No. 02-102

IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari
To The Court of Appeals of Texas
Fourteenth District

BRIEF OF AMICUS CURIAE CONCERNED WOMEN FOR AMERICA, IN SUPPORT OF THE STATE OF TEXAS, RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Concerned Women for America ("CWA") is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state and local legislatures and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, the academic community, business leaders and the general public about family, cultural and constitutional issues that affect the nation. CWA has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts and state courts.[1]

The issues in this case directly affect the constitutional right of the states to exercise their police power to protect public health, safety and morals.

CONSENT TO FILE BRIEF

Petitioners and Respondent, through their counsel of record respectively, have granted consent to the filing of this Brief *Amicus Curiae* in support of Respondent. Their letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Amicus respectfully urges this Court to dismiss the *Petition for Certiorari* as improvidently granted because the

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[1] This brief was authored by Janet M. LaRue, Chief Legal Counsel for Concerned Women for America, and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

record below does not provide a sufficient basis for the Court to decide the questions on which *certiorari* was granted.[2] In the alternative, the Court is urged to affirm the decision below because Petitioners cannot sustain their burden to demonstrate that no set of circumstances exists under which the statutes would be valid.[3]

The record below is virtually nonexistent, except for the scant statement that the arresting officers "observed appellants engaged in deviate sexual intercourse." Nothing in the record establishes whether the conduct was consensual, noncommercial, or whether anyone else was present to observe the conduct. Nothing establishes that the arresting officers knew Petitioners' sexual orientation at the time of the arrest or that it mattered to the officers. Furthermore, Petitioners did not establish in the proceedings below that they are homosexuals. Petitioners concede that there are circumstances under which the statues may be validly enforced.

The Texas statutes at issue do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The statutes are facially neutral in that they prohibit same-sex "deviate sexual intercourse." They criminalize conduct, not status. The statutes do not discriminate on the basis of sexual orientation or sex (gender) because they apply equally to two women or two men regardless of their orientation. Even if the statutes discriminated on the basis of sexual orientation, for equal

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[2] *New York v. Uplinger*, 467 U.S. 246 (1984); *Illinois v. Gates*, 462 U.S. 213 (1982) (writ of *certiorari* to review a decision holding unconstitutional a New York law prohibiting loitering for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse).

[3] *United States v. Salerno*, 481 U.S. 739 (1987).

protection purposes, sexual orientation is not entitled to anything more than rational basis scrutiny.[4]

Homosexuals do not meet the criteria for a "suspect class" because they do not meet the "traditional indicia of suspectness."[5] Homosexuals have enormous political, legal, cultural and economic power according to their own publications. If the Court were to extend heightened protection to homosexual "orientation," the Court would open the door to equal protection claims by numerous groups seeking minority status on the basis of their sexual "orientation." Immutable characteristics, not conduct, should remain the basis for identifying a "suspect" class.

The statutes do not violate a fundamental constitutional right. There is no constitutional zone of privacy that shields same-sex "deviate sexual intercourse" from state regulation.[6] Protecting public health, safety and morals is a rational, if not compelling, reason to prohibit same-sex "deviate sexual intercourse."

The Court is respectfully urged to defer to the police power authority of the State of Texas to do so under the statutes in question.[7]

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[4] *Romer v. Evans*, 517 U.S. 620 (1996).

[5] *Bowen v. Gilliard*, 483 U.S. 587 (1987).

[6] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[7] *Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

ARGUMENT

I. THE PETITION FOR THE WRIT OF *CERTIORARI* SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. When The Record Below Does Not Provide A Sufficient Basis For The Court To Decide The Constitutional Questions On Which A Petition For *Certiorari* Was Granted, The Petition Should Be Dismissed.

In *Uplinger, supra,* Justice Stevens concurred in dismissing a *cert.* petition after full briefing and oral argument. He reasoned that when the "posture, record, or presentation of issues makes it an unwise vehicle for exercising the 'gravest and most delicate' function that this Court is called upon to perform, the Rule of Four should not reach so far as to compel the majority to decide the case."[8]

In *Gates*, *supra*, the Court emphasized the need of a sufficient factual record to rule on a question:

> Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we "promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions." … Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances.[9] [Internal citation omitted.]

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[8] *Uplinger,* 467 U.S. at 251.

[9] *Gates*, 462 U.S. at 224; *See Board of Education v. Pico*, 457 U.S. 853 (1982) (White, J. dissenting.).

B. The Record Below In This Case Does Not Provide A Sufficient Basis For The Court To Decide Whether Petitioners Were Discriminated Against In Violation Of The Fourteenth Amendment To The United States Constitution; Therefore, The Petition for Certiorari Should Be Dismissed

Texas Penal Code §§ 21.06 and 21.01 ("statutes"), under which Petitioners were charged, prohibit same-sex "deviate sexual intercourse" whether oral or anal. Sexual orientation is not an element of the offense.[10]

The statutes do not discriminate on their face on the basis of sexual orientation or any persons or classes of persons. They criminalize sexual conduct not sexual orientation or status. Although "homosexual conduct" is the title of § 21.06, it may be applied to heterosexuals, homosexuals, lesbians or bisexuals. Texas is not required to prove the sexual orientation of the persons in order to prosecute. Liability is based solely on whether persons of the same sex engaged in "deviate sexual intercourse" with each other.

The statutes do not discriminate based on sex (gender). They are enforceable against a woman who engages in "deviate sexual intercourse" with another woman and a man who does so with another man.

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

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

The record below consists only of two one-page probable cause affidavits filed by the arresting officers. The affidavits are identical except for the identification of the defendant [each a Petitioner herein]. The opinion below includes a scant statement from the record describing the incident that led to the arrests: "While investigating a reported 'weapons disturbance,' police entered a residence where they observed appellants engaged in deviate sexual intercourse."[11]

Nothing in the record below indicates whether the sex act was consensual or noncommercial, or whether anyone else was present to observe the conduct. Nothing in the record indicates that the arresting officers knew or had any basis to know Petitioners' sexual orientation at the time of the arrest. Nothing in the record indicates that the sexual orientation of Petitioners was a reason for the arrests. Nothing in the record provides any basis to presume that the officers would not have arrested Petitioners if the officers had believed Petitioners to be heterosexual or bisexual. Furthermore, Petitioners did not establish in the proceedings below that they are homosexuals.

Nothing in the record provides a sufficient basis for the Court to decide the constitutional questions on which the Petition for *Certiorari* was granted. For that reason, *amicus* respectfully urges the Court to dismiss the Petition as improvidently granted.

II. PETITIONERS CANNOT SUSTAIN A FACIAL CHALLENGE TO THE STATUTES UNDER THE STANDARD ARTICULATED BY THE COURT IN *U.S. V. SALERNO*; THEREFORE THE DECISION BY THE COURT BELOW SHOULD BE AFFIRMED

[11] *Lawrence v. Texas*, 41 S.W.2d 349, 350 (Tex. App. 2001). *See also* Brief of Petitioners at 3.

Petitioners are making a facial challenge to the statutes. As such, they "must establish that no set of circumstances exists under which the Act would be valid."[12] Petitioners concede that the statutes could be enforced against same-sex sodomy where there is no valid consent, or to same-sex sodomy involving prostitution, or to same-sex sodomy in public view. Each constitutes circumstances under which the statutes could be validly enforced.

Amicus respectfully urges the Court to affirm the decision below.

III. TEXAS PENAL CODE §§ 21.06 AND 21.01 DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Statutes On Their Face Do Not Discriminate On The Basis Of Sex (Gender) Or Sexual Orientation And Apply Equally To Both Sexes.

1. Sexual Orientation:

Amicus contends that Petitioners have no valid basis to raise or sustain a facial challenge to the statutes on equal protection grounds because they did not assert in the proceedings below that they are homosexuals. Furthermore, the statutes are directed at same-sex conduct and not orientation or status.[13] See Section I., *supra*.

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[12] *Salerno*, 481 U.S. at 745; *Ohio v. Akron Ctr. For Reproductive Health,* 497 U.S. 502, 514 (1990) (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1987) (O'Connor, J., concurring.)); *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J. dissenting from denial of *cert*.).

[13] *Meinhold v. U.S. Department of Defense* 34 F.3d 1469, 1478 (9th Cir. 1994) (recognizing *Robinson* rule that criminal penalties may be inflicted

The court below correctly concluded: "[W]e cannot assume homosexual conduct is limited only to those possessing a homosexual 'orientation.' Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct. Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation."[14]

A recent survey revealed that the percentage of people having same-sex partners had significantly increased over the prior year for both men and women; however, the number of exclusively homosexual men and women did not change significantly. The author attributed changes to homosexual experimentation by those previously exclusively heterosexual, in the more accepting social climate today.[15]

Bay Windows, self-described as "New England's Largest Gay & Lesbian Newspaper," published an editorial citing "repeated studies of sexuality," which "have found that much of the American public is functionally bisexual over the course of their lifetime, experiencing attraction or engaging in sexual contact with people of both genders."[16]

A very high percentage of bisexual women engage in sex with men, including homosexual men. Dr. Jeanne Marrazzo, an assistant professor of medicine at the University of Washington School of Medicine and nationally recognized expert on lesbian health, states: "About 90

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only if accused has committed act by contrast with status); *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991); *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989).

[14] *Lawrence*, 41 S.W.3d at 353.

[15] A.C. Butler, *Trends in Same-Gender Sexual Partnering*, 1988-1998. Journal of Sex Research 333-343 (visited Feb. 5, 2003): <http://www.mygenes.co.nz/updates.html.

[16] Andrew Rapp, "Try Coming Out as Bisexual" (visited Feb. 3, 2003): <http://www.baywindows.com/main.cfm?include=detail&storyid=341517.

percent of women who have sex with women have been sexually active with men at some point in their lives."[17] Dr. Katherine Fethers, who led an Australian study on bisexual women, reported in *Sexually Transmitted Infections*, a specialty journal published by the *British Medical Journal*:

> Ninety-three percent of the women who reported having sex with another woman also reporting having sex with men within the past year. These bisexual women were found to be more likely than strictly heterosexual women to have injected drugs, had sex with homosexual or bisexual men and had more than 50 male sexual partners in their lifetime.[18]

"Deviate sexual intercourse" is a common occurrence in prisons and is not exclusively homosexual. Prison rape and consensual sex include sex between same-sex heterosexuals, same-sex homosexuals and same-sex bisexuals:

> Because a prison population is highly controlled and inmates no longer have the regular opportunity to engage in consenting heterosexual sex, acting out behaviors pose a grave danger to the safety of other inmates and to staff. [Id., Exs. # 5; Ex. # 20]. Unfortunately, even today, inmates are victimized by sexual assaults from other inmates. Inmates at WSR have been caught engaging in consensual and non-consensual homosexual sex. [Id., Ex. # 5]. Inmates have also been forced into performing fellatio on other inmates. … The probability or possibility of

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[17] Walter Neary, *All Women Should Be Getting Regular Pap* Tests, Study Shows, University Week July 19, 2001 available at: <http://depts.washington.edu/~uweek/archives/2001.07.JUL_19/_article9.html.

[18] Melissa Schorr, "Bisexual Women More at Risk: May Serve as 'Bridge' to Bring STDs to Their Female Partners," (visited Feb. 7, 2003): <http://abcnews.go.com/sections/living/DailyNews/lesbianstds001023.html.

> inmates engaging in consensual and non-consensual sex with other inmates increases exacerbating the problems with HIV, hepatitis, herpes, and other sexually transmitted diseases. … Inmates, who are not homosexual, may engage in homosexual acts in order to satisfy their sexual appetite created by the presence of sexually explicit materials.[19]

"[M]ultiple unsolicited and unwanted requests for homosexual sex" is a problem in prisons.[20] "Because of the lack of physical relationships of choice in prison, there is an increased possibility that inmates who view sexually explicit material will engage in consensual and non-consensual homosexual sex, thereby increasing the spread of HIV, hepatitis and other sexually transmitted diseases."[21] "Some complaints were voiced by the inmates at the failure to segregate inmates who are homosexuals or sex deviates from the rest of the population."[22]

Petitioners were prosecuted for engaging in "deviate sexual intercourse." "Deviate sexual intercourse" is conduct pure and simple. It is conduct commonly engaged in by bisexuals and heterosexuals (engaging in homosexual experimentation) who would be subject to the same criminal liability under the Texas statutes as are Petitioners.

According to the American Psychiatric Association, sexual orientation "refers to erotic attraction to males, females, or both."[23] A person's "erotic attraction" is not an

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[19] *See Ford Powell v. Chase Riveland,* 991 F. Supp. 1249, 1251-1253 (W.D. Wash. 1997).

[20] *Brewer v. Hillard*, 15 S.W.3d 1, 7 (Ky. App. 1999).

[21] *Allen v. Wood*, 970 F. Supp. 824, 830 (E.D. Wash. 1997).

[22] *Sas v. Maryland*, 295 F. Supp. 389, 418 (D. Md. 1969).

[23] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders,* Fourth Edition, Text Revision 535 (Washington, DC, American Psychiatric Association, 2000).

element of the offense proscribed and is, therefore, irrelevant.

There is no basis on which the Court should conclude that the statutes discriminate on their face or as applied to Petitioners.

2. Sex (Gender)

The statutes do not discriminate based on sex (gender). They are enforceable against a woman engaging in "deviate sexual intercourse" with another woman and a man with another man. Men and women are treated with absolute equality as persons. The statutes neither advantage nor disadvantage one sex but not the other.

Petitioners and their *amici* construe the statutes as if they permit men to engage in sexual conduct with other men but not women with women. The statutes do not in any way require adherence to or reinforce any such gender stereotypes. The language could not be clearer: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Women and men are treated exactly the same. The statutes are neutral to both sexual orientation and sex (gender).

Even if the word "sex" in the statutes were expanded beyond the dictionary and traditional definition as a biological distinction between male and female, to mean "gender," defined as "personality features and socio-sexual roles typically associated with 'masculinity' or 'femininity,'"[24] there would still be no discriminatory effect.

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[24] *Bibby v. The Philadelphia Coca Cola Bottling Co*., 85 F. Supp. 2d 515, 517 (E.D. Pa. 2000) (citing *Higgins v. New Balance Athletic Shoe*, 21 F. Supp. 2d 66, 73, 75 (D. Me. 1998)); *Goins v. West Group, Inc*., 635 N.W.2d 717, 723 (Minn. 2001) (holding that under state's Human Rights Act, an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination, defined as "self-image of gender").

"Gender," in that sense, would apply to both men and women, regardless of their biological distinctions or "orientation."

It is instructive that Congress did not include gender or sexual orientation in Title VII of the Civil Rights Act and the courts have refused to define "sex" beyond its traditional meaning, even after the Court's ruling in *Oncale v. Sundowner Offshore Services, Inc.*[25]

Although the Court used both gender and sex in its opinion in *United States v. Virginia*,[26] ("*VMI*") gender is used only as the biological distinction between men and women, male and female. The Texas statutes are completely consistent with the Court's ruling in *VMI*. Justice Stevens emphasized in *Bray v. Alexandria Women's Health Clinic*,[27] "the capacity to become pregnant is the inherited and immutable characteristic that 'primarily differentiates the female from the male.'"[28]

Even if a facially neutral statute operates to the advantage of one sex over the other, that factor alone is not dispositive of whether the legislature had a discriminatory intent. In *Personnel Administrator of Massachusetts v. Feeny*,[29] an equal protection challenge was made to a Massachusetts statute that created a lifetime preference for veterans who qualified for state civil service positions ahead of any qualifying nonveterans. The preference operated overwhelmingly to the advantage of males. A district court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment and this Court reversed. Because

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[25] 523 U.S. 75 (1998).

[26] 518 U.S. 515 (1996).

[27] 506 U.S. 263 (1993).

[28] *Id*. at 330. (Stevens, J. dissenting.)

[29] 442 U.S. 256 (1979).

the statute was gender-neutral on its face, the Court considered first whether the statutory classification was neutral and then whether the adverse effect reflected invidious gender-based discrimination. The Court held that "the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."[30]

The Texas statutes do not prefer one sex over the other nor do they prefer heterosexuals over homosexuals. The statutes are intended to restrain "deviate sexual intercourse." The Legislature may have concluded that only same-sex "deviate sexual intercourse" could be prohibited in light of the Court's rulings in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*. *See infra*, section III. E.

B. For Equal Protection Purposes, "Deviate Sexual Intercourse" Is Not A Fundamental Right

Because of "the practical necessity that most legislation classifies for one purpose or another,"[31] this Court gives states "wide latitude" in enacting social legislation.[32] To satisfy the Fourteenth Amendment's equal protection guarantee, such legislation need only have "a rational relationship to some legitimate end" as long as it "neither burdens a fundamental right nor targets a suspect class."[33]

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[30] *Id*. at 280.

[31] *Romer*, 517 U.S. at 631.

[32] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

[33] *Romer*, 517 U.S. at 631.

This Court has held that to be "fundamental," a right must be either "implicit in the concept of ordered liberty"[34] or "deeply rooted in this Nation's history and tradition."[35] This Court has already held that "neither of these formulations would extend a fundamental right … to engage in acts of consensual sodomy."[36] Such a proposition, this Court said, "is, at best, facetious."[37] Thus the lower court in the present case correctly held that "there is no fundamental right to engage in sodomy"[38] or, in the exact terms of the Texas statute, same-sex "deviate sexual intercourse."

In *Bowers*, this Court held that such an asserted right bears no resemblance to its previously recognized substantive personal rights[39] such as privacy.[40] As defined in the Texas statute, "deviate sexual intercourse" has nothing to do with the privacy of "the home, the family, marriage, motherhood, procreation, and child rearing"[41] that this Court has said the Fourteenth Amendment protects. As the incidents of same-sex sodomy in prisons, *see supra*, and other examples illustrate, many who engage in same-sex sodomy are not involved in or pursing any kind of relationships at all, but merely personal sexual gratification.

Even where a right deemed by this Court to be fundamental is generally involved, legislatures retain

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[34] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[35] *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

[36] *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

[37] *Id*. at 193.

[38] *Lawrence,* 41 S.W.3d at 357.

[39] *Bowers*, 478 U.S. at 190-91.

[40] *See*, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[41] *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973).

authority to make policy choices. In *Harris v. McRae*,[42] for example, this Court upheld a prohibition on public funding for medically necessary abortions:

> Where, as here, Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard, since, by encouraging childbirth except in the most urgent circumstances, it is rationally related to the legitimate governmental objective of protecting potential life.[43]

Neither does this asserted sexual right find any protection in the privacy of the home recognized in *Stanley v. Georgia*.[44] As this Court explained in *Bowers*, that right was "firmly grounded in the First Amendment."[45] In stark contrast, the asserted right to "deviate sexual intercourse" in the present case, like the asserted right to sodomy in *Bowers*, "has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment."[46]

The present claim would begin an ever-widening series of claims for constitutional protection of various forms of sexual conduct. "Its limits are … difficult to discern. … And … it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed

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[42] 498 U.S. 297 (1982).

[43] *Id.* at 299.

[44] 393 U.S. 557 (1969).

[45] *Bowers*, 478 U.S. at 195.

[46] *Id*.

to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."[47] As in *Bowers*, this Court should be "unwilling to start down that road."[48]

C. For Equal Protection Purposes, Sexual Orientation Is Not A Suspect Class

Even if a legislative classification does not implicate a fundamental right, it may still require more than a "rational basis" justification if it targets a "'suspect' or 'quasi-suspect' class."[49] The Texas statutes at issue here do not discriminate on the basis of sexual orientation, and the record contains no evidence of Petitioners' sexual orientation. Indeed, this Court in *Romer* did not identify homosexuals as a suspect class but applied the rational basis standard.[50] It should do the same in the present case.

This Court has held that classifications targeting a "suspect class" must be "suitably tailored to serve a compelling state interest."[51] To be a suspect class, a group must meet the "traditional indicia of suspectness."[52] It must "have been subjected to discrimination," must "exhibit obvious, immutable, or distinguishing characteristics that

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[47] *Id*.

[48] *Id*. at 196.

[49] *Bowen v. Gilliard,* 483 U.S. 587, 602 (1987).

[50] *Romer*, 517 U.S. at 632.

[51] *Cleburne*, 473 U.S. at 40.

[52] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

define them as a discrete group" and be "politically powerless."[53]

This Court has consistently identified as immutable characteristics such things as "race, gender, or ethnic background"[54] and "height or blindness."[55] As such, the only classes recognized by this Court as "suspect" are race,[56] alienage,[57] and ancestry.[58] Central to each are the "obvious, immutable, or distinguishing characteristics that define them as a discrete group." Indeed, this Court has held that a "status" defined not by "an absolutely immutable characteristic" but "conscious, indeed unlawful, action" does not qualify as a suspect class.[59]

Lower courts have held, as this Court implied in *Romer*, that homosexuals are not a suspect class for equal protection purposes. The Ninth Circuit, for example, concluded that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from such traits as race, gender, or alienage."[60]

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[53] *Bowen*, 483 U.S. at 602. *See also Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976); *San Antonio Independent School District*, 411 U.S. at 28.

[54] *See*, e.g., *Holland v. Illinois*, 493 U.S. 474,496 (1990); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

[55] *Cleburne*, 473 U.S. at 472.

[56] *See Loving v. Virginia*, 388 U.S. 1 (1967).

[57] *See Graham v. Richardson*, 403 U.S. 365 (1971).

[58] See *Korematsu v. United States*, 323 U.S. 214 (1944).

[59] *Plyler v. Doe*, 457 U.S. 202, 220 (1981).

[60] *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563,573 (9th Cir. 1990). *See Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97,102 (D.C. Cir. 1987).

An extensive *National Journal* analysis concluded, "[g]ays and lesbians have achieved unprecedented acceptance in America."[61]

The proliferation of anti-discrimination laws covering sexual orientation demonstrate that "homosexuals are not without political power."[62] Homosexual political action committees raise millions for political candidates.[63] A spokesman for the National Gay & Lesbian Task Force stated: "The Gay vote is large, powerful, and able to swing a closely contested election."[64] *The National Journal* found that homosexuals "use their clout and their dollars to shape laws and social policy."[65]

Open homosexuals are being elected to legislatures[66] and courts[67] and appointed as U.S. ambassadors.[68] According

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[61] Zeller, *Marching On, but Apart*, The National Journal, Jan. 12, 2002.

[62] *High Tech Gays*, 895 F.2d at 574. Last year, according to a leading homosexual publication, Connecticut extended legal rights to same-sex couples and cities prohibiting discrimination against homosexuals included New York City; Takoma, Washington; Dallas, Texas; Westbrook, Maine; Chicago, Illinois; Baltimore, Maryland and Orlando, Florida. *News of the Year*; 2002 Time Line, The Advocate, Jan. 21, 2003.

[63] *See* Lou Chibarro, *A Hard Line On 'Soft Money'* Washington Blade, August 3, 2001.

[64] Lisa Keen, *Groups Tout Clout*, The Washington Blade, Sept. 22, 2000.

[65] *See, supra,* note 61.

[66] The U.S. House of Representatives now has three openly homosexual members.

[67] *See* Lisa Krieger, *Judicial Election Shatters Barrier; First Gay Elected to Superior Court*, San Francisco Examiner, March 28, 1996, at A-9.

[68] President Clinton appointed James Hormel to be Ambassador to Luxembourg and President Bush has appointed Michael Guest to be Ambassador to Romania.

to a leading homosexual publication,[69] significant events during 2002 alone include:

- "The first openly gay candidate to be selected to run with a sitting U.S. governor."
- The majority leader of the Maryland House of Delegates became "the state's first legislator to come out of the closet." "The American Academy of Pediatrics officially endorses adoption by gay people."
- "The … National Education Association adopts a policy asking school districts to protect gay and lesbian students and staff members."
- "[n]ewspapers nationwide, including, most significantly, the New York Times" began running same-sex union announcements.
- Homosexual activists saw only one "Election Day ballot measure defeat" last year.
- "the first openly gay mayor of a U.S. state capital."

Homosexual activist groups themselves claim increasing influence over many aspects of American culture and politics. The Gay & Lesbian Alliance Against Defamation (GLAAD) claims to have "changed the way lesbians and gay men are portrayed on the screen and in the news" and to be "a major source of resources and information for entertainment and news media decision makers. Entertainment Weekly has named GLAAD as one of Hollywood's most powerful entities."[70]

Groups such as the National Lesbian and Gay Journalists Association,[71] Gay and Lesbian Medical

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[69] *News of the Year*, *supra* note 62.

[70] GLAAD, "Our History," available at http://www.glaad.org/about/history.php.

[71] At an NLGJA event on April 12, 2000, longtime member Richard Berke, national correspondent for the New York Times, said, "literally three-quarters of the people deciding what's on the [New York Times']

Association, National Gay and Lesbian Chamber of Commerce, National Organization of Gay and Lesbian Scientists and Technical Professionals, Servicemembers Legal Defense Network, and the Gay, Lesbian & Straight Education Network are a few of the homosexual organizations targeting specific sectors of society.

A recent GLAAD report claimed, "[i]n mainstream and gay media gay consumers are becoming big business."[72] According to Online Partners, owners of the Web portal gay.com,[73] homosexuals represent a $450 billion market.[74] The *Miami Daily Business Review* reports that homosexuals have "extraordinarily high disposable income, and are very attractive target for advertisers."[75]

Clearly, Petitioners are not part of a suspect class. Neither do Petitioners constitute a quasi-suspect class. This Court has held that classifications based on sex (gender) must meet a "heightened standard,"[76] that is, be "substantially related to a sufficiently important government

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front page are not-so-closeted homosexuals." *See* Peter LaBarbera, *Just How 'Gay Is The New York Times*, available at http://www.cultureandfamily.org/articledisplay.asp?id=3249&department=CFI&categoryid=cfreport.

[72] Katherine Sender, *"Business, not Politics": Gays, Lesbians, Bisexuals, Transgender People and the Consumer Sphere* (GLAAD Center for the Study of Media and Society, 2002), at 4.

[73] Online Partners boasts that "According to DoubleClick's @plan research, Gay.com is the #1 site on the Internet in reaching single men with household incomes over $100,000." http://www.onlinepartners.com/pages/market.html.

[74] Selig Center for Growth, University of Georgia, available at http://www.onlinepartners.com/pages/market.html.

[75] Marcia Philbin, *Branching Out*, Miami Daily Business Review, Oct. 6, 2000, p. A13.

[76] *Cleburne*, 473 U.S. at 440.

interest."[77] The Texas statute at issue here, of course, is entirely gender-neutral, applying equally to same-sex "deviate sexual intercourse" by men and by women and without regard to sexual orientation.

The court below also rejected Petitioners' disproportionate impact argument: "Where, as here, a statute is gender-neutral on its face, appellants bear the burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose."[78]

The court went on to cite this Court's decision in *Washington v. Davis*[79] with respect to disproportionate impact. That decision, however, addressed disproportionate impact in the context of racial discrimination. "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[80]

The court below rightly recognized the weakness of Petitioners' argument:

> A fallacy of "amphiboly": sex in the sense of gender is not the same as sex act as distinguishing heterosexual conduct from homosexual conduct. … Appellants complain only that the statute has had a disparate impact between homosexuals and heterosexuals; this simply does not raise the specter of gender-based discrimination.[81]

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[77] *Id*.

[78] *Id*. at 359.

[79] 426 U.S. 229 (1976).

[80] *Id*. at 239.

[81] *Lawrence*, 41 S.W.3d at 358.

In *Baker v. Nelson*,[82] petitioners, both adult males, sought a license to marry, which was denied because petitioners were of the same sex. On appeal to the Minnesota Supreme Court, they argued, "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."[83] The Minnesota Supreme Court stated that it did "not find support for them in any decisions of the United States Supreme Court." Citing *Skinner v. Oklahoma*,[84] the court reasoned, "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[85] The court distinguished racial discrimination from sexual discrimination: "But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.[86]

As Justice White cautioned, the Court should remain unwilling to go down a road that would inevitably lead the Court to face equal protection claims raised by individuals who engage in other types of sexual conduct (paraphilias), such as pedophilia or zoophilia,[87] which some characterize as a "sexual orientation."

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[82] 191 N.W.2d 185 (Minn. 1971).

[83] *Id*. at 186.

[84] 316 U.S. 535 (1942).

[85] *Id.* at 540.

[86] *Baker,* 191 N.W.2d at 187. *See also McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down a Florida criminal statute, which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black.)

[87] American Psychiatric Association, *supra* note 23 at 566-582. *See* Appendix.

It is conceivable that the paraphilias defined in note 87, which are presently classified as "mental disorders" will be declassified just as the American Psychiatric Association declassified homosexuality as a "mental disorder" in 1973.[88]

In the Foreword to "Male Intergenerational Intimacy," published in *The Journal of Homosexuality,* Dr. Gunter Schmidt writes: "Each individual case must be looked upon on its own merits...the threat to make all pedophile acts punishable by law can barely be labeled civilized...it implies discrimination and persecution of a minority and should be abolished."[89] Pedophile activists describe their "paraphilia" as a sexual orientation: "Pedophilia is a sexual-orientation, like heterosexuality, homosexuality, bisexuality, etc."[90] *The Washington Times* reported that the University of Massachusetts at Amherst had revised its nondiscrimination policy to protect "persons whose sexual orientation includes minor children as the sex object."[91]

In 1997, *The New York Times* reported on a growing phenomenon called "polyluv," in which three or more people form "sexual relationships" Because jealousy is still a problem, organizations devoted to group sex such as Loving More use exercises "in which you practice feeling glad that your mate is with another…. Some have even 'married,' with as many as six figures on the wedding cake."[92] Individuals

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[88] Ronald Bayer, PhD, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 3-4 (New York: Basic Books 1981).

[89] Gunter Schmidt, D.Phil., *Male Intergenerational Intimacy*, J. HOMOSEXUALITY, Vol. 20, nos. 1/2, l990, at 4.

[90] "The Pedophilia/Pedophile Education Web Site Mirror" (visited Feb. 5, 2003:<http://lege.cz/win.en/archiv/pedo1.htm.

[91] *PC 101*, Wash. Times, May 27, 1992, at B1.

[92] *They Call it Polyluv*, N.Y. Times Magazine, Feb. 16, 1997, Section 6, at 15.

engaging in "polyluv" "relationships" could make the same claim that their "private consensual adult behavior" deserves constitutional protection as Petitioners herein make.

D. Protecting Public Morals, Health and Safety Is A Rational, If Not Compelling Reason, To Prohibit "Deviate Sexual Intercourse"

The Court's decisions in *Griswold* establishing a fundamental privacy protecting marital intimacy and its holding in *Eisenstadt v. Baird*,[93] that there was no rational reason for the dissimilar treatment of married and unmarried persons who were similarly situated, should not be extended to same-sex sodomy.

The fact that Texas does not criminalize opposite sex sodomy should not be construed as bias or animus toward homosexuals. It is entirely rational to presume that the Texas Legislature's decision to decriminalize opposite sex sodomy in 1973 was a response to this Court's rulings in *Griswold* and *Eisenstadt,* and to protect marital intimacy and opposite sex relationships that are likely to result in marriage. The Legislature's decision is certainly rational in light of Justice Stevens' dissent in *Bowers*:

> Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' *Griswold*, 381 U.S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U.S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct

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[93] 405 U.S. 438 (1972).

proscribed by § 16-6-2 of the Georgia Criminal Code.[94]

The fact that the prohibited conduct is called "deviate" should not be construed as evidence of legislative animus or bias toward homosexuals. Historically and currently, juries are instructed that in judging obscenity they may find that the prurient appeal requirement is met if the material is designed for and primarily disseminated to a clearly defined deviant sexual group including homosexual conduct. Justice Brennan writing for the Court in *Mishkin v. New York*[95] referred to material "depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, …."[96]

Whenever the state regulates conduct for the sake of public morality, it is a policy-based determination made by the legislature that the conduct in question addresses, thereby affecting the morality of the citizens of that state. It is perfectly valid for the state to make a legislative decision that reflects a deeper moral choice. Thus, the concern for the public morality is not limited to nonconsensual conduct or conduct that occurs in public. "Public morality" should be construed to mean the morality of the public, not merely morality in public. As noted above, unless the conduct is protected by some constitutional right, it may be validly proscribed by the state's police power.

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[94] *Bowers*, 478 U.S. at 218 (Stevens, J. dissenting.).

[95] 383 U.S. 502 (1966).

[96] *Id*. at 508. *See Hamling v. United States*, 418 U.S. 87 (1974) ("consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups.) *Id*. at 128; *Pinkus v. United States*, 436 U.S. 293 (1978); *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied sub nom. Thomas v. United States*, 519 U.S. 82 (1996); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

The purpose of the "deviate sexual intercourse" law is to encourage moral behavior,[97] i.e., that which is productive, healthy, or otherwise beneficial for the individual or society and to discourage immoral behavior.

This Court has also recognized that a state may validly exercise its police power in the interest of public health and safety.[98] This is especially important in the advent of the HIV/AIDS epidemic and the explosion of other sexually transmitted diseases.

States are struggling to find a way to reduce the rapid spread of disease, and many experimental measures have been tried.[99] It has been proposed that the HIV/AIDS crisis has a much greater impact on homosexuals and intravenous drug users.[100] If the tide of this epidemic is to be turned, then such "high risk" behavior must become the focal point of concern.

The liberal magazine *Rolling Stone* published an article in which the author describes a disturbing and deadly trait of homosexual men known as "bug chasers" — homosexual men who yearn to get infected with the HIV virus. "The men who want the virus are called 'bug chasers,'

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[97] *See Bowers*, 478 U.S. at 192.

[98] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 719 (1985) and *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

[99] *See* Comment, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 631-34 (1986).

[100] *See* UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, REVIEW OF THE PUBLIC HEALTH SERVICES RESPONSE TO AIDS 6 (WASH., D.C.) (pub. No. OTA- TM-H-24) (Feb. 1985).

and the men who freely give the virus to them are called 'gift givers.' … HIV-infected semen is treated like liquid gold."[101]

A closely related high-risk behavior by men who have anal sex with other men is a further compelling reason for Texas to criminalize same-sex sodomy. The prevalence and popularity of "barebacking" (unprotected anal sex) greatly increases the risk of HIV and sexually transmitted disease infections.[102]

The fact that incidents of "bug chasing" and "barebacking" are consensual and occur in a private residence does nothing to mitigate the serious threat to both the health and safety of the persons who engage in the conduct and to the public generally. The Texas Legislature's decision to prohibit "deviate sexual intercourse" serves a substantial if not compelling state interest to protect public morality, health and safety.

E. Absent An Express Constitutional Violation, Courts Should Defer To State Legislative Acts Such As §§ 21.06 and 21.01

The Texas Legislature acted within its police power authority to criminalize conduct it considers to be "deviate sexual intercourse." Justice Holmes stated:

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[101] Gregory A. Freeman, *In Search of Death*, Rolling Stone, Feb. 6, 2003, at 45; *See* Matthew Laza, *Men Who Want Aids*, The Spectator, Feb. 1, 2003:<http://www.spectator.co.uk/article.php3?table=old&section=current&issue=2003-02-01&id=2744; *Russian Roulette: The Story Behind the Story* (CBC television broadcast, Nov. 21, 2001) available at<http://www.cbc.ca/disclosure/archives/0111_russianroulette/behindstory.html.

[102] Terry Beswick, *Bareback 'Outings' Spark Debate Over Well-Known Secret*, The Bay Area Reporter, July 27, 2000, available at:<http://www.aegis.com/news/bar/2000/BR000705.html. A World Wide Web search on Feb. 8, 2003, utilizing the "Google" search engine and the term, "bareback sex," produced links to 31,000 Web sites.

> [T]he proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.[103]

Justice Douglas writing for the Court in *Griswold*, *supra*, stated, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[104] "The traditional police power of the states is defined as the authority to provide for the public health, safety, and morals. A legislature can legitimately act on such a conclusion to protect the social interest in order and morality."[105] "As Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society".[106] "Above all we must remember that this Court's power of judicial review is not 'an exercise of the powers of a super-legislature.'"[107] Justice Brandeis wrote to emphasize the importance of judicial restraint: "Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged."[108]

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[103] *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (dissenting opinion joined in by Brandeis, J.).

[104] *Griswold*, 381 U.S. at 482.

[105] *Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991).

[106] *Paris*, 413 U.S. at 59.

[107] *Dennis v. United States*, 341 U.S. 494, 526 (1951) (quoting Brandeis, J. dissenting in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924)).

[108] *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting.).

This Court has affirmed the states' rights to define and protect morality:

> 'In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' … 'We do not sit as a super legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.'[109]

The fact that the prohibited conduct occurs in private by consenting adults is not a sufficient basis to grant it constitutional protection. "Most exercises of individual free choice--those in politics, religion, and expression of ideas--are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society."[110]

> Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take. … The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision.[111]

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[109] *Paris*, 413 U.S. at 61, 64.

[110] *Id.* at 63, 64.

[111] *Id*. at 68, 69.

Justice Black emphasized the importance of restrained judicial review of legislative enactments:

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational.[112]

To invalidate a law, not because it is unconstitutional, but merely because it reflects a moral decision on the part of the legislature, is to deprive the states of their constitutional right to regulate the conduct of their citizens. To strip the state of the moral dimension of its police power is to render the state helpless in controlling and confronting conflicts for which its citizens expect a remedy.

CONCLUSION

For all of the foregoing reasons, Amicus respectfully requests this Honorable Court to dismiss the *Petition for Certiorari* as improvidently granted, or in the alternative to affirm the decision of the court below.

February 13, 2003 Respectfully submitted,

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[112] *Griswold*, 381 U.S. at 520, 521 (Black, J. dissenting.).

APPENDIX

1. Pedophilia: "sexual activity with a prepubescent child (generally age 13 years or younger). The individual with Pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with Pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account." (571)
2. Transvestic fetishism: "cross-dressing by a male in women's attire." (574)
3. Autogynephilia: "sexual arousal is produced by the accompanying thought or image of the person as a female". (574)
4. Voyeurism: "obtaining sexual arousal through the act of observing unsuspecting individuals, usually strangers, who are naked, in the process of disrobing, or engaging in sexual activity." (575)
5. Exhibitionism: "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one's genitals to an unsuspecting stranger." (569)
6. Fetishism or Sexual Fetishism: "intense sexually arousing fantacies, sexual urges, or behaviors involving the use of nonliving objects (e.g. female undergarments)." (570)
7. Zoophilia: becoming excited by and/or engaging in sexual activity with animals. (576)
8. Sexual sadism: "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person." (574)

9. Sexual Masochism: "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the act (real, not simulated) of being humiliated, beaten, bound, or otherwise made to suffer." (573)
10. Necrophilia: sexual arousal and/or activity with a corpse. (576)
11. Klismaphilia: erotic pleasure derived from enemas. (576)
12. Telephone Scatalogia: the compulsion to utter obscene topics over the phone. (576)
13. Urophilia: sexual arousal associated with urine. (576)
14. Coprophilia: sexual arousal associated with feces. (576)
15. Partialism: "sexual arousal obtained through exclusive focus on part of the body." (576)
16. Gender Identity Disorder: "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex," along with "persistent discomfort about one's assigned sex or a sense of the inappropriateness in the gender role of the sex." (576)
17. Frotteurism: "touching and rubbing against a nonconsenting person." (570)

CERTIFICATE OF SERVICE

Three copies of this BRIEF OF *AMICUS CURIAE* were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, on the 18th day of February 2003, by Byron Adams Printers, addressed to:

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