No. 02-102

IN THE

*Supreme Court of the United States*

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JOHN GEDDES LAWRENCE AND TYRONE GARNER,
*Petitioners,*

v.

TEXAS,
*Respondent.*

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**On Writ of Certiorari to the Texas Court of Appeals Fourteenth District**

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# Brief of *Amici Curiae* Constitutional Law Professors Bruce A. Ackerman, Jack M. Balkin, Derrick A. Bell, Jr., Paul Brest, Evan Caminker, Erwin Chemerinsky, David D. Cole, David B. Cruz, Thomas C. Grey, Pamela S. Karlan, Kenneth L. Karst, Andrew Koppelman, Sanford Levinson, Frank Michelman, William B. Rubenstein, Steven H. Shiffrin, Geoffrey R. Stone, and Kenji Yoshino in Support of Petitioners

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## Interest of Amici Curiae

The law professors named below teach and write about constitutional law. Both basic and advanced constitutional law courses, as well as a wide range of scholarship on constitutional issues, regularly consider the rights of gay men and lesbians. *Amici* are among the many scholars who have spent a considerable amount of time thinking, writing, and teaching about the issues before the Court in this case. A selected list of their scholarship on these issues is contained in an Appendix to this brief.

Based on this expertise, and on careful review of this Court's decisions, *amici* argue in this brief that Texas Penal Code § 21.06 violates the equal protection clause of the Fourteenth Amendment. *Amici* join this brief solely on their own behalf and not as representatives of their universities.[1]

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation and submission of this brief.

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**Summary of Argument**

The petition for certiorari presents the question whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled. *Amici* support petitioners' position. But this Court need not reach that question – nor hold that heightened scrutiny is required for statutes that discriminate on the basis of sexual orientation – in order to conclude that Texas Penal Code § 21.06 violates the equal protection clause. The statute fails conventional equal protection analysis because it is not rationally related to the achievement of a legitimate state interest.

In equal protection cases, the nature of the interests affected by a particular classification helps determine the nature of this Court's review. When classifications burden rights protected by the Constitution as "fundamental," this Court applies heightened judicial scrutiny. See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). When classifications restrict the enjoyment of other liberty interests unequally, by restricting the freedom of some citizens, but not of others, the nature and importance of the interest involved also weighs in the Court's constitutional appraisal.[2] In cases such as *Plyler v. Doe*, 457 U.S. 202 (1982), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Romer v. Evans*, 517 U.S. 620 (1996), *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), and *Bush v. Gore*, 531 U.S. 98 (2000), this Court has found violations of the equal protection clause in part because of the way in which the challenged state action infringed on individuals' ability to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631.

Section 21.06 and statutes like it similarly affect important liberties. The impact of these laws is not limited to those few individuals who are actually convicted of violating them and thus subject to the punishment and collateral consequences that flow from a criminal conviction. Rather, these statutes are used to undermine the

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[2] Cf. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (taking into account the nature of a real property owner's "significant," but nonfundamental, interests in finding a violation of the due process clause test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

"undeniably important" interest in "family association," *M.L.B.*, 519 U.S. at 117, that gay people possess. They are used to restrict employment opportunities for gay people, even when individuals have never been charged with – let alone convicted of – violating any law. And they impinge on important Fourth Amendment interests in the privacy of the homes and persons of gay men, lesbians, and bisexuals.

Part I of this brief sets out this Court's longstanding practice of considering the quality of the interests affected by a particular classification, even when it is conducting rationality review. It shows that the interests that § 21.06 impacts are vitally important to the individuals involved and thus counsel sensitive review.

Part II of this brief shows that § 21.06 is unconstitutional because it is not sufficiently related to the achievement of any legitimate government purpose. Section A demonstrates that § 21.06 does not even serve a legitimate government purpose. This Court has squarely held that the straightforward desire to harm a politically unpopular group cannot be a legitimate governmental interest. *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996). Section 21.06 conveys precisely this form of intolerance. Texas has identified no rationale for *why* it has condemned the acts prohibited by § 21.06 beyond its lawyers' declaration that the law reflects a choice about the morality of those acts.[3] Given the way § 21.06 actually operates, it does not serve as a means of preventing these acts. It can be explained only as a means of singling out gay people for burdens not imposed on other individuals. The law can and is used as an excuse to persecute gay people, even if it is seldom directly enforced.

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[3] In an earlier challenge to § 21.06, Texas's attorney general offered a different defense of the law and did not claim that the statute promoted morality. *Baker v. Wade*, 553 F. Supp. 1121, 1142 n.55 (N.D. Tex. 1982) (quoting the brief filed by the attorney general), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

Section B argues that even if this Court were to conclude that respondent is entitled to express a moral judgment about homosexuality, § 21.06 would still fail scrutiny under the equal protection clause because it is not rationally related to achieving this purpose. The best evidence that the state's chosen means – criminalization – is not rationally related to its end is that the state rarely ever employs these means. Thus, because § 21.06 is not actually enforced, it operates only to express constitutionally impermissible animus. Yet given the nature of the acts involved, if Texas were permitted to enforce § 21.06 as a criminal statute, this would pose unacceptable risks that constitutionally repugnant behavior would occur in the course of enforcing the statute.

## Argument

### I. Because of the Important Individual Interests Involved, This Case Calls For a Less Deferential Form of Rationality Review

In reviewing state action under the equal protection clause, this Court generally asks three questions: First, what is the basis on which the government has distinguished among individuals? Second, how weighty is the governmental interest purportedly served by the challenged law or practice? Third, how well does the challenged law or practice serve that interest?

The answer to the first question channels the second and third inquiries. In cases where the government has used a suspect or quasi-suspect criterion, such as race or sex, the challenged law will survive equal protection review only if it is closely related to a particularly significant government purpose.[4] By contrast, in cases that do not

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[4] In cases involving racial classifications, this is generally expressed as requiring that the challenged measure be "narrowly tailored" to achieve "compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). In cases involving gender-based classifications, the defendant must provide an "exceedingly persuasive"

involve a suspect or quasi-suspect classification, or a restriction on a "fundamental" interest, the challenged law will survive as long as it is rationally related to a legitimate government purpose – a more deferential standard.

It would be a serious misreading of this Court's precedents to conclude that rationality review is invariably toothless. The Court has repeatedly struck down statutes using rationality review. See generally Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through *Romer v. Evans*, 32 Ind. L. Rev. 357, 370 (1999) (listing various examples); Suzanne B. Goldberg, Equality Without Tiers, 57 U. Miami L. Rev. ___ (2003) (same). Some of these laws have run afoul of the purpose prong of rationality review because they expressed nothing more than prejudiced or stereotypical thinking about the individuals involved. In other cases, where states were pursuing some legitimate purpose, classifications were nonetheless judged to be an ill-conceived means of achieving that end. And often both the means and the ends are deemed problematic: the cases in which the Court has most often found that laws fail rationality review are those in which concerns with the logic of a law's means reinforce questions about the legitimacy of its ends.[5]

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justification for the challenged practice, *United States v. Virginia*, 518 U.S. 515, 533 (1996), by showing that the challenged law is at least "substantially related" to the achievement of "important governmental objectives," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

[5] Indeed, it is worth remembering that, until the emergence of three-tiered equal protection in the mid-1970's, the Court regularly employed the language of rationality review even in race and gender cases. See, e.g., *Anderson v. Martin*, 375 U.S. 399, 403 (1964) (striking down a statute that required a candidate's race be indicated on the ballot because it was not "reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates"); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (striking down a statute that automatically preferred male to female relatives as administrators of estates because it did not "bea[r] a rational relationship to a state objective" but instead "ma[d]e the very kind

### A. This Court Has Been More Likely to Find Equal Protection Violations When Significant Liberty Interests Are Involved, Even When Those Interests Are Not Independently Considered to Be Fundamental

When the basis for a state's decision on how to classify individuals is not a suspect or quasi-suspect one, the nature of the interest at issue nonetheless helps to determine the nature of the Court's analysis. Where a state classification unequally burdens a right deemed by the Constitution to be fundamental, this Court applies heightened scrutiny. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (applying strict scrutiny under the equal protection clause to state laws that deny some citizens the right to vote). In the absence of such a fundamental right, the Court tends to defer to the state. Yet this Court's application of rationality review in equal protection cases has been noticeably more assertive where the classification at issue unequally restricts individuals' ability to participate fully in one of the particularly significant "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. at 631. This is true even when the interests involved are not themselves so "fundamental" as to require heightened protection against government restrictions that apply to all citizens alike.

In *Plyler v. Doe*, 457 U.S. 202 (1982), for example, this Court confronted a Texas statute that authorized local school districts to deny enrollment to children who were not legally admitted to the United States. The Court rejected the claim that "illegal aliens" are a suspect class entitled to heightened scrutiny. *Id.* at 219 n.19. It also recognized that public education is not a fundamental "'right' granted to individuals by the Constitution." *Id.* at 221; see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973). Nonetheless, the Court struck down the statute as a violation of the equal protection clause, finding that the lasting impact on a child's life of denying him or her access to public education distinguished

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of arbitrary legislative choice forbidden by the Equal Protection Clause").

education "from other forms of social welfare legislation." *Plyler*, 457 U.S. at 221.

*Plyler* is one of a number of cases in which ideas of equality and liberty reinforce one another. Several of this Court's recent equal protection decisions follow a similar pattern, striking down governmental decisions as violations of the equal protection clause in part because of the importance of the underlying interest affected, even when that interest does not independently constitute a fundamental right. Most recently, in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), this Court held that Florida's use of different standards for counting ballots during a statewide recount violated the equal protection clause even though an "individual citizen has no federal constitutional right to vote for electors for the President of the United States." *Id.* at 104. While the abstract right to vote for electors was not itself a fundamental right, this Court held that once the legislature has provided for popular election, each voter is entitled to be treated with "equal dignity." *Id.*

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), this Court addressed the constitutionality of a Mississippi statute that required appellants to prepay substantial costs in order to perfect civil appeals. The Court reiterated the longstanding rule that the Constitution does not "independently require that the State provide a right to appeal" judicial determinations. *Id.* at 120. But, as the Court explained, in cases "concerning access to judicial processes . . . . 'due process and equal protection principles converge.'" *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)). In these cases, this Court's equal protection inquiry has repeatedly been informed by the nature of the interest at issue in the underlying judicial proceeding. In *M.L.B.*, the underlying case involved a parental termination proceeding. The interest at issue was the appellant's relationship with her child. Because parental "termination decrees 'work a unique kind of deprivation,'" 519 U.S. at 127 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981)), the Court held that it violated the equal protection clause to deny M.L.B. the ability to appeal enjoyed by non-indigent parents.

*M.L.B.*'s reliance on *Mayer v. City of Chicago*, 404 U.S. 189 (1971), see *M.L.B.*, 519 U.S. at 111-12 & 121-22, shows how other, seemingly less draconian, deprivations of liberty can also form the basis for finding equal protection violations. *Mayer* involved an impecunious medical student who was charged with disorderly conduct and interference with a police officer – two non-felony, non-jailable offenses. Mayer was convicted and given a $500 fine. He challenged the state's refusal to provide him with a free trial transcript. This Court held that the state's refusal to provide the transcript violated the equal protection clause. As the *M.L.B.* Court explained, even though Mayer faced no term of confinement, the conviction "could affect his professional prospects and, possibly, even bar him from the practice of medicine. . . . The State's pocketbook interest . . . was unimpressive when measured against the stakes for the defendant." *M.L.B.*, 519 U.S. at 121.

In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court struck down an application of a municipal zoning regime that treated group homes for the mentally retarded differently from other group living arrangements. It held that the city's decision reflected nothing beyond an "irrational prejudice against the mentally retarded," *id.* at 450, which negatively affected their undeniably important interest in living in the community, see *id.* at 438, 444 (opinion of the Court); *id.* at 461 (Marshall, J., joined by Brennan and Blackmun, JJ.) (describing the importance of group homes to retarded individuals).

Finally, *Romer* itself offers a particularly salient example of the way in which the nature of the liberty interests at stake can inform rationality review under the equal protection clause. The provision this Court struck down – Colo. Const. Art. II, § 30b ("Amendment 2") – interfered with gay people's "right to seek specific protection from the law." *Romer*, 517 U.S. at 633. The way Amendment 2 foreclosed this right was to wipe out protections gay people and their allies had already achieved through the political system and to make future gains impossible. Thus, Amendment 2 impaired the ability of gay people to participate in one of the most protected aspects of "civic life in a free society," *id.* at 631 – concerted political activity to persuade elected

officials to adopt helpful policies. The impermissibility of the classification Colorado drew was driven home by the extraordinary way in which it disabled gay men, lesbians, and bisexuals.

The *Romer* decision also recognizes that gay people form an identifiable class that cannot constitutionally be targeted for status-based animus. *Id.* at 635. In so holding, the Court implicitly acknowledged that one's choice to identify as a gay person implicates some species of liberty interest. This Court was not required to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), to reach that conclusion. *Romer* is thus a good – but hardly the only – example of how this Court's rationality review varies with the importance of the individual interests involved.

In short, just as this Court's rationality review has been "especially deferential" in some contexts, such as "classifications made by complex tax laws," *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992), it has been noticeably more vigorous in contexts where the classification touches upon important individual interests. And *Romer* shows that one of those contexts involves discrimination against gay men, lesbians, and bisexuals that touches on their ability to participate as equal citizens in daily life.

### B. Statutes That Criminalize Private, Consensual Homosexual Activity Interfere With Significant Liberty Interests

The form Texas's prohibition on homosexual activity takes may look quite different from the Colorado provision that failed rationality review in *Romer*. But § 21.06 actually operates in a quite similar fashion. Like Amendment 2, § 21.06 strips gay men, lesbians, and bisexuals of "the safeguards that others enjoy or may seek without constraint," including "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631.

1. Section 21.06 Interferes with the Intimate Relationships of Lesbians, Gay Men, and Bisexuals

At the most basic level, § 21.06 denies gay men, lesbians, and bisexuals in Texas a right "taken for granted" by other people in Texas, "because they already have [it]," *Romer*, 517 U.S. at 631 – the right to make decisions about the nature of their private, consensual sexual relationships with other adults free from state interference. Until recently, states that criminalized oral and anal sex did so without regard to the status or identity of the individuals involved. See Nan D. Hunter, Life After *Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 538-39 (1992). In 1974, Texas selectively repealed its pre-existing statute, which made it a felony for anyone in Texas – married or unmarried, gay or straight – to engage in private, consensual oral or anal sex with another adult. See Tex. Penal Code, art. 524 (adopted 1943). It replaced that provision with one that criminalizes particular acts only when engaged in by a distinct minority – those who could be expected to act with partners of the same sex. The heterosexual majority, by contrast, has the right to engage in *precisely* the same acts – defined by Texas law as "(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," Tex. Penal Code § 21.01(1) – without fear of criminal punishment and the ensuing civil and social disabilities that come from being branded a criminal.[6]

Section 21.06 is a paradigmatic example of the evil that concerned Justice Robert Jackson in his often-cited concurrence in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949):

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[6] The Texas statute differs in this significant respect from the Georgia statute at issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which applied to acts of oral or anal sex regardless of the identity of the participants. When confronted with a case where that statute was applied to participants of the opposite sex, the Georgia Supreme Court declared the statute unconstitutional in its entirety as a matter of state law, *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), and the Georgia Legislature did not attempt to replace the statute with one covering only homosexual activity.

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

*Id.* at 112-13 (Jackson, J., concurring); see also *Hill v. Colorado*, 530 U.S. 703, 731 (2000); *Larson v. Valente*, 456 U.S. 228, 245-46 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972); cf. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.")

By interfering with the interest gay people share with all other adults in making choices about their private consensual sexual activity, § 21.06 also interferes with the relationships gay couples develop. As this Court has long acknowledged, sexual intimacy contributes to "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). This is true for gay people no less than for heterosexuals.

Gay people form couples and create families that engage in the full range of everyday activities, from the most mundane to the most profound. They shop, cook, and eat together, celebrate the holidays together, and share one another's families. They make financial and medical decisions for one another. They rely on each other for companionship and support. See generally *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989) (finding that a gay couple constituted

a family). Many gay couples share "the duties and the satisfactions of a common home." *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977) (plurality opinion).[7]

Section 21.06 denies gay men and lesbians the discrete, undeniably important right all other adults in Texas enjoy to control the nature of their intimate relationships. Because of this alone, § 21.06 warrants the kind of sensitive scrutiny that this Court accorded the state's practices in cases like *Plyler*, *Cleburne*, *M.L.B.*, and *Romer*. Yet this is not the sole liberty interest impacted by § 21.06.

2. Section 21.06 Undermines the Parental Relationships of Lesbians, Gay Men, and Bisexuals

This Court has long recognized that parents' relationships with their children are "undeniably important," *M.L.B.*, 519 U.S. at 117. Thus, under the equal protection clause, when states intrude on family relationships, this Court "has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion." *Id.* at 116.

Courts in most states have recognized that sexual orientation is unrelated to parenting ability. Thus, they have generally rejected the view that sexual orientation can be used to curtail a parent's relationship with his or her children. See William B. Rubenstein, Cases and Materials on Sexual Orientation and The Law 810-11 (2d ed. 1997); Developments in the Law – Sexual Orientation and The Law, 102 Harv. L. Rev. 1508, 1636 (1989).

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[7] The *Moore* plurality's understanding of what "family" meant was informed by census data "bear[ing] out the importance of family patterns other than the prototypical nuclear family," including the fact that a rising number "of all families contained one or more members over 18 years of age, other than the head of household and spouse." *Id.* at 504 n.14. Similarly, this Court's consideration of § 21.06 should be informed by data from the 2000 census showing that nearly 43,000 same-sex couples live together in Texas.

However, courts in states with sodomy laws unreasonably rely on these laws to restrict parental rights. For example, in *Ex parte D.W.W.*, 717 So.2d 793 (Ala. 1998), the Alabama Supreme Court upheld restrictions on a divorced mother's visitation with her children. The trial court ordered that the mother's visits take place only under the supervision of the children's grandparents. Part of the court's basis for restricting the mother's visitation rights was the Court's observation that "the conduct inherent in lesbianism is illegal in Alabama. . . . R.W., therefore, is continually engaging in conduct that violates the criminal law of this state." *Id.* at 796.[8] Similarly, in *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996), one of the bases for the trial court's determination to award custody to the father was the fact that the mother was in a "monogamous intimate relationship" with another woman. *Id.* at 1213. The trial court found that this conduct "demonstrates a lack of moral example to the child and a lack of moral fitness. This conduct is unlawful in the State of Utah." *Id.* And in *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985), the Virginia Supreme Court concluded that a gay father was unfit for joint custody because "the conduct inherent in the father's relationship is punishable as a class six felony" and his behavior meant that "the conditions under which this child must live daily are . . . unlawful." *Id.* at 694.

In these, and many similar cases, the mere existence of sodomy laws directly affected gay people's parenting rights.

### 3. Section 21.06 Restricts Employment Opportunities For Lesbians, Gay Men, and Bisexuals

The right of an individual "to engage in any of the common occupations of life" is part of the liberty guaranteed by the Fourteenth

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[8] The statute cited by the Court, Ala. Code 1975, § 13A-6-65(a)(3), defined the crime of "sexual misconduct" to include consensual "deviate sexual intercourse." Alabama defines "deviate sexual intercourse" to include "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another." Ala. Code 1975, § 13A-6-60(2).

Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Even though access to government employment is not a fundamental right entitled to protection under the substantive component of the due process clause, it is nonetheless an important interest for many individuals. Here, too, statutes like § 21.06 have been used to restrict the opportunities of gay men, lesbians, and bisexuals.

The Dallas Police Department, for example, has had a policy of denying jobs to applicants who have engaged in violations of § 21.06, without regard to whether they have ever been charged with, or convicted of, any crime. See *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. Ct. App. 1993). By contrast, the department did not disqualify from consideration heterosexual applicants who engaged in oral or anal sex.

Similarly, in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc), the Eleventh Circuit concluded that the state attorney general could rescind a job offer to an attorney who had received excellent evaluations as a summer intern because she participated in a religious marriage ceremony with another woman. The court of appeals found the rescission justified because "reasonable persons may suspect that having a Staff Attorney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy." *Id.* at 1105 n.17. Thus, the court of appeals found it unnecessary to decide whether the plaintiff "has engaged in sodomy within the meaning of Georgia law." *Id.* The mere *existence* of a sodomy law became the legal justification for Shahar's discharge. See generally Diana Hassel, The Use of Criminal Sodomy Laws in Civil Litigation, 79 Tex. L. Rev. 813, 828-33, 835-38 (2001) (discussing cases in which courts or employers presume violations of sodomy statutes from a litigant's or applicant's sexual orientation); Christopher Leslie, Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws, 35 Harv. C.R.-C.L. L. Rev. 103 (2000) (discussing the various ways in which formally unenforced sodomy statutes lead to discriminatory treatment of gay people generally).

Moreover, individuals who are actually *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions for misdemeanors like § 21.06, the right to practice certain professions. In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).

4. Section 21.06 Threatens The Sanctity of the Homes of Lesbians, Gay Men, and Bisexuals

An "overriding respect for the sanctity of the home . . .has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). This value finds its most explicit expression in the Fourth Amendment, which "reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). As this Court recently reemphasized, "[i]n the home, . . . *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)

Fourth Amendment values not only play a role in deciding how police may conduct investigations. They also limit the conduct the state may criminalize. *Stanley v. Georgia*, 394 U.S. 557 (1969), shows that concerns about the privacy of the home can limit a state's ability to criminalize behavior that implicates an individual's "right to satisfy his intellectual and emotional needs in the privacy of his own home." *Id.* at 565. See *Paris Adult Theatre*, 413 U.S. at 66 (explaining that *Stanley* cannot be justified solely on the basis of First Amendment interests, since Stanley was charged with possession of constitutionally unprotected obscene materials). As this Court observed in *Paris Adult Theatre*, "marital intercourse on a street corner or a theater stage" is simply a different act than sexual intimacy

that takes place within the specially protected confines of the home. *Id.* at 66 n.13; see *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Statutes that make consensual homosexual conduct a crime even when it occurs within an individual's home clearly deny gay men, lesbians, and bisexuals the ability to pursue their most intimate relationships in the privacy of their own homes. Moreover, by making behavior in the home a crime, these statutes authorize wholesale intrusion into the homes of gay men, lesbians, and bisexuals, as *amici* explain in Section II.B.2 of this brief.

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In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 S.A.L.R. (Const. Ct. Oct. 9, 1998) (No. 11/98) <http: www.law.wits.ac.za/judgements/1998/gayles.html>, Justice Albie Sachs of the South African Constitutional Court offered in his concurrence a particularly eloquent articulation of the relationship between liberty and equality that is also at issue here:

> The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behavior becomes the foundation for the repudiation of equality.

## II. Section 21.06 Is Not Rationally Related to a Legitimate Government Interest

Section 21.06 fails rationality review for at least two reasons. First, like the zoning decision in *Cleburne Living Center*, 473 U.S. at 450, or the constitutional provision in *Romer*, 517 U.S. at 634, § 21.06 reflects nothing more than "irrational prejudice against," or

"animosity toward the class of persons affected." Under the circumstances of this case, § 21.06 cannot reasonably be viewed as directed at a legitimate government interest in promoting private sexual morality. Second, even if this Court were to conclude that promotion of private sexual morality can serve as a legitimate government purpose, § 21.06 is not a permissible means for pursuing that goal. Like the statutes at issue in *Mayer*, *M.L.J.*, and *Stanley*, § 21.06 unjustifiably interferes with significant individual freedoms. Thus, this Court can strike down § 21.06 without deciding whether classifications based on sexual orientation are inherently suspect or quasi-suspect.[9]

### A. Section 21.06 Does Not Serve a Legitimate Government Purpose

Respondent defends § 21.06 solely on the grounds that it reflects the Legislature's conclusion that sexual intimacy between same-sex partners is immoral. See Brief in Opposition at 16. But that bare assertion cannot end this Court's inquiry into the state's purpose, because not all moral judgments embody legitimate state goals. In particular, a so-called moral judgment that is utterly indistinguishable from "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer*, 517 U.S. at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)). See also *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."). When a challenged law or practice reflects "mere negative attitudes, or fear," *Cleburne Living*

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[9] Of course, if this Court were to hold that § 21.06 should be subjected to heightened scrutiny under either the equal protection clause or the due process clause, *amici*'s argument would apply with even greater force.

*Center*, 473 U.S. at 448, or is "inexplicable by anything but animus toward the class it affects," *Romer*, 517 U.S. at 632, it lacks a legitimate purpose.

While most criminal laws involve moral choices, in the mine run of cases, the moral intuition that drives the legislature to make particular behavior a crime involves some sense that the conduct at issue causes tangible harm. Put somewhat differently, in most cases, there is a clear answer to the question "*Why* does the legislature consider this conduct immoral?" beyond the blanket assertion "Because it does." The examples pointed to by the Texas Court of Appeals simply underscore this point. To say that "the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral," *Lawrence v. State*, 41 S.W.3d 349, 354 (Tex. Ct. App. 2001), ignores the fact that the legislature deemed those activities to be immoral for a reason. The obvious reason why the state outlaws murder is to protect the lives of potential victims. The reasons why states outlaw prostitution surely include the effects prostitution has on public order in neighborhoods where it occurs. Cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (finding that a city's zoning ordinance regarding the locations of adult theaters was designed to address various "secondary effects" such as increased crime, decreased retail trade and property values, and the quality of urban life).

As the decision in *Renton* suggests, even with respect to crimes that involve judgments about sexual morality, this Court has generally pointed to purposes beyond simple expressions of moral outrage. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (emphasis added) ("This and other public indecency statutes were designed to protect morals *and* public order."); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469-70 (1981) (plurality opinion of Rehnquist, J.) (holding, after noting that legislators might have been concerned about "protecting young females from ... the loss of 'chastity,' and ... promoting various religious and moral attitudes towards premarital sex" that a California statutory rape law was properly sustained because of the state's strong interest in deterring teenage pregnancy). When those public effects

are absent, this Court has been far more skeptical of the state's asserted interests. In *Stanley v. Georgia*, 394 U.S. 557 (1969), for example, the Court held that a state's power to punish the public distribution of constitutionally unprotected, obscene material did not permit it to punish the private possession of such material within an individual's home.

In this case, respondent points to no reason why private, consensual homosexual conduct between adults is immoral and should be made a crime. It does not argue that the conduct at issue harms third parties in some tangible fashion. It does not argue that private consensual homosexual conduct creates threats to public order or brings in its wake other criminal behavior. It does not argue that § 21.06 is tied to *any* concrete harm.[10] The obvious explanation for § 21.06 is that it reflects popular disapproval of gay people. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Respondent recognizes that after *Romer*, straightforward animus against gay men, lesbians, and bisexuals is impermissible. But it tries to distinguish § 21.06 by claiming Colorado's Amendment 2, was "based upon sexual *orientation*," Brief in Opposition at 18 (emphasis in original), while § 21.06 "is directed at certain conduct, not at a class of people." *Id.* at 12. The fact that § 21.06 is phrased in terms of conduct does not undermine the conclusion that it targets – in a similar manner – the same class that was targeted in *Romer*. While the *Romer* Court referred to the class as "homosexual persons or gays and lesbians," Amendment 2 literally prohibited claims of protection based on "homosexual, lesbian or bisexual orientation, *conduct, practices or relationships*" as well. *Romer*, 517 U.S. at 624 (emphasis added).

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[10] Other criminal statutes, which apply to heterosexual and homosexual conduct alike, prohibit public sexual activity, Tex. Penal Code § 21.07(a)(2), nonconsensual sexual activity, *id.* § 22.011(a)(1), and sexual activity involving minors, *id.* §§ 22.011(a)(2), 21.11.

Texas's attempt to call this a conduct regulation fails for another reason. The Eighth Amendment prohibits states from criminalizing a particular status in the absence of "any antisocial behavior." *Robinson v. California*, 370 U.S. 660, 666 (1962). Because a state therefore cannot make it a crime to "be gay," a state with that motive will try to circumvent the Constitution by crafting a law that makes it a crime to engage in behaviors correlated with being gay. That is in essence what Texas did here. But it is a charade the Court has not tolerated in other cases. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227, 232 (1985) (finding that an Alabama statute that disenfranchised individuals convicted of certain misdemeanors of "moral turpitude" was in fact purposefully discriminatory because "the crimes selected for inclusion . . . were believed by the [drafters] to be more frequently committed by blacks"). Thus, § 21.06 fails a critical aspect of any rational basis test: it does not advance a legitimate state objective.

### B. Even If This Court Were To Find the Presence of a Legitimate State Interest in This Case, Section 21.06 Still Would Not Be Rationally Related to Achieving That Purpose

Respondent itself acknowledges that not all penalties or burdens imposed on individuals who engage in homosexual conduct can survive even rationality review. After arguing that the state has a legitimate interest in "implementing morality," it observes that

> 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.

Brief in Opposition at 19. What respondent fails to recognize is that if the hypothetical school-exclusion statute is unconstitutional, it is not

because it is less well tailored than § 21.06 to "implement[ing] the communal belief that the conduct is wrong and should be discouraged." Given the centrality of public education to one's membership in the community, surely exclusion of "practicing homosexuals" – a group essentially indistinguishable from "persons who engage in homosexual conduct" – would convey the communal belief that homosexuality is wrong quite well. And a statute prohibiting practicing homosexuals from attending public schools would seem to discourage homosexual conduct at least as much as the unenforced § 21.06 does. *Cf. Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230, 1235 (2002) (finding that the threat of being evicted from public housing for drug-related conduct could help to deter such activity). Rather, the reason the hypothetical school-exclusion statute fails rationality review is because the price it exacts is unacceptably high. So too, making private, consensual homosexual conduct a crime is a constitutionally inappropriate means to any permissible end.

1. Nonenforcement of Statutes Like Section 21.06 Transforms Them Into Expressions of Constitutionally Impermissible Animus

The state of Texas rarely enforces § 21.06. Indeed, in a civil action challenging the constitutionality of § 21.06, Texas's highest court ruled that the plaintiffs lacked standing because they could show no threat of imminent enforcement. *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994). The court premised this conclusion on "the Attorney General's contention that § 21.06 has not been, and in all probability will not be, enforced against private consensual conduct between adults." *Id.*[11]

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[11] It is important to recognize that the reason Texas's Homosexual Conduct Law is seldom enforced is *not* because it is seldom violated. There are probably around one million gay or lesbian individuals in Texas. See *Baker v. Wade*, 553 F. Supp. at 1129 (explaining this estimate). Thus, there are millions of violations of § 21.06 every year. Nonetheless, the state apparently makes virtually no effort to detect and prosecute violations of §

In light of the record of pervasive indifference to enforcement of § 21.06, it is impossible to credit respondent's assertion that the statute reflects a societal interest of any kind, moral or other, in preventing private, consensual sexual activity between same-sex partners. See *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting) ("To me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time – in effect a right to hold this statute as an imminent threat to the privacy of the households of the State – conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary."). Indeed, in an earlier case challenging § 21.06, the Attorney General of Texas withdrew his appeal of a district court decision striking down § 21.06, leaving only a single county prosecutor to defend (successfully) the statute. See *Baker v. Wade*, 769 F.2d at 291.

But if the state makes virtually no effort to enforce the statute, the only explanation for its presence on the books is that it stays there to express animus against gay people. Given the way these laws function in society, see *supra* Section I.B., the government and the public read § 21.06 as an endorsement of discrimination against gay people. Thus, the major function § 21.06 serves is to brand all gay men and lesbians as immoral criminals.

Lest there be any doubt about this message, consider how the Texas law of defamation treats false allegations of homosexuality. In *Plumley v. Landmark Chevrolet*, 122 F.3d 308 (5th Cir. 1997), Hamilton, a salesman at the defendant truck dealership, called Plumley, a potential customer, a "fucking faggot." *Id.* at 310. In Plumley's subsequent slander suit, the Fifth Circuit held that Plumley was not required to prove special damages because "when Hamilton

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21.06. In this case, for example, petitioners were discovered only because police officers went to petitioner Lawrence's house to investigate what turned out to be a criminally misleading report about a weapons disturbance.

called Plumley a 'faggot,' Hamilton imputed the crime of sodomy to Plumley. Therefore, the alleged remark is slander per se," *id.* at 311. See also *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Ct. Civ. App. 1980) (calling someone "homosexual" or "queer" is slanderous per se because it imputes a crime even though that crime is not punishable by imprisonment). The Texas courts continue to this very day to equate being gay with being a criminal. See *Thomas v. Bynum*, 2002 WL 31829509 (Tex. Ct. App. 4th Dist., Dec. 18, 2002) (reaffirming *Head*).

Under these circumstances, the decision to keep § 21.06 on the books reveals that Texas is using the means of the criminal law not to interdict conduct but solely to make a statement that the Constitution does not permit the state to make – namely that gay men, lesbians, and bisexuals are an inherently unworthy class "unequal to everyone else." *Romer*, 517 U.S. at 635.

2. Vigorous Enforcement of Laws Like Section 21.06 Would Involve Constitutionally Repugnant Methods

Although the means of the criminal law are rarely employed to enforce the edict of § 21.06, the availability of the awesome state power that flows from criminalizing particular behavior offers an alternative reason for striking down § 21.06. If the state can make private, consensual homosexual behavior a crime, then it can also deploy "all the incidental machinery of the criminal law, [including custodial] arrests, searches and seizures," *Poe v. Ullman*, 367 U.S. at 548 (Harlan, J., dissenting).

This Court's recent decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), drives home the dangers § 21.06 imposes. Like Mrs. Atwater, petitioners in this case were subjected to a custodial arrest, with the attendant loss of liberty and "pointless indignity," *id.* at 373 (O'Connor, J., dissenting), for a non-jailable offense. They were forced to spend the night in jail, despite the fact that the maximum statutorily authorized penalty for violating § 21.06 is a $500 fine. See Tex. Penal Code § 12.23. Their experience shows that

law enforcement personnel or prosecutors who have the kind of "negative attitudes" or "irrational prejudice" that *Cleburne* held to be constitutionally illegitimate can unilaterally impose a punishment on gay people that the Texas Legislature never authorized. In short, as the title of Malcolm M. Feeley's classic book puts it, The Process Is The Punishment (1979). And because upholding § 21.06 necessarily requires holding that the state can treat gay men, lesbians and bisexuals differently from all other citizens, the fact that anti-gay prejudice motivated a particular officer or department's decision to enforce § 21.06 would be irrelevant. Cf. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) (explaining that "unbounded discretion" to carry out full custodial arrests "carries with it grave potential for abuse" and that "the relatively small number of published cases dealing with such arrests proves little and should provide little solace," especially given problems with discriminatory enforcement).

The commentary to the American Law Institute's Model Penal Code identified precisely these dangers several decades ago: to the extent that laws like § 21.06 "are enforced against private conduct between consenting adults, the result is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment. This invitation to arbitrary enforcement not only offends notions of fairness and horizontal equity, but it also creates unwarranted opportunity for private blackmail and official extortion." Model Penal Code §213.2 Comment 2 (1962, Comments Revised 1980).

If § 21.06 is a valid criminal statute, there are other perhaps even more constitutionally repugnant methods of enforcing the law than simply confining defendants overnight until they can be arraigned. As noted above, the 2000 U.S. Census reports nearly 43,000 same-sex cohabiting couples in Texas. A vindictive or bigoted law enforcement officer or prosecutor could perhaps quite easily establish probable cause to believe that these couples, or any openly gay or lesbian individuals, have engaged in violations of § 21.06, especially given the presumption, as a matter of Texas law, that homosexuals violate § 21.06. See, e.g., *Plumley*, 122 F.3d at 310; *Head v. Newton*, 596 S.W.2d at 210. If they can establish probable cause, police or

prosecutors can obtain search warrants to enter individuals' homes and search their personal effects for incriminating evidence. In *Griswold*, 381 U.S. at 485-86, one of the considerations that influenced this Court's holding that Connecticut could not criminalize the use of contraceptives was the prospect that otherwise the Court would be required to "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," an idea "repulsive to the notions of privacy surrounding the marriage relationship." The idea is no less repulsive if the police are searching the bedrooms of gay and bisexual individuals for telltale signs of sexual activity. As this Court recognized in *Kyllo*, 533 U.S. at 37, "[i]n the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes."

Other cases suggest that police might be justified in even more intrusive searches of individuals themselves. Courts of appeals have repeatedly recognized that body cavity searches and "strip searches involving the visual inspection of the anal and genital areas [are] demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (internal quotation marks omitted). See also *Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985); *Swain v. Spinney*, 117 F.3d 1, 6-7 (1st Cir. 1997). But they have nonetheless allowed them in a variety of circumstances. For example, in *Rodriques v. Furtado*, 950 F.2d 805, 810-11 (1st Cir. 1991), the court of appeals upheld a warrant authorizing a vaginal search for drugs in light of informants' statements that they had overheard the target saying that she sometimes hid drugs in her vagina. In *Salinas v. Breier*, 695 F.2d 1073, 1085 (7th Cir. 1982), *cert. denied*, 464 U.S. 835 (1983), the court of appeals held that the police were entitled to conduct strip and body cavity searches without warrants of an entire family taken into custody on the basis of an arrest warrant for the father because they had probable cause to believe that a controlled substance was hidden in at least *one* of the family members' rectums or vaginas. Most recently, in *United States v. Husband*, 2002 U.S. App. LEXIS 22851 (7th Cir., Nov. 4, 2002), the court of appeals upheld a search in which, after a suspect refused to open his mouth, the police had him

anesthetized and rendered unconscious in order to remove evidence from his mouth. See also *Winston v. Lee*, 470 U.S. 753, 759, 760 (1985) (providing that "compelled surgical intrusion into an individual's body for evidence . . . . depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure").

The most objective physical evidence of a violation of § 21.06 would surely be the presence of the saliva or semen of one person on (or in) his or her partner's body. Forcing a suspect to submit to a strip search, cavity search, or other intrusion to retrieve this evidence, no matter how probative, of an act that Texas has chosen to treat as a misdemeanor subject to a $500 fine would be constitutionally repugnant. As the commentary to the Model Penal Code observes, "the methods available to the police for enforcing such laws involve tactics which are often unseemly, and which, by their very nature, stretch the limits of constitutionality." Model Penal Code §213.2 Comment 2 (1962, Comments Revised 1980). But the availability of such enforcement measures flows almost ineluctably from the conclusion that states can enforce notions of morality by criminalizing the harmless conduct at issue in this case. Though respondent has argued that it is entitled to make the moral choice that underlies § 21.06, nothing in its argument suggests that it should be entitled to deploy the full panoply of *criminal* law enforcement against citizens who have engaged in private, consensual homosexual acts. That is an irrational and impermissible response.

**Conclusion**

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Texas Court of Appeals.

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# APPENDIX

# Appendix A-1

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