No. 02-102

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 Texas Court Of Appeals For The Fourteenth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petitioners were convicted in a Texas court of the misdemeanor offense of engaging in homosexual conduct, as defined by TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). Three questions for review are presented in their petition:

1. Whether their criminal prosecutions under section 21.06 of the Texas Penal Code violated the Fourteenth Amendment guarantee of equal protection of the law.

2. Whether their criminal prosecutions under section 21.06 of the Texas Penal Code violated their constitutional rights to liberty and privacy, as protected by the Due Process Clause of the Fourteenth Amendment.

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

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondent State of Texas hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

Harris County sheriff's deputies were told by a named informant that an armed man was "going crazy" in the apartment of petitioner John Lawrence. Pet. App. 129a. The investigating officers entered the apartment and observed petitioners Lawrence and Garner engaged in anal sexual intercourse. *Id.* The petitioners were each charged by complaint in a Harris County justice court with the commission of the Class C misdemeanor offense of engaging in homosexual conduct, an offense defined by TEX. PEN. CODE ANN. § 21.06(a) (Vernon 1994), as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[1] A Class C misdemeanor is punishable only by a fine not to exceed $500. TEX. PEN. CODE ANN. § 12.23 (Vernon 1994).

After the petitioners were convicted and fined in the justice court, they gave notice of appeal and the proceedings were transferred to Harris County Criminal Court at

[1] The term "deviate sexual intercourse" is defined in the Texas Penal Code as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01(1) (Vernon 1994).

Law No. 10.[2] After that court denied the petitioners' motions to quash the complaints on various constitutional grounds, they entered pleas of *nolo contendere* and were found guilty of the offense of engaging in homosexual conduct. Punishment was assessed in each case, pursuant to a plea bargain, at payment of a fine in the amount of $200.00, and the petitioners again gave notice of appeal from their convictions.[3]

A three-judge panel of the Court of Appeals for the Fourteenth District of Texas initially held that the petitioners' convictions violated the Equal Rights Amendment of the Texas Constitution,[4] with one justice dissenting. The respondent's motion for rehearing *en banc* was subsequently granted, and on March 15, 2001, the court of appeals issued a thorough and well-reasoned opinion *en banc*, in which all of the petitioners' constitutional challenges to the enforcement of section 21.06 were overruled, with two justices dissenting. *See Lawrence v. State*, 41 S.W.3d 349 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd); Pet. App. 4a, *et seq*. The holdings of the court of appeals may be briefly summarized as follows:

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[2] An appeal from a judgment of conviction in a Texas justice court results in a trial de novo in a county court. TEX. CODE CRIM. PROC. ANN. art. 45.042 (Vernon Supp. 2002).

[3] A case which has been appealed from a Texas justice court to a county court may be further appealed to a court of appeals if the fine exceeds $100 or the sole issue is the constitutionality of the statute on which the conviction is based. TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 2002).

[4] TEX. CONST. art. I, § 3a.

1. Enforcement of the statute prohibiting homosexual conduct did not violate the respective Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 3, of the Texas Constitution, because the statute does not implicate fundamental rights or a suspect class, and it has a rational basis in the Legislature's determination that homosexual sodomy is immoral. The fact that heterosexual sodomy is no longer a criminal offense under Texas law is not constitutionally significant, since the Legislature could rationally distinguish between an act performed with a person of the same sex and a similar act performed with a person of different sex. *Lawrence*, 41 S.W.3d at 353-59; Pet. App. 13a-18a.

2. Enforcement of section 21.06 did not violate the Equal Rights Amendment of the Texas Constitution, because the statute applied equally to both men and women who engaged in the prohibited conduct, and it was not the product of prejudice towards persons of either gender. *Lawrence*, 41 S.W.3d at 357-59; Pet. App. 20a-24a.

3. The petitioners' prosecutions for the offense of engaging in homosexual conduct did not violate any constitutional right to privacy or fundamental liberty rights under the State or Federal Constitution, since, in light of the long history of imposition of criminal sanctions for such conduct, it could not be said that the State of Texas or the United States recognizes any "fundamental right" to engage in homosexual activity. *Lawrence*, 41 S.W.3d at 359-62; Pet. App. 25a-31a.

The petitioners attempted to persuade the Texas Court of Criminal Appeals to review the decision of the

Court of Appeals for the Fourteenth District, but their petition for discretionary review was refused, without written opinion, by that court on April 22, 2002 (Pet. App. 1a.)

ARGUMENT

I. Introduction.

The opinion issued by a Texas intermediate appellate court in this case broke no new ground. The court of appeals, sitting *en banc*, carefully reviewed this Court's precedents involving the constitutional right of privacy and the guarantee of equal protection of the laws, and it rendered a decision which is squarely consistent with the decisions of this Court, the federal courts of appeals and the state appellate courts which have construed and applied the federal constitutional provisions in question. There is no conflict for this Court to resolve, and there is no need for this Court's intervention in a debate which is ongoing in the various state legislatures, the deliberative bodies properly charged with the task of determining whether particular conduct is still regarded as immoral to the extent that it warrants the imposition of a penal sanction.

With regard to the constitutional right-to-privacy issue, the court below merely recognized that its decision was controlled by this Court's holding on precisely the same issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and there is no need for the Court to reconsider its decision in *Bowers* at this time. In light of the fact that homosexual anal sodomy was viewed as criminal behavior under state law and the common law for a period of

centuries, that conduct could not conceivably have achieved the status of a "fundamental right" in the brief period of sixteen years since *Bowers* was decided.

Second, while this Court has not previously addressed the precise issue of whether a "homosexual conduct" statute violates the Equal Protection Clause if heterosexuals are permitted to engage in similar acts of deviate sexual intercourse, the Court's prior decisions governed both the lower court's choice of the appropriate standard of review, and its ultimate resolution of the question of whether the legislative classification was constitutionally permissible. The holding of the Court of Appeals for the Fourteenth District followed, rather than deviated from, the holdings of this Court, and in the absence of any contrary holding from any appellate court construing the Equal Protection Clause of the United States Constitution, there is no need for this Court to review that holding at this time.

II. Constitutional Right to Privacy.

The Texas court of appeals correctly recognized that its disposition of the petitioners' constitutional privacy claim under the United States Constitution was directly controlled by this Court's decision in *Bowers*:

> Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here – the Fourth and Ninth Amendments.

> The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.
>
> The Ninth Amendment also offers no support. In *Bowers v. Hardwick*, the defendants were convicted of violating the Georgia sodomy statute. 478 U.S. at 190-91, 106 S.Ct. 2841. Relying upon *Griswold v. Connecticut* [381 U.S. 479 (1965)] and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers*, 478 U.S. at 191, 106 S.Ct. 2841. . . . Because we find no constitutional "zone of privacy" shielding homosexual conduct from state interference, appellants' second point of error is overruled.

Lawrence, 41 S.W.3d at 360-62.

In its opinion in *Bowers*, this Court observed that it had recognized the existence of a constitutional right of privacy, permitting an individual to make certain personal decisions free from governmental interference, only in cases involving child-rearing and education, family relationships, procreation, marriage, and the "fundamental individual right to decide whether or not to beget or bear a child," *Bowers*, 478 U.S. at 190-91, and the Court noted the lack of any obvious connection between homosexual

sodomy and those prior decisions relating to family and childbearing. *Id.*

The Court noted in *Bowers* that it had previously singled out for heightened constitutional protection from governmental regulation only fundamental freedoms that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). In light of the fact that homosexual sodomy constituted a criminal offense under the common law and, until 1961, the statutes of every state in the Union, the Court found in *Bowers* that any suggestion that the right to engage in such conduct was a fundamental freedom "implicit in the concept of ordered liberty" was, "at best, facetious." *Bowers*, 431 U.S. at 191.

There is nothing in this Court's subsequent treatment of *Bowers* to suggest that it was wrongly decided or should be reconsidered. To the contrary, the methodology utilized by the Court in *Bowers* has been similarly employed in subsequent cases involving claims that personal liberties were protected by a constitutional right to substantive due process under the Fourteenth Amendment.

For instance, in *Michael H. v. Gerald D.,* 491 U.S. 110 (1989), the Court found that a biological father had no constitutional right to visitation with a child born while the child's mother was married to another man. As in *Bowers,* the Court's opinion explored whether the petitioner's asserted liberty interest was grounded in the "historic practices of our society," *id.* at 124*,* since the Court has recognized only fundamental rights which are "traditionally protected by our society," *i.e.*, "only those

protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'." *Id.* at 122 (quoting from *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934) (Cardozo, J.)). As in *Bowers*, the Court found in *Michael H.* that the legal tradition of our society was actually hostile to the position espoused by the petitioner, and determined that his asserted liberty interest could, therefore, not be deemed a fundamental right protected by the Fourteenth Amendment.

More recently, the same mode of analysis was utilized in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the claimed fundamental right was physician-assisted suicide. In its determination of whether the case involved a liberty interest protected by the Fourteenth Amendment, the Court began, "as in all due process cases, by examining our Nation's history, legal traditions, and practices," *id.* at 710, in order to determine whether the asserted right was, "objectively, 'deeply rooted in this Nation's history and tradition'," and "implicit in the concept of ordered liberty." *Id.* at 720-21. As in *Bowers*, the Court found "a consistent and almost universal tradition that has long rejected the asserted right," *id.* at 723, and concluded that, therefore, there was no fundamental liberty interest protected by the Due Process Clause. *Id.* at 728.

It is apparent from *Glucksberg* that the historical analysis utilized in *Bowers* is fully consistent with the Court's current substantive due process jurisprudence, and that there is no point in rehashing the issue again raised in this case. Fundamental rights must be grounded in the nation's history and legal traditions, and as noted in *Bowers* and in the opinion of the court below, the states of the Union have traditionally punished homosexual conduct as a serious criminal offense. History has not

changed, and it is inconceivable that homosexual sodomy has suddenly achieved the status of a treasured constitutional right, deeply rooted in the nation's history and legal traditions, in the few years since *Bowers* was decided.

It is true that a small number of state courts have recently invalidated statutes prohibiting sodomy or homosexual conduct on state constitutional privacy grounds. Nothing in those courts' opinions suggest that this Court's Fourteenth Amendment analysis requires reconsideration, however, since their decisions are all predicated upon findings that their respective state Constitutions provide more privacy protection than the Federal Constitution.

In *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992), in which the Kentucky statute criminalizing homosexual conduct was invalidated, the Kentucky Supreme Court based its ruling upon the "textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that reached by the United States Supreme Court is more appropriate." In *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996), an intermediate appellate court invalidated a similar statute, noting that both the "Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution."

Similarly, in *Gryczan v. State,* 942 P.2d 112, 121-22 (Mont. 1997), in which enforcement of a statute prohibiting "deviate sexual conduct" was found to violate a state constitutional right to privacy, the Supreme Court of Montana noted that it had "long held that Montana's

Constitution affords citizens broader protection of their right to privacy than does the federal constitution." In *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998), a general sodomy statute was invalidated upon a finding that the "right to be let alone guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U. S. Constitution . . . " Finally, in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), the Arkansas Supreme Court recently accepted the appellant's suggestion that "Arkansas's Constitution can be held to provide greater privacy rights than the United States Constitution," *id.* at 344, noting that, "Arkansas has a rich and compelling tradition of protecting individual privacy." *Id.* at 349-50.[5]

The fact that several state courts have found a more extensive right to privacy in their respective state constitutions obviously has no significance with regard to this Court's construction of the United States Constitution. Those decisions certainly do not conflict with the Texas court's analysis of protected liberty interests under the Federal Constitution in this case, and their reasoning does not suggest any need to reconsider the Court's prior approach to identifying those rights under the Fourteenth Amendment. If anything, the availability of state court

[5] It should not be inferred from this litany that *all* of the state courts are finding that their state constitutions protect private consensual acts of sodomy from criminal prosecution. For instance, the Louisiana Supreme Court recently held in *State v. Smith*, 766 So.2d 501 (La. 2000), that neither the Louisiana Constitution nor the Federal Constitution created any right of privacy or liberty interest which would preclude prosecution for consensual acts of heterosexual or homosexual sodomy, despite the inclusion in the Louisiana Constitution of a provision expressly guaranteeing a right to privacy.

relief based upon independent state constitutional grounds only diminishes the apparent need for federal intervention in an issue which is properly being resolved on a state-by-state basis.

III. Equal Protection.

The Court of Appeals for the Fourteenth District correctly held that because the petitioners' prosecutions did not implicate the exercise of fundamental rights or constitute discrimination against a suspect class of individuals, the statute under which the petitioners were prosecuted must be "presumed to be valid," and it must be "sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Lawrence*, 41 S.W.3d at 352 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). The court's choice of the appropriate standard for reviewing the legislative classification in question was entirely consistent with the relevant decisions of this Court and the federal courts of appeals, and the petitioners have identified no decisional conflict requiring the granting of a petition for writ of certiorari.

The court of appeals could not have erred in holding that section 21.06 does not impede the exercise of fundamental rights, for the reasons stated in the preceding section of this brief in opposition. As noted *supra,* in light of the long legal tradition of treating homosexual sodomy as a criminal offense, it cannot reasonably be suggested that engaging in homosexual anal intercourse is a vital fundamental right "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Bowers*, 478 U.S. at 194.

Also, the court of appeals could not have erred in holding that section 21.06 does not target a "suspect class" of individuals, for at least two reasons.

First, section 21.06 does not apply only to persons with a fixed homosexual orientation. It applies equally to bisexuals, and to heterosexuals who are tempted to engage in homosexual conduct because of confinement in prison, an interest in sexual experimentation or any other reason. The "statute is directed at certain conduct, not at a class of people," and it "affects only those who choose to act in the manner proscribed." *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1984) (opinion on rehearing), *cert. denied*, 478 U.S. 1022 (1986). If Dr. Alfred C. Kinsey's estimates are accurate, as little as fifty percent of the population remains exclusively heterosexual, *see Lawrence*, 41 S.W.2d at 353, n. 6, which would mean that the statute may affect the contemplated conduct of more heterosexual or bisexual individuals than individuals who view themselves as exclusively homosexual in orientation. Therefore, it is not at all clear that the statute "targets" any particular group for discriminatory treatment.[6]

Second, even if it is assumed that the statute represents a legislative classification involving sexual orientation, the use of the deferential "rational basis" standard of review would still be appropriate, since it is well established that individuals of homosexual orientation do not

[6] When a statute is not a product of purposeful discrimination, a mere disparate impact upon a class of citizens does not establish a violation of the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

constitute a suspect class for the purpose of equal protection analysis.

The profusion of litigation involving the exclusion of homosexuals from military service has provided ample opportunity for consideration of whether homosexuals constitute a suspect class, and the federal courts of appeal appear to be so far unanimous in holding that classifications based upon homosexuality do not require any heightened scrutiny under the Equal Protection Clause.[7]

[7] *See, e.g.*, *Thomasson v. Perry,* 80 F.3d 915, 928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996) ("rational basis is . . . the suitable standard for review" of the military "don't ask/don't tell" policy; *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) ("the standard for review is whether section 21.06 [of the Texas Penal Code] is rationally related to a legitimate state end"); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289, 292-93 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (holding that city charter amendment pertaining to sexual orientation was subject to review "under the most common and least rigorous equal protection norm . . . the 'rational relationship' test"); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) ("deferential standard of review" held applicable to military regulation targeting homosexuals); *Richenberg v. Perry,* 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997) (rejecting contention that homosexuality is "suspect classification" requiring heightened scrutiny).

See also Holmes v. California Army National Guard, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1998) ("because homosexuals do not constitute a suspect or quasi-suspect class," the military "don't ask/don't tell" policy is subject only "to rational basis review"); *Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); *Steffan v. Perry,* 41 F.3d 677, 684, n. 3 (D.C. Cir. 1994) (holding that a group "defined by reference" to homosexual conduct "cannot constitute a suspect class"); *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990)

(Continued on following page)

In addition, this Court itself utilized the most deferential standard of review – the rational basis test – in *Romer v. Evans,* 517 U.S. 620, 631-32 (1996), in which the Court found that a state constitutional provision which targeted homosexuals was unconstitutional under the Equal Protection Clause. The plaintiffs in *Romer v. Evans* had not even contested a determination by a lower court that homosexuals did not constitute a "suspect class." *Id.* at 640 n. 1 (Scalia, J. dissenting).

It thus appears, with regard to the issue of the appropriate standard for review, that there is no conflict for this Court to resolve, and that the Court of Appeals for the Fourteenth District could not have erred in utilizing the "rational basis" standard in reviewing the constitutionality of section 21.06.

Furthermore, that Court's ultimate holding – that the Texas Legislature had a rational basis for its determination that homosexual deviate sexual intercourse should be unlawful – is equally unassailable.

This Court held in *Bowers,* 478 U.S. at 196, that the Georgia statute which made sodomy a penal offense had a "rational basis," in that it implemented the belief of the majority of the Georgia electorate that "homosexual sodomy is immoral and unacceptable." Justice White, the author of the majority opinion, rejected the notion that laws may not be based upon perceptions of morality:

(holding that a homosexual "is not a member of a class to which heightened scrutiny must be afforded").

> The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id. at 478 U.S. 196; *see also Dronenburg v. Zech,* 741 F.2d 1388, 1397 (D.C. Cir. 1984) (noting the unlikelihood that "very many laws exist whose ultimate justification does not rest upon the society's morality," and upholding naval regulations excluding homosexuals from service as a permissible implementation of public morality).

Six years after *Bowers* was decided, a plurality of this Court held in *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 569 (1991), that the goal of implementing public morality could meet even the higher standard of need required to justify the incidental restriction of freedom of expression which would result from enforcement of a public nudity ban in the context of nude dancing in nightclubs:

> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973), we said:
>
> "In deciding *Roth [v. United States*, 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498] (1957)],

> this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' *Id.*, at 485 [77 S.Ct., at 1309]." (Emphasis omitted.)

And in *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986), we said:

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

It does not appear that any Court has ever rejected the proposition that the implementation and protection of public morality may constitute a rational basis for a statute which criminalizes illicit sexual behavior, in resolving a challenge to such a statute under the Equal Protection Clause of the Federal Constitution. To the contrary, the federal courts of appeals have repeatedly noted that the enforcement of public morality is an acceptable justification for legislative action. In fact, one year before *Bowers* was decided, the Court of Appeals for the Fifth Circuit upheld the very statute in issue in this case – section 21.06 of the Texas Penal Code – as an appropriate exercise of the Legislature's power and authority to regulate public morality:

> In view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that

> section 21.06 is "totally unrelated to the pursuit of," [*McDonald v. Board of Election Commissioners,* 394 U.S. 802,] at 809, 89 S.Ct. [1404] at 1408, 22 L.Ed.2d [739] at 745 [(1969)], implementing morality, a permissible state goal*, Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984). Therefore, section 21.06 does not deprive Baker of equal protection of the laws.

Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3337 (1986). *See also Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998), *cert. denied*, 525 U.S. 1024 (1998) (noting that "[l]egislatures are permitted to legislate with regard to morality . . . rather than confined to demonstrable harms," and that a "traditional purpose of criminal punishment is to express moral condemnation of the criminal's acts"); *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (holding that the protection of public morality was a constitutionally acceptable basis for an Alabama statute prohibiting sale of sexual devices, since the "crafting and safeguarding of public morality has long been an established part of the State's plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny").[8]

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[8] *Accord, Yorko v. State*, 690 S.W.2d 260, 266 (Tex. Crim. App. 1985) ("We hold that the rationale justifying the State's exercise of the police power against obscene expression – that is, the protection of the social interest in order and morality – also justifies the State in criminalizing the promotion of objects designed or marketed as useful primarily for the stimulation of human genital organs.").

The petitioners argue that it is illogical to continue to treat homosexual sodomy as an "immoral" criminal offense after the Texas Legislature repealed the state's general sodomy statute in 1974, but in light of the biological differences between the sexes, there is plainly a rational distinction to be made between heterosexual and homosexual conduct. Homosexual conduct cannot lead to biological reproduction, or occur within or lead to a marital relationship. The Texas electorate evidently continues to believe that *any* sexual conduct between persons of the same sex is more "immoral and unacceptable," *Bowers,* 478 U.S. at 196, than similar conduct occurring between persons of opposite sex, and that belief is consistent with the traditional and historical view that homosexual activity is *malum in se.* A legislative distinction between persons of the same sex engaging in an act and persons of different sex engaging in the same act is simply not so strange or foreign as to be irrational.

Finally, the petitioners argue that this Court's decision in *Romer v. Evans,* 517 U.S. 620 (1996), supports their equal protection argument, but the Colorado constitutional provision in issue in *Romer* was entirely dissimilar to section 21.06, in at least two respects: the Colorado classification was based upon sexual *orientation*, rather than conduct; and the disadvantage imposed upon individuals with a homosexual orientation was undemocratic and irrational.

The constitutional amendment attacked in *Romer* would have absolutely barred any "legislative, executive, or judicial action at any level of state or local government designed to protect" the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 620. This Court held that

the amendment lacked an adequate relationship with any legitimate state purpose because it was "at once too narrow and too broad," as it classified persons by a single trait – homosexual orientation – and then denied persons with that trait any legal protection or consideration whatsoever. *Id.* at 633. In other words, the Colorado amendment went beyond punishment of the act of engaging in deviate sexual intercourse, and tended to disenfranchise individuals because of their mere tendency or predilection to engage in such conduct.

Section 21.06 does not suffer from that flaw. It is the sexual conduct itself which is treated as immoral, and a statute which renders such conduct illegal is obviously related to the goal of discouraging the conduct and thereby implementing morality. A statute which, say, prohibited practicing homosexuals from attending public schools would not be rationally related to that permissible state goal, and would violate the Equal Protection Clause; but a statute imposing criminal liability upon only those persons who actually engage in homosexual conduct is perfectly tailored to implement the communal belief that the conduct is wrong and should be discouraged. Thus the plaintiffs in *Romer v. Evans* disavowed any intent to even argue that *Bowers v. Hardwick* should be overruled, *Romer*, 517 U.S. at 630-31 (Scalia, J., dissenting), and it has never been so much as suggested that *Romer* had the effect of overruling *Bowers*.

Because section 21.06 is narrowly tailored to implement the permissible legislative goal of discouraging individuals from engaging in homosexual deviate sexual intercourse, and it does not impose unrelated or irrational penalties upon persons of homosexual orientation, *Romer*

is inapposite and does not conflict with the decision of the Texas court of appeals in this case.

Since the holding of the court below on the equal protection issue was based upon well-established principles of constitutional law, and it does not conflict with other courts' construction of the Equal Protection Clause of the Fourteenth Amendment in similar or analogous cases, there is no need for this Court to review that holding.

IV. Summary.

Morality is a fluid concept, and public opinion regarding moral issues may change over time, but what has *not* changed is the understanding that government may require adherence to certain widely-accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties. The legislature exists so that laws can be repealed or modified to match prevailing views regarding what is right and wrong, and so that the citizens' elected representatives can fine-tune the severity of the penalties to be attached to wrongful conduct. Perhaps homosexual conduct is not now universally regarded with the same abhorrence it inspired at the time of the adoption of our Federal Constitution, but any lag in legislative response to a mere change of public opinion – if such a lag actually exists – cannot and must not constitute the basis for a finding that the legislature's original enactment exceeded its constitutional authority.

As stated in *Washington v. Glucksberg,* 521 U.S. at 735-36, there is "an earnest and profound debate about the morality, legality and practicality" of the statute in question; and the denial of the petition for writ of certiorari in

this case will "permit this debate to continue, as it should in a democratic society."

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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