to justify their action under *Keller* by maintaining that the vote was not to directly support invalidation of the statute but to permit a voluntary section of the Bar to support invalidation. We understand that Board

members have stated after the fact that no members' dues will be used to prepare the brief and that the sponsor of the brief will be the Family Law Section, a voluntary organization, instead of the integrated bar. This is a distinction without a constitutional difference.

First, members' dues are expended in conducting Board of Governors' meetings, paying expenses, and for administrative functions, all of which were incurred as part of the recent vote. Therefore, the assertion that no members' dues are being expended on this endeavor is untrue.

Second, the general public will not discern the difference between the Family Law Section sponsoring a brief with the state bar's blessing and the state bar sponsoring the brief. Instead, they will understand that the Florida Bar, of which all of us are members, is supporting invalidation of a law that has wide public support. Liberty Counsel's clients, constituents and supporters, who depend upon us to defend their values in the public square, will not understand the alleged subtle difference between a section of the state bar and the state bar, but will believe that we are part of an organization that has taken a stand diametrically opposed to the values that they and we hold and that they expect us to uphold. This is clearly a violation of the spirit, if not the letter, of *Keller*.

Furthermore, if, as Board members assert, the Family Law Section is a wholly distinct, voluntary association, then it is not necessary for it to seek the Board's blessing on its proposal. If it is necessary for the section to seek the Board's approval, then they are not a wholly distinct, voluntary association. In addition, to the extent that the Board views the section's proposal as being within the section's mission, that is also incorrect. Article I, §2 of the by-laws for the section set forth its purposes, which include providing a forum for the exchange of ideas, establishing methods for more efficient administration of family law cases, encouraging consideration of the needs of children in court proceedings, fostering a high standard of ethical conduct, and preparing educational programs. The by-laws mention advising the *Legislature* about proposed changes in the substantive law but do not provide for advocacy for judicial invalidation of legislation, which a subset of the Bar's membership does not like. Wholly absent from the by-laws are any provisions that permit advocacy and advancement of ideological causes. Consequently, the preparation of this amicus brief is wholly outside of the permitted activities for the Family Law Section, and it was inappropriate for the Board of Governors to approve the request.

This action by the Florida Bar is completely out of step with the member attorneys it represents and with the vast majority of Floridians. On November 4, 2008, the people of Florida amended the state Constitution by passing the Florida Marriage Protection Amendment (also known as Amendment 2) by a majority of 62.5 percent. Implicit in the passage of this amendment is the affirmation of the traditional family unit comprised of a mother and a father. This same core value is encompassed in the Florida law that prohibits adoption by those activity engaged in homosexual activity. Permitting homosexual adoption is contrary to the values affirmed in the Florida Marriage Protection Amendment. Homosexual adoption would establish a public policy that children do not need mothers and fathers. Homosexual adoption permanently precludes a child from having a mother or a father. Homosexual adoption is nothing less than a policy which says that moms and dads are expendable. The majority of Floridians rejected this proposition by passing the Florida Marriage Protection Amendment. It is irresponsible for the Florida Bar to inject itself

in the midst of this political debate.

The undersigned personally drafted the Florida Marriage Protection Amendment and successfully argued on behalf of that amendment before the Florida Supreme Court. See *Advisory Opinion to Attorney General re: Florida Marriage Protection Amendment*, 926 So.2d 1229 (Fla. 2006). The undersigned also filed a brief in support of the same law which is now being challenged and which was upheld by the Eleventh Circuit Court of Appeals. See *Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) *cert denied* 543 U.S. 1081 (2005) (upholding Fla. Stat. §63.042(3) which prohibits adoption by those actively engaged in homosexual activity). Moreover, the undersigned, through Liberty Counsel, will be filing an amicus brief in support of the same Florida law which the Florida Bar recently voted to oppose. As a mandatory bar association, the action by the Florida Bar has made it an adversary of the members it represents. This action has placed the members of the Florida Bar in a very uncomfortable position. When this same issue arose while the *Lofton* case was appealed to the Eleventh Circuit Court of Appeals, the former members of the Board of Governors took the right course of action by agreeing not to enter this political arena because of the conflicts it would create with its members. That was the right decision then, and this recent vote is the wrong decision now. The First Amendment demands that the Florida Bar respect all of its members and thus refrain from entering into this controversial arena.

The Board of Governors' vote was an impermissible attempt to circumvent *Keller* in order to pursue a divisive political agenda. The Florida Bar should attend itself to only matters that are of general concern and need for Florida attorneys. The Florida Bar has no business injecting itself into these controversial and politically divisive topics. The action violates our First Amendment rights, and we request that the Board rescind its action. We want peace with the Florida Bar and do not want to be placed in an adversarial position. However, we are serious about our First Amendment rights and the proper role of the Bar in respecting those rights. We therefore ask that the Board of Governors immediately rescind its vote and remove the Florida Bar from this political issue. Since the upcoming dates for the filing of amicus briefs is fast approaching, we expect the Florida Bar to rescind its vote and refrain from taking sides in this issue. We look forward to hearing from the Florida Bar prior to the time the amicus brief is due.

A handwritten signature in black ink, appearing to read "Mathew D. Staver". The signature is written in a cursive style with a large, sweeping initial "M".

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Anita L. Staver #0611131  
Mary E. McAlister #0010168  
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cc: Board members of the Florida Bar