No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS
Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Texas
Fourteenth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of the laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

PARTIES

Petitioners are John Geddes Lawrence and Tyron Garner. Respondent is the State of Texas.

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In this case, the full power of the criminal law was brought to bear against Petitioners John Lawrence and Tyron Garner, who were arrested, held in custody, convicted, and punished for engaging in consensual sexual intimacy in the privacy of one of their homes. Texas's "Homosexual Conduct" law targets gay and lesbian couples while leaving heterosexual couples free to engage in the very same acts. The Texas statute invades consensual, adult intimacy that is an integral part of forming and nurturing long-term relationships; it pries into the home; and it regulates at the uniquely intrusive level of how chosen partners physically express their affections for one another. Petitioners challenge the Texas statute and their convictions under the rights to equal protection and to privacy and liberty guaranteed by the United States Constitution.

OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' orders refusing discretionary review are unreported. App. 1a, 2a. The decision of the *en banc* Court of Appeals for the Fourteenth District of Texas is reported at 41 S.W.3d 349. App. 4a. The court's prior panel opinion is unreported. App. 80a. The judgments entered by the Harris County Criminal Court are unreported. App. 107a, 109a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2001. App. 3a. On April 17, 2002, the Texas Court of Criminal Appeals denied a timely consolidated petition for discretionary review. App. 1a, 2a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The Homosexual Conduct Law

Texas law criminalizes private consensual adult sexual conduct when engaged in by same-sex couples, but not identical conduct by different-sex couples. The Texas Penal Code defines certain conduct, including oral and anal sex, as "deviate sexual intercourse," *without* regard to whether the actors are of the same or different sexes. *See* Tex. Pen. Code § 21.01(1); *C.M. v. State*, 680 S.W.2d 53, 56 (Tex. App. – Austin 1984, no writ). The Code makes "deviate sexual intercourse" a crime, for all, when it occurs in public. Tex. Pen. Code § 21.07(a)(2). The Code also criminalizes sexual conduct, for all, whenever it is without consent, *id.* § 22.011(a)(1), in exchange for money, *id.* § 43.02, or with a minor, *id.* §§ 22.011(a)(2), 21.11. But in addition to those crimes, the

Texas Penal Code creates a separate offense, called "Homosexual Conduct," that consists simply of engaging in so-called "deviate sexual intercourse" with another person of the same sex. *Id.* § 21.06 (the "Homosexual Conduct Law" or "Section 21.06"). Thus, the Homosexual Conduct Law criminalizes private, adult, consensual sexual conduct for same-sex couples only, but not identical conduct by different-sex couples.[1]

Because it singles out same-sex couples, this law is unlike the typical common law prohibition on "sodomy," and differs fundamentally from the Georgia law considered by the Court in *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986).[2] The evolution of Texas law illustrates this unusual quality. In 1860, Texas adopted a law prohibiting anal sodomy for all persons. 1860 Tex. Crim. Stat. art. 342. In 1943, the State added a general proscription against oral sex to the statute. 1943 Tex. Sess. Law Serv. ch. 112, § 1 (Vernon). In the early 1970s, however, the general law focusing on these acts was repealed and the present law, narrowed to cover only certain persons, was adopted. 1973 Tex. Gen. Laws ch. 399, § 1.

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[1] The behaviors labeled "deviate sexual intercourse" by Texas are widely practiced by different-sex as well as same-sex couples. *See, e.g.* Edward O. Laumann *et al.*, *The Social Organization of Sexuality* 98-99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex, and 26% of all men and 20% of all women had engaged in anal sex).

[2] When the Fourteenth Amendment was ratified, only three of the 37 States had sodomy laws limited to male-male couples, and none had laws that targeted all same-sex couples but exempted different-sex couples. Most of the other States had sodomy laws that applied generally. Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1082-84 (1998).

As an increasing number of States abandoned sodomy offenses that applied to all, a few in the 1970s and 1980s enacted new statutes that specifically targeted homosexual couples. Most States that adopted such laws, however, have already abandoned them. *See infra* note 26. Today, in addition to Texas, only Kansas has an explicitly same-sex-only sodomy law in full force and effect, Kan. Stat. Ann. § 21-3505(a)(1); Missouri enforces such a statute in part of that State, *see* Mo. Rev. Stat. § 566.090;[3] and Oklahoma's general sodomy statute has been judicially construed to exclude heterosexual consensual behavior, *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986); Okla. Stat. tit. 21, § 886. Nine other States retain criminal laws that bar consensual sodomy for all.[4]

In earlier civil litigation, a Texas intermediate court struck down the State's Homosexual Conduct Law as unconstitutional. *State v. Morales*, 826 S.W.2d 201 (Tex. App.-Austin 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994). The Texas Supreme Court subsequently held, however, that the constitutionality of the law could not be decided in a civil declaratory judgment action. It ruled that constitutional review should occur in the context of a criminal prosecution, with final review in the Texas Court of Criminal Appeals. 869 S.W.2d at 943-47. In the present case, however, the latter court refused

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[3] One state court of appeals in Missouri has construed that State's same-sex-only law not to apply to consensual behavior, *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999), but prosecutions still occur elsewhere in the State, *see Six Men Charged Under Rarely Used Homosexual Intercourse Law*, Assoc. Press Newswires, Mar. 30, 2002.

[4] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

to exercise its jurisdiction to review the law, App. 1a, 2a, leaving its uniquely intrusive burdens in effect throughout Texas.

B. Petitioners' Arrests, Convictions, and Appeals

Late in the evening of September 17, 1998, sheriff's officers entered the private home of Petitioner Lawrence while investigating a false report of a "weapons disturbance." App. 129a, 141a; Clerk's Record in *State v. Lawrence*, at 6 ("C.R.L."); Clerk's Record in *State v. Garner*, at 6 ("C.R.G.").[5] There, they intruded on Lawrence and Garner having sex. App. 129a, 141a. The officers arrested Petitioners, and they were not released until a day later. *See* C.R.L. 3; C.R.G. 3.

The State charged Petitioners with violating Section 21.06. The sole facts alleged by the State to make out a violation were that each Petitioner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. 127a, 139a. The State did not allege that the sexual conduct was public, violent or non-consensual, with a minor, or in exchange for money. App. 127a, 129a, 139a, 141a. The charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home. *Id.*

After proceedings and initial convictions in the Justice of the Peace Court, Petitioners appealed for a trial *de novo* to the Harris County Criminal Court. C.R.L. 15; C.R.G. 12. They filed motions to quash the charges on the ground that the law is unconstitutional on its face and as applied to their "consensual, adult, private sexual relations with another person of the same

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[5] The person who called in the report later admitted his allegations were false and was convicted of filing a false report. *See* R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, Hous. Chron., Nov. 6, 1998, at 1A.

sex." App. 118a, 131a. Petitioners each contended that the Homosexual Conduct Law violates their "right to equal protection under the Equal Protection Clause of the Fourteenth Amendment," including by discriminating on the basis of sexual orientation. App. 117a, 119a-120a, 130a, 132a-133a. Petitioners also argued that the law violates the federal constitutional rights to privacy and due process, invoking the Bill of Rights generally, and the First, Fourth, Fifth, Ninth and Fourteenth Amendments specifically, and contending that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided. App. 117a, 121a-122a, 130a, 134a-135a.[6]

On December 22, 1998, the court denied the motions to quash. App. 113a. Lawrence and Garner then pled *nolo contendere*. App. 114a. The Court accepted the pleas after the State's recitation of prima facie facts taken only from its complaints, found both men guilty, and imposed on each $200 in fines and $141.25 in court costs. App. 107a-108a, 109a-110a, 116a.

In consolidated appeals to the Texas Court of Appeals, Lawrence and Garner continued all their federal challenges.[7] They argued that Section 21.06 impermissibly classifies between citizens "[u]nder any characterization of the classification." In particular, they urged that the law discriminates on the basis of sexual orientation without a sufficient justification. Amended

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[6] In addition, Lawrence and Garner raised state constitutional privacy and equal protection claims.

[7] Under the Texas Code of Criminal Procedure, a defendant entering a plea of *nolo contendere* has a right to appeal any issue raised in a written motion filed prior to trial. Tex. Code Crim. P. § 44.02; *Morgan v. State*, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985) ("the Legislature surely contemplated a meaningful appeal – one that addresses and decides each issue on its merits").

Brief of Appellants John Geddes Lawrence and Tyron Garner 4, 5, 6-17 ("Am. Br."); Additional Brief of Appellants 1 n.1, 14-22 ("Add'l Br."); Petition for Discretionary Review 7-13 ("Pet. Disc. Rev."). They continued to argue that under the federal Constitution the statute "invades the privacy rights of Mr. Garner and Mr. Lawrence by enabling the government to punish them for engaging in sexual relations in the privacy of Mr. Lawrence's home," and to preserve their contention that *Bowers* was wrongly decided. Am. Br. 5, 23-26; Add'l Br. 23 n.20; Pet. Disc. Rev. 16-19.

At oral argument in the appellate court, the State conceded that there is no compelling government justification for Section 21.06. App. 76a (Anderson, J., dissenting) (state counsel "could not 'even see how he could begin to frame an argument that there was a compelling State interest,' much less demonstrate that interest for [the] Court"). Texas repeatedly has identified its only aims as "enforcement of principles of morality and the promotion of family values." *See, e.g.*, State's Brief in Support of Rehearing En Banc 16.

On June 8, 2000, a panel of the Court of Appeals reversed Petitioners' convictions under the Texas Equal Rights Amendment, holding that Section 21.06 discriminates on the basis of sex. App. 86a-92a. The State moved for rehearing *en banc*, which was granted. On March 15, 2001, the *en banc* Court of Appeals reinstated Petitioners' convictions. App. 3a, 4a. Citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), the court rejected Petitioners' federal privacy claim. App. 24a-31a. As to the federal equal protection claim, the court held that the statute was subject to and survived rational basis review, because it "advances a legitimate state interest, namely, preserving public morals." App. 13a. The court distinguished *Romer v. Evans*, 517 U.S. 620 (1996),

as limited to discrimination in the right to seek legislation. App. 14a-15a.

Two Justices of the appellate court "strongly" dissented from the rejection of Petitioners' federal equal protection arguments. App. 42a. The dissent reasoned that:

> where the same conduct, defined as "deviate sexual intercourse[,]" is criminalized for same sex participants but not for heterosexuals[,] [t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict.

App. 44a.

On April 13, 2001, Petitioners filed their Petition for Discretionary Review with the Texas Court of Criminal Appeals. On April 17, 2002, that court refused review. App. 1a, 2a.

REASONS FOR GRANTING THE WRIT

The Texas Homosexual Conduct Law has made Petitioners Lawrence and Garner convicted criminals based solely on their private sexual activity in Lawrence's home. By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. That discriminatory criminalization tears at gay relationships and stigmatizes loving behavior that others can engage in without the brand of "lawbreaker." The law sends a powerful signal from the State condemning homosexuals. Not surprisingly, then, it is also used to justify discrimination against gay men and lesbians in parenting, employment, access to civil rights laws, and many other aspects of everyday life. This Court

should grant review because the direct and indirect harms imposed by this law and others like it are a glaring affront to the Constitution's guarantee of equal protection.

Much of the reason these laws and harms persist is traceable to the Court's reasoning in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which is in tension with the Court's equal protection jurisprudence, including *Romer v. Evans*, 517 U.S. 620 (1996). Only this Court can step in to make clear that its due process analysis of Georgia's general sodomy statute in *Bowers* does not, despite that decision's focus on "homosexual sodomy," endorse the validity of same-sex-only bans on consensual sexual intimacy under the Equal Protection Clause. As a matter of equal protection, bare condemnation of one group of people – whether termed a moral judgment, a value judgment, or simple dislike – cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny. This equal protection question is separate and independent from the privacy claim also urged here, and confusion in equal protection law independently warrants the Court's intervention.

The time has come, too, for reconsideration of *Bowers*. In the sixteen years since that decision, legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home. That decision should be reversed, for Petitioners as for their gay and non-gay fellow citizens. Since 1986, this Court has employed substantive due process analyses that are less rigidly determined by history and has articulated strong spatial privacy values, particularly in the home. In the same period, more and more States have followed the American tradition that bars government from intruding into couples' consensual sexual and emotional

intimacies in the bedroom, so that now three-fourths of the States have rejected both same-sex-only and general sodomy laws. *Infra* at 24 & note 26. Finally, both law and society now widely recognize the connection between same-sex intimacy and committed relationships, families with children, and households fundamentally like those inhabited by heterosexuals. The Court should take this opportunity to address and protect Petitioners' fundamental rights of privacy and liberty.

I. Whether Equal Protection Permits a State To Impose Wide-Ranging Harms on Gay People by Criminalizing Their Intimate Conduct, While Leaving Others Free To Engage in the Same Conduct, Is a Question of Critical Importance.

There is a compelling need for the Court to take this opportunity to address whether a State may criminalize particular sexual acts only when practiced by same-sex couples. Texas's discriminatory law not only exposes gay couples to prosecution, but also encourages and is used to justify many other forms of inequality against lesbians and gay men. The Homosexual Conduct Law's direct and indirect consequences are contrary to the Constitution's "commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623.

A. The Homosexual Conduct Law and Other Laws Like It Brand Gay People as Second-Class Citizens and Are Used To Justify Further Discrimination.

The law at issue here causes grave harms to those who are prosecuted and to all other gay and lesbian Texans. Lawrence and Garner are now convicted criminals because of who they are, not because of what they were doing in Lawrence's home when the police intruded. Only same-sex couples can run afoul of the Homosexual Conduct Law, which – true to its name – uses

the definition of a gay sexual orientation to trigger illegality. A homosexual is a person who seeks sexual intimacy with a partner of the same sex.[8] The Homosexual Conduct Law flatly forbids lesbians and gay men from engaging in basic forms of sexual expression that are open to and wholly legal for heterosexuals.

Thus, as the Kentucky Supreme Court observed in striking down that State's discriminatory sodomy law, "[s]exual preference, and not the act committed, determines criminality, and is being punished." *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992); *see also State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002) (where a law punishes same-sex couples much more harshly than "members of the opposite sex," "the argument that it is not aimed at homosexuals cannot be made with a straight face").[9] *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews").

The "special disability" imposed on lesbians and gay men by the Homosexual Conduct Law has "severe consequence[s]," *Romer*, 517 U.S. at 629, 631. First, based on nothing more than the identity of their chosen partners in private sexual relations,

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[8] *See, e.g.*, John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications for Public Policy* 1 (Gonsiorek & Weinrich eds., 1991) ("*sexual orientation* is erotic and/or affectional disposition to the same and/or opposite sex"); *Webster's Ninth New Collegiate Dictionary* 579, 568 (Merriam-Wesbster Inc. 1991) ("homosexual" is one who "direct[s] sexual desire toward another of the same sex"; "heterosexual" is one who "direct[s] sexual desire toward the opposite sex"). For gay and lesbian people, just as for heterosexuals, adult relationships typically include sexual, emotional, intellectual, and familial aspects. Yet, *sexual* orientation, at its base, focuses on the orientation of one's sexual attraction – to a person of the same or of a different sex.

[9] Petitioners have lodged copies of *Limon* with the Clerk of the Court.

Lawrence and Garner were arrested and held in custody for more than a day – a humiliating invasion of personal dignity. "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief.... And once the period of custody is over, the fact of the arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting).[10]

Petitioners now each have a criminal conviction for private consensual sexuality. This "finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties." *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002).

Moreover, "[t]he Texas courts have held that the crime of homosexual conduct . . . is a crime involving moral turpitude." *In re Longstaff*, 538 F. Supp. 589, 592 (N.D. Tex. 1982) (citation omitted), *aff'd*, 715 F.2d 1439 (5th Cir. 1983). Petitioners' convictions may therefore be used in Texas court proceedings to impeach their character and credibility. *See* Tex. R. Evid. 404(a)(1)(B); Tex. R. Evid. 609(a). The convictions could also enhance a prison sentence if a subsequent federal conviction occurred. *See* U.S. Sentencing Guidelines Manual §§ 4A1.1(c), 4A1.2(c). They disqualify or restrict Lawrence and Garner from practicing dozens of professions in Texas, from physician to

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[10] Although Section 21.06 does not authorize imprisonment as a penalty, prison terms can be imposed in the other states with same-sex-only sodomy prohibitions. *See* Okla. Stat. tit. 21, § 886, *amended by* Okla. Sess. Law Serv. ch 460, § 8 (2002) (ten years); Mo. Rev. Stat. §§ 566.090, 558.011 (one year); Kan. Stat. Ann. §§ 21-3505, 21-4502 (six months).

athletic trainer to bus driver.[11] In four states, Lawrence and Garner are considered sex offenders and would have to register with law enforcement as such.[12]

Even apart from direct criminal enforcement, same-sex-only sodomy prohibitions attach a badge of criminality to intimate same-sex relations. *See Jegley v. Picado*, No. 01-815, __ S.W.3d __, 2002 Ark. LEXIS 401, at *30-*31 (Ark. July 5, 2002)[13] (under same-sex-only sodomy laws, gay and lesbian citizens "suffer the brand of criminal impressed upon them by a[n] . . . unconstitutional law").[14] The Homosexual Conduct Law interferes with more than specific sex acts – it strikes at gay relationships in a deeply harmful manner. For gay adults, as for heterosexual ones, sexual expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive. *See, e.g.*, L. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples*, in *Sexuality in Close Relationships* 177-91 (K. McKinney & S. Sprecher eds. 1991);

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[11] *See, e.g,* Tex. Occ. Code § 451.251(a) (athletic trainer); *id.* § 164.051(a)(2)(B) (physician); *id.* § 301.409(a)(1)(B) (registered nurse); *id.* § 401.453(a) (speech-language pathologist); *id.* § 1053.252(2) (interior designer); *id.* § 2001.102 (bingo licensee); Tex. Educ. Code § 512.022(f) (school bus driver); Tex. Alco. Bev. Code § 11.46(a)(3) (liquor sales).

[12] *See* Idaho Code §§ 18-8301 to 18-8326; La. Rev. Stat. Ann. §§ 15:540-15:549; Miss. Code Ann. §§ 45-33- 21 to 45-33-57; S.C. Code Ann. §§ 23-3-400 to 23-3-490.

[13] Petitioners note that the LEXIS pagination of the *Jegley* decision is non-final and subject to change at the time this Petition is being filed.

[14] In Texas, calling someone a "homosexual" or using epithets that mean the same is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App.–Houston [14th Dist.] 1980, no writ).

C. Leslie, *Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 116-20 (2000).

Same-sex sodomy statutes are also widely cited to uphold additional discrimination without reasoned justification. As the State stipulated in an earlier challenge to Section 21.06, it "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03. This law and similar statutes in other states are routinely invoked to limit the custody or visitation that fit, gay parents would otherwise have with their biological children, without any showing of indiscretion or that the child's best interests are jeopardized. *See, e.g., Jegley*, 2002 Ark. LEXIS 401, at *29 (citing case in which analogous Arkansas law was held relevant factor in denying custody to gay parent).[15] Furthermore, these laws are used to block the adoption of civil rights ordinances that would prohibit sexual orientation discrimination.[16]

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[15] *See also* Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, Hous. Chron., June 27, 1994, at A11 (reporting that common tactic of vilifying gay parents in custody battle is "give[n] . . . teeth by § 21.06"); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (restricting gay father's visitation rights, in part because a "statute of this state declares that deviate sexual intercourse with another person of the same sex is illegal. § 566.090.1"). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws In Civil Litigation*, 79 Tex. L. Rev. 813 (2001).

[16] *See, e.g.*, Dianna Hunt, *Plan to Ban Anti-Gay Bias In Fort Worth Dies*, Dallas Morning News, Jan. 20, 1999, at 32A (local anti-discrimination measure in Texas abandoned after several members of town council expressed desire to wait until status of state's sodomy law has been resolved); *see also* Arthur S. Leonard, Gay/Lesbian Law Notes (Summer 1998) (Kansas sodomy law cited in support of halting Topeka Human Rights Commission from investigating anti-gay discrimination).

To be sure, discrimination against gay and lesbian Americans is also frequently justified by reference to *general* sodomy laws that are *not* limited to same-sex couples. The Court's decision in *Bowers* – unchecked by any equal protection ruling involving sodomy statutes – contributes to this broad harm. *Bowers* described the case before it as being about "homosexual sodomy," *e.g.*, 478 U.S. at 190, even though the Georgia law at issue, and nearly every other sodomy law cited in *Bowers*, applied to specific acts by any and all couples, *see id.* at 200 (Blackmun, J., dissenting). As a result, consensual sodomy laws that, by their terms, apply to all are used uniquely to harm gay men and lesbians in the same range of ways as same-sex-only sodomy statutes. The laws are often cited as a basis for denying gay parents custody of or restricting their visitation with their own children.[17] Courts also have cited general sodomy laws as a ground for denying public employment to gay people, *see, e.g., Shahar v. Bowers*, 114 F.3d 1105, 1104 & n.17 (11th Cir. 1997), and to uphold public employment questionnaires that ask about homosexual conduct, *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (upholding question about homosexual relations "because the *Bowers* decision is controlling," even though "relevance of this type of question to Wall's employment is uncertain"). In the

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[17] *See, e.g., Weigand v. Houghton*, 730 So. 2d 581, 591 (Miss. 1999) (even though sodomy was not unlawful in State where gay father seeking custody lived,"[t]he element of morality must be resolved against [father] because of his homosexual activity which, if committed within this state would constitute felonious conduct"); *Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (affirming imposition of severe visitation restrictions on lesbian mother, reasoning, "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from lesbian mother and giving custody to child's grandmother, concluding, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody").

political sphere, general sodomy laws have been invoked to block protection of gay citizens by state hate-crime legislation.[18] *See generally* Nan D. Hunter, *Life After* Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 542 (1992) (today "sodomy" has become "code word for homosexuality, regardless of statutory definition").

The real, significant, and ongoing harms suffered by Lawrence, Garner, and thousands of others under the Homosexual Conduct Law and similar statutes make this case one of substantial importance. In Texas and other States with a same-sex-only crime, a federal remedy is especially necessary because those States' own high courts – like the Court of Criminal Appeals here – have refused even to consider constitutional challenges to the laws. *See, e.g., City of Topeka v. Movsovitz*, 960 P.2d 267 (Kan. 1998) (table), *denying review of* No. 77,372 (Kan. Ct. App. April 24, 1998) (rejecting constitutional challenge to same-sex-only sodomy law).[19]

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[18] An amendment to include "sexual orientation" in the Utah hate crime bill was defeated after a representative referred to Utah's sodomy law, stating that the "effect of granting special protection under [the hate crime act] to homosexuals would be contradictory under Utah law." *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 222. Similarly, a hate crime bill in North Carolina covering sexual orientation was rejected in 2000 after the House heard testimony about the illegality of sodomy. People for the American Way Foundation, *Hostile Climate: Report on Anti-Gay Activity* 257 (2000).

[19] Petitioners have lodged copies of the Kansas intermediate appellate court's decision in *Movsovitz* with the Clerk of the Court.

B. Under Basic Equal Protection Principles, Bare Disapproval of a Group of People, Whether Couched as "Morality" or Otherwise, Cannot Justify Discriminatory Laws.

The reasoning of the decision below conflicts with core equal protection principles that this Court has recognized in many cases. *See, e.g., Romer v. Evans*, 517 U.S. 620; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). The Texas court reached the wrong result by incorrectly limiting *Romer* to contexts involving "the right to seek legislative protection from discriminatory practices," App. 15a, despite *Romer's* use of the established rational basis test applicable to any legal classification. The Texas court further erred by reading *Bowers* – which expressly declined to address equal protection issues, 478 U.S. at 196 n.8, notwithstanding its references to "homosexual sodomy" – to support the State's "morality" justification for this discriminatory statute. Those errors are not isolated ones. They are spawned by ongoing confusion suggesting that *Bowers* might trump *Romer* in equal protection challenges to laws that discriminate against gay people.[20] The Court should grant *certiorari* both to make clear

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[20] For example, the Kansas courts have upheld a criminal law scheme under which a male defendant was sentenced to imprisonment for more than 17 *years* for sexual conduct involving another male, even though the State's laws impose a maximum penalty (including applicable sentencing enhancements) of only 15 *months* for identical conduct if the other person had been female. *Limon*, slip. op at 5-6. (Copies of the *Limon* opinion have been lodged with the Clerk of the Court). Rejecting the defendant's equal protection challenge, the state court construed *Romer* narrowly, *id.* at 13, and upheld the sentencing disparity based on *Bowers*:

> The impact of *Bowers* on our case is obvious. The United States Supreme Court did not recognize homosexual behavior to be in a protected class requiring strict scrutiny

that *Bowers* does not legitimize laws targeting gay Americans for disfavored treatment and to reaffirm that class-based laws require justification beyond the majority's desire to make one group unequal.

Every instance of legislative line-drawing must at least satisfy the "conventional inquiry" of rational basis review. *Romer*, 517 U.S. at 632. This is true no matter how the classification is framed. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. The only government interest offered by Texas here is a desire to "require adherence to certain widely accepted moral standards" or "family values." State's Appellate Brief 8 ("St. App. Br."). The disparity in treatment serves to condemn same-sex couples based on the majority's disapproval of them, yet leaves different-sex couples – the majority – free to engage in the very same conduct without censure.

This is no independent justification at all. It is just a statement that the legislature wants the criminal law to include this condemnation. If such a rationale, accepted by the court below,

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> of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently . . . .

Id. at 12; *see also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 295, 300 (6th Cir. 1997) ("the salient operative factors which motivated the *Romer* analysis and result were unique to that case"; discrimination against gays and lesbians can be justified as "the expression of community moral disapproval of homosexuality"); *Shahar*, 114 F.3d at 1109-10 & n.25. *But see Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996) ("Of course, *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*").

were sufficient, any discriminatory law could be justified with the statement that the legislature considered it "moral" to disadvantage the targeted group.

As the Court took pains to emphasize in *Romer*, "'[i]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534); *see also id.* at 635 (a State cannot classify "to make [one group of people] unequal to everyone else"); *Cleburne*, 473 U.S. at 448 ("mere negative attitudes . . . unsubstantiated by factors which are properly cognizable [by government], are not permissible bases" for discriminatory legal rules). Whether termed a moral judgment, a value judgment, a negative attitude, or bias, the majority's bare dislike of one group for engaging in consensual intimate behavior common to all kinds of adult couples cannot suffice to support the government's enactment of that kind of discriminatory standard into law. Texas's "reasoning" here is nothing more than a preference for one group of people and animus toward another.

Further, the line drawn in Section 21.06 is irrational and arbitrary. As supreme courts in other States have explained, "the discouragement of what has historically been perceived to constitute immoral behavior," St. App. Br. 8, cannot legitimize imposition of traditional morality only on a minority:

> "[T]he practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized. . . . The issue here is *not* whether sexual activity traditionally viewed as

> immoral can be punished by society, but whether it can be punished *solely on the basis of sexual preference*."

Jegley, 2002 Ark. LEXIS 401, at *55-*56 (emphasis added) (quoting *Wasson*, 842 S.W.2d at 499).

In striking down same-sex-only consensual sodomy laws, state courts have used state constitutional guarantees of equal protection that incorporate the same rational basis standards applied under the Fourteenth Amendment. *See, e.g., id.* at *52-*55 (relying on *Romer*, *Moreno*, and *Cleburne*, as well as Arkansas precedents). Those state high courts – unlike the court below – found no legitimate or rational basis for such laws. As explained by the Kentucky Supreme Court:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform.... We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

Wasson, 848 S.W.2d at 501; *see also Gryczan v. State*, 942 P.2d 113, 127 (Mont. 1997) (Turnage, C.J., concurring in result by applying equal protection guarantees of both Montana and federal constitutions).

The Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose

on you and me." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *accord Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring). Yet, Texas now imposes the extremely intrusive burdens of traditional sexual mores only on same-sex couples, while exempting the heterosexual majority from traditional moral injunctions against the very same acts by them. This the State may not do.[21]

The State's inability to put forth even a rational and legitimate basis is fatal under any level of scrutiny. In addition, the Homosexual Conduct Law should be subjected to a more rigorous test than rational basis review. Gay Americans have historically been the targets of substantial and harmful discrimination by both government and private actors. *See generally* William B. Rubenstein, *Sexual Orientation And The Law* (2d ed.1997). This history and its present manifestations include brutal hate-motivated crimes against gay men and lesbians merely because of their sexual orientation, creating a climate of fear and silence even among many who are not victims. *See* Enhancement Act of 2001, S. Rep. No. 107-147, at 6 (2002). Gay men and lesbians are targeted and grouped together by a characteristic that "bears no relation to [their] ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Moreover, this group's political power has been limited by its size and by discriminatory sentiment in the halls of government, as elsewhere. Some States have responded with anti-

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[21] This is not to say that morality never has a place in informing and justifying legislative enactments. Equal protection limits arise, however, when morality is discriminatory and not even-handed, and when no other legitimate state concern – solely a negative value judgment by the majority – stands behind a law.

discrimination laws, and various hate-crime statutes have also been passed, to ensure that gay citizens, too, receive the equal protection of the laws. But state-sponsored discrimination is far from eradicated, as demonstrated both by the law at issue here and by Colorado's Amendment 2 struck down in *Romer*, to name just two examples. Given this history of discrimination, laws like the Homosexual Conduct Law should be scrutinized with greater skepticism than applies under the rational basis test. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996) (heightened scrutiny appropriate given history of discrimination); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).[22]

II. The Court Should Reconsider *Bowers* and the Critically Important Question Whether Criminalization of Consensual Adult Sexual Intimacy Violates the Rights of Privacy and Due Process.

This case also presents the crucial question whether Texas goes too far by subjecting individuals to criminal penalties for private, adult sexual intimacy. Section 21.06 invades a uniquely intimate realm of personal autonomy, family, and relationships. *See Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 849-51 (1992). Texas here tramples on entrenched expectations of privacy that are central to personal dignity and are deeply valued and broadly shared – even by those who disapprove of the conduct

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[22] In addition, the Homosexual Conduct Law uses a *sex*-based classification to accomplish its discrimination against same-sex couples, as the original panel decision in the court below recognized. App. 86a-92a. Petitioner Lawrence would not be guilty of a criminal offense if Petitioner Garner were a woman rather than a man (and vice versa). Laws that use gender to perpetuate traditional social roles are extraordinarily suspect and may stand only if supported by a "highly persuasive justification." *United States v. Virginia*, 518 U.S. at 531. Even more fundamentally, laws that make criminality turn on gender are repugnant. *Cf. McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

outlawed by the statute. The Court should grant *certiorari* to consider anew whether invasive and arbitrary laws of this sort impinge upon liberty and privacy, in violation of due process.

Bowers, of course, addressed parallel issues in the context of a gay man's declaratory judgment challenge to the Georgia sodomy law, which applied to all persons.[23] But much has changed since *Bowers*. *Cf. Atkins v. Virginia*, 122 S. Ct. 2242, 2243 (2002) ("Much has changed since [*Penry*]").[24] The doctrine of *stare decisis* – never an "inexorable command" and even less so in constitutional cases – should not operate to insulate *Bowers* from reconsideration. *Casey*, 505 U.S. at 854; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). This Court's supremacy means that no other tribunal has the power to reconsider *Bowers*, a case "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of th[e] decision[]," 501 U.S. at 828-29.

Bowers does not have any of the unique qualities of cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), that have become imbedded in our "national culture." *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).[25] To the contrary, *Bowers* is out of

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[23] *See Bowers*, 478 U.S. at 188 n.1. *But cf. id.* at 198 (Powell, J., concurring) (emphasizing understanding of Georgia sodomy law as "moribund" and that "respondent has not been tried, much less convicted and sentenced").

[24] *Atkins* involved the Eighth Amendment, which incorporates evolving standards of decency. Though defined using other standards, fundamental privacy rights are likewise not static. *See infra* at 26-27. The great change described below indicates the minimal weight that *stare decisis* concerns have here.

[25] Nor are there present here any economic or other reliance interests, nor any issues of statutory interpretation, that have led the Court to determine in other contexts that it is more important that the law "be settled than that it be settled right." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

step with the vast majority of the States. At the time of *Bowers*, 24 States plus the District of Columbia still had sodomy laws. 478 U.S. at 194. Since *Bowers*, half of those jurisdictions have repealed their sodomy laws legislatively or invalidated them as contrary to the respective State's constitution, so that today 37 States plus the District of Columbia no longer criminalize adult, consensual sodomy.[26] "The unmistakable trend . . . nationally . . . is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." *Jegley*, 2002 Ark. LEXIS 401, at *66-*67 (Brown, J., concurring). But 13 States, including Texas, still have such laws, necessitating review by this Court. *See supra* at 4 & note 4.

The "consistency of the direction of change," *Atkins*, 122 S. Ct. at 2243, among the States is indicative of a strong national consensus reflecting profound judgments about the limits of government's intrusive powers in a civilized society. To Americans, nothing is more personal and private than sexual

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(quotation marks and citation omitted).

[26] Repeal or invalidation of same-sex-only sodomy laws since *Bowers*: 1993 Nev. Stat. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley*, 2002 Ark. LEXIS 401 (Arkansas); *Wasson*, 842 S.W.2d 487 (Kentucky); *Gryzcan*, 942 P.2d 112 (Montana); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996), *appeal denied* (Tenn. June 10, 1996 and Sept. 9, 1996).

Repeal or invalidation of general sodomy laws since *Bowers*: 2001 Ariz. Legis. Serv. 382 (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. Glendening*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); *Michigan Org. for Hum. Rights v. Kelley*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. 4th Dist. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

relations between consenting adults behind closed doors. As this case demonstrates, sodomy laws permit gross invasions of privacy and impose public humiliations that are an affront to personal dignity. Enforcement of such laws involves police tactics – including inspections of the specific physical details of sexual conduct to verify criminal violations – that are repugnant to any system of ordered liberty. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

As Arizona Governor Jane Hull said in signing the bill repealing Arizona's sodomy law: "At the end of the day I returned to one of my most basic beliefs about government: It does not belong in our private lives." Howard Fischer, *Hull OKs Repeal of 'Archaic' Sex Laws Unenforced Ban on Sodomy*, Ariz. Daily Star, May 9, 2001, at A1. Similarly, when the Georgia Supreme Court struck down, under the state constitution, the very law upheld by this Court in *Bowers*, it stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998); *see also Gryczan*, 942 P.2d at 122 ("[A]ll adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation").[27]

These decisions reflect expectations of liberty and privacy that are foundational to the relationship between government and free citizens. *See Bowers*, 478 U.S. at 217 (Stevens, J.,

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[27] *See also Powell*, 510 S.E.2d at 22 (right of privacy is "ancient law," derived from "the Roman's conception of justice" and natural law) (quotation marks omitted); *Gryczan*, 942 P.2d at 121-22 (right of privacy is "'essential to the well-being of a free society'"); *Campbell*, 926 S.W.2d 250, 261-62 & nn.9, 10, 11 (tracing historical foundation of sanctity of home and right of privacy).

dissenting). Indeed, while *Bowers* pointed to state laws as evidence that proscriptions of sodomy comport with our Nation's traditions, *see id.* at 192-94, subsequent authoritative rulings from state courts have established the contrary principle: such laws violate ancient and fundamental rights guaranteed by the States to their citizens. *See, e.g., Powell*, 510 S.E.2d at 22; *Gryczan*, 942 P.2d at 125-26; *Wasson*, 842 S.W.2d at 494-95; *Campbell v. Sundquist*, 926 S.W.2d 250, 261-62 (Tenn. App. 1996), *appeal denied* (Tenn. June 10, 1996 and Sept. 9, 1996).

Bowers has been criticized for characterizing the right at issue in narrow, group-based terms, *i.e.*, "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," 478 U.S. at 190. *See, e.g.*, Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L.R. 737, 747-49 (1989). The Court's unusual approach was widely interpreted as sanctioning discrimination against gay and lesbian people. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) ("As the [D.C. Circuit] has aptly put it [in *Padula v. Webster*, 822 F.2d 97, 103 (1987)]: 'If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious'"). The *Bowers* methodology has inexorably led to "erroneous decisions as a consequence," *Casey*, 505 U.S. at 858, counseling reconsideration.

Since *Bowers*, of course, the Court's substantive due process cases have continued to consider relevant history and tradition in determining the existence of a fundamental right, *e.g., Glucksberg*, 521 U.S. at 720-23, but the Court has not confined its view of the liberties substantively guarded by the Due Process Clause to historical practices examined at the most specific level. *Casey*, 505 U.S. at 848-50 (opinion of Court); *County of Sacramento*

v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., joined by O'Connor, J., concurring) ("history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry"); *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O'Connor, J., joined by Kennedy, J., concurring in part).

Also since *Bowers*, the Court has more forcefully recognized the constitutional dimension of privacy in the home and comparable settings. "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (emphasis in original); *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (overnight guest receives protection under "everyday expectations of privacy that we all share"). Consensus expectations about the limits of government intrusion into private, adult sexual intimacies, especially in the home, provide the kind of "objective considerations," *Lewis*, 523 U.S. at 858 (Kennedy, J., joined by O'Connor, J., concurring), that undergird a principled approach to the Due Process Clause. *See also Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold*, 381 U.S. at 484.

Moreover, *Bowers* has been undermined by *Romer*. The holding in *Bowers* that the "the presumed belief of a majority of the electorate in Georgia that *homosexual* sodomy is immoral and unacceptable" sufficed to sustain the Georgia law, 478 U.S. at 196 (emphasis added), is in tension with *Romer*'s holding that gay men and lesbians may not be arbitrarily singled out for disfavored legal status, *Romer*, 517 U.S. at 633; *see also id.* at 641 (Scalia, J., dissenting). This inconsistency should be resolved by the Court. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law").

The underpinnings of *Bowers* have been substantially eroded in yet another crucial way. *Bowers* rested in large part on the notion that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." 478 U.S. at 191. Since 1986, however, the country has developed a more accurate understanding of gay and lesbian couples and families – neighbors, friends, relatives, and coworkers who live their lives more openly. Even using methods expected to undercount the relevant population, for example, the 2000 United States Census measured more than 600,000 households of unmarried same-sex partners nationally, including almost 43,000 in Texas, the third highest state total. David M. Smith and Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households* at 1-2 and Table 1 (August 21, 2001), *available at* http://www.hrc.org/familynet/documents/L%census.pdf. These families live in 99.3% of American counties. *Id.* at 2, Table 4.

Many State and local governments and thousands of employers have enacted domestic partner or more extensive protections for unmarried couples. *See Employers That Offer Domestic Partner Benefits, available at* http://www.hrc.org/worknet/dp/index.asp. These efforts bear witness to American society's deepened familiarity with and respect for these committed relationships. *See also* Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (June 24, 2002) (named after gay New York firefighter chaplain who lost his life in September 11 terrorist attacks, law allows federal death benefits to surviving same-sex partners); Alia Ibrahim, *District Registers Domestic Partners: Congress Blocked Law for 10 Years*, Wash. Post, July 9, 2002, at B1. Every State (except Florida) permits gay men and lesbians to

adopt children individually, jointly and/or through "second-parent adoptions" that are analogous to stepparent adoptions. *See, e.g.*, American Academy of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 339 (Feb. 2002). Many thousands of gay and lesbian partners are protected as the joint legal or *de facto* parents of children they are raising together, and many gay people provide foster homes to needy children.

These changes are part of a broader current recognized by the Court after *Bowers*: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000); *id.* at 85 (Stevens, J., dissenting); *id.* at 98-101 (Kennedy, J., dissenting); *see also Michael H.*, 491 U.S. at 124 n.3 (plurality) ("The family unit accorded traditional respect in our society . . . includes the household of unmarried parents and their children").

For adults in gay and lesbian families, as in all families, sexual intimacy is a basic component of stable, healthy relationships.[28] The Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life." *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545-46

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[28] Persons not in committed relationships have the same fundamental rights as those who are. "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . ." *Casey*, 505 U.S. at 898; *see also id.* at 896 (extolling "the right of the *individual*, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person") (quotation marks omitted).

(1987) (internal quotation marks omitted). Of course, this case does not present questions concerning formal recognition or affirmative support of gay and lesbian couples and their children. The question here is whether States may *criminally punish* private, consensual, sexual conduct.

The idea that a State may enter into American bedrooms and closely inspect the most intimate and private physical interactions, or give its police officers unbridled discretion to arrest disfavored minorities for engaging in consensual sexual activity, is a stark affront to fundamental liberty that the Court should end. Much has changed since *Bowers*, but both same-sex and broader sodomy laws persist -- and have resisted full eradication. *Bowers* itself has been used to perpetuate and even expand inequities for gay and lesbian people. These consequences of *Bowers* are not what *stare decisis* exists to defend, but rather explain the need for the Court's intervention.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

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