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 THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is filing this brief in support of the petitioners. The parties in the case have consented to the filing of this *amicus* brief.[1]

SUMMARY OF THE ARGUMENT

This case is about the proper scope of and limits on government power more than it is about homosexuality or homosexual conduct. Texas asserts that it may criminalize a noncommercial, nonpublic, non-harmful activity between consenting adults in the privacy of their home for the sole reason that it believes that activity immoral. This brief asserts that Texas' statute exceeds the police power.

The petitioners and other *amici* will undoubtedly demonstrate that the lower court's decision should be reversed because the law in question is irrational, gives effect to private biases, and violates the right to privacy. This brief, however, addresses a different issue – the limits on government power. The brief urges this Court to ask not whether the defendants had the right to engage in their specific sexual activity but instead whether the

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

government has the power to prohibit it. We suggest that even before analyzing state action under one of the constitutional amendments, the Court first ask whether the contested government action falls within the police power. This approach provides an alternative to substantive due process analysis and is consistent with the approach of both our Founders and the leading Western jurists whose ideas underlay our political system.

The primary purpose of police power regulation is to protect individuals from harm. Even the government's purported interest in protecting public morality does not extend government power into the realm of private moral or immoral conduct. Indeed, legislative declarations demanding that people behave in certain ways in their private lives based on majority perceptions of what is moral destroy individual liberty.

Finally, Texas' statute cannot survive rational basis review. Bearing in mind the limits on the police power, the statute has no legitimate government purpose. Nor is it possible to show, or even inquire how, the statute relates to a legitimate government interest. With only a stark assertion of a moral claim, there are no facts and no relationship for a court to examine. The statute fails both prongs of the rational basis test and thus violates equal protection guarantees.

ARGUMENT

I. REGULATION OF CONSENSUAL, NONCOMMERCIAL, NONPUBLIC, NON-HARMFUL CONDUCT EXCEEDS THE POWER OF GOVERNMENT IN THIS COUNTRY.

A. This Court Should Ask Whether the State's Police Power Extends This Far, Not Whether the Defendants Have a "Right" to Engage in the Conduct at Issue.

This Court's decisions have long recognized that there is a private sphere beyond which no state may intrude.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted in, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 758 (1985)).

Although it has recognized that there must be a realm of individual autonomy beyond state power, this Court has struggled to find a proper method and textual basis for defining that sphere. At different times, the Court has treated a person's interest in conducting his or her own affairs as aspects of the First Amendment, Fourth Amendment, and Fourteenth Amendment. *See, e.g.*,

Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (freedom of intimate association protected by First Amendment); *Katz v. U.S.*, 389 U.S. 347, 350-51 (1967) (Fourth Amendment protects reasonable expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (discussing many possible bases for a right to privacy, including Fourteenth Amendment).

There is certainly a reasonable argument to be made for each of these textual bases.[2] Yet each seems somehow to miss the mark. The First Amendment analysis depends on the exact nature of the private activity at issue, while the Fourth Amendment inquiry usually turns on the government's investigative techniques.[3] Substantive due process depends largely on whether the liberty interest at

[2] We expect that other briefs will address these issues directly.

[3] Some scholars argue that the Ninth Amendment is the appropriate textual basis for the protection of private activity. *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1, 41-42 (1998) (analyzing relationship of Ninth Amendment to state regulation and arguing that state governments may not violate unenumerated rights). For a discussion of the application of the Ninth Amendment to state regulation of private sexual activity, see Mark Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. Rev. 85, 125-34 (2000); *see also Griswold*, 381 U.S. at 491-95 (Goldberg, J., concurring) (privacy rights may reside in Ninth Amendment). Our police power analysis does not require the Court to directly apply the Ninth Amendment. The limits on the police power – a power nowhere mentioned in the text – precede, underlie, and continue after the drafting of our Constitution and the Fourteenth Amendment. Here, we urge this Court to look at whether the state action falls within its police power before even attempting to place the legal challenge within the framework of a particular constitutional provision. If it fails this analysis, further inquiry is unnecessary.

issue has historically been treated as a "fundamental" right. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (expressing reluctance to add to the Court's short list of fundamental rights); *see also Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (commission of homosexual sodomy not a fundamental right, protected by time-honored tradition, and the government can therefore prohibit it).

The problem with these approaches, and particularly with the fundamental rights inquiry, is that there are countless private activities that are protected by no tradition or express constitutional provision. It would be unimaginable that they could be prohibited in a free society, even if some objection could be raised to them – cooking unhealthy meals, staying up too late, spending a slothful day drinking coffee and doing puzzles instead of accomplishing something productive. Indeed, almost anything that an ordinary person might spend his or her weekend doing, from gardening to cleaning to touching up house paint, would probably not qualify as a "fundamental" right. *See, e.g.*, Glen Reynolds & David Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 Hastings Const. L.Q. 511, 536 (2000) (criticizing approach of evaluating affirmative rights, rather than limits on government power). Yet such private activities, in the aggregate, are the essence of ordered liberty.

As detailed in the following section, our Founders and leading scholars throughout Western history all believed that there were limits on the power of government to intrude into the private activities of citizens. That basic understanding preceded, underlay, and continued after our Constitution. It is woven into the fabric of liberty in this country. This brief urges that this Court ask first whether

a government action falls within the legitimate scope of the police power, before it examines the nature of the liberty interest at issue.

B. In Our Political and Constitutional Tradition, Government Power Is Limited While the Number of Private Liberties Is Not.

Every political and legal scholar in our philosophical tradition has written about the need for limits on government power and the importance of preserving personal liberty. "Jefferson, Burke, Paine, Mill, compiled different catalogues of individual liberties, but the argument for keeping authority at bay is always substantially the same . . . to preserve our personal freedom." Isaiah Berlin, *The Proper Study of Mankind* 198 (Farrar Straus Giroux 1997).

Legislators are perfectly capable of invading liberty, and that is why government is limited:

> [T]he community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they should be so foolish or so wicked to carry on designs against the liberties and properties of the subject.

John Locke, *Two Treatises on Government* 197 (Hafner 1947) (1690).

The Founders fully adopted this view of the limits on government power and the broad scope of individual liberty. As Jefferson wrote:

> An elective despotism was not the government we fought for; but one which should not only be

> founded on free principles, but in which the power of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

Thomas Jefferson, *Notes on the State of Virginia* (*quoted in The Federalist* No. 48 (Madison) at 278-79 (Clinton Rossiter ed., 1961)). The Founders believed the only way to prevent the danger of overreaching government action was to limit government power and give the judiciary the power to check legislative excesses. As Hamilton explained in Federalist 78, limitations on the legislative power:

> can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

The Federalist No. 78, *supra*, at 437. Indeed, that is the essential function of the federal judiciary as envisioned by the framers.

Rather than identify a long list of liberties to be protected from infringement by government, the drafters of the original Constitution advocated protecting liberty by establishing a government of limited and enumerated powers. When opponents to the proposed constitution objected that it lacked a bill of rights, defenders argued vociferously that any effort to enumerate rights would be both unnecessary and dangerous.

For example, James Wilson, a member of the Constitutional Convention, future member of the Supreme

Court, and professor of jurisprudence at the University of Pennsylvania, exclaimed "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." *Elliot's Debates*, Vol. II at 454 (Dec. 4, 1787) (2d ed., 1937) (1836-45); *see also id*., Vol. IV at 316 (Jan. 18, 1788) (Charles Pinckney explaining that the drafters did not "delegate[] to the general government a power to take away such of our rights as we had not enumerated").

Future Supreme Court Justice James Iredell, speaking to the North Carolina ratification convention, cheerfully invited "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id*., Vol. IV at 167 (July 29, 1788).

As the debates on the Constitution show, the Founders were deeply concerned about the risks of delineating their liberties with specificity. During the debate on whether to adopt the Bill of Rights, Madison said that:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against.

James Madison, "Discussion of Drafts and Proposals to the Constitution," 1 Cong. 1789 (*quoted in The Complete Bill of*

Rights, 55 (Neil Cogan ed., Oxford 1997)). Madison responded to this objection by adding the Ninth Amendment and building the limited power of government into our constitutional structure.

The leading theorists of the 19th century also agreed that the police power had its limits. John Stuart Mill regarded each individual as having "a certain sphere of activity in his sole and exclusive possession. Within this sphere he is to exercise perfect freedom, unimpeded by the free action of any other human creature." J.S. Mill, *On Social Freedom* 40 (Columbia University Press 1941) (1873).

In his seminal work interpreting and explaining the Fourteenth Amendment, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* (Little, Brown and Company 1868), Thomas Cooley, then a justice on the Michigan Supreme Court and the Jay Professor of Law at the University of Michigan, sought to address the question of "whether the State exceeds its just powers in dealing with the property and restraining the actions of individuals." *Id.* at 572. His answer turned on the content of the police power, which he defined in light of previous judicial opinions as follows:

> The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is

> reasonably consistent with a like enjoyment of rights by others.

Id.

Whereas the protection afforded common-law rights by adjudication occurs after they have been violated, police power regulations seek to facilitate the exercise of these rights and prevent their infringement before the fact. Thus damage actions compensate for past rights violations, while police power regulations *prevent* rights violations from occurring.

Because the police power of a state is its power to protect the liberties of the people, the proper scope of that power is a function of and limited by those same liberties. There is no enumeration or list of specific state powers for much the same reason the founders thought rights could not be comprehensively listed. Just as all the ways that liberty may be exercised rightfully cannot be enumerated in advance, neither can all the specific ways that people may transgress upon the rights of others:

> It would be quite impossible to enumerate all the instances in which this power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number and in variety.

Id. at 594.

Like the modern doctrine that views content-neutral time, place, and manner regulations of speech to be consistent with the First Amendment, the police power permits the states the authority "to make extensive and

varied regulations as to the time, place, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming into conflict with any of those constitutional principles which are established for the protection of private rights or private property." *Id.* at 597. The police power, then, can best be viewed as the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts.

After Cooley, the leading nineteenth century theorist of the police power was Christopher Tiedeman. In his *Treatise on the Limitations of Police Power in the United States* (F.H. Thomas 1886), he repeatedly relied on the power to prevent rights violations to identify reasonable and therefore constitutional exercises of the police power.

Like Locke, Tiedeman defines the legitimate purpose of government as the protection of rights. "The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights." *Id*. at 1-2. Government protects and develops these rights by preventing people from violating the rights of others. "The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. . . . The power of the government to impose this restraint is called POLICE POWER." *Id*.

C. Prevention of Harm Is the Prime Justification for Invoking the State's Ability to Use the Police Power.

Adam Smith wrote that "the first and chief design of all government is to preserve justice amongst the members of the state and prevent all encroachments on the individual in it, from others of the same society." Adam Smith, *Lectures on Jurisprudence* 7 (Oxford 1978) (1762-63). Mill was even more emphatic:

> [The principle of human liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

J.S. Mill, *Autobiography and Essay On Liberty* 206 (Harvard University Press 1963) (1859).

Christopher Tiedeman concurred that the police power allowed the regulation of citizens' activities in order to prevent harm:

> Any law which goes beyond that principle [preventing harm] which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice.

Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* 4-5 (1886).

Following Tiedeman, a leading jurist of the early twentieth century, Ernst Freund, wrote that:

> Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests.

Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 511 at 546-547 (1904).

Even today, the prevention of harm is still the prime justification for the use of the police power. "In the absence of preventing harm . . . it is difficult to understand the assertion that [social] conformity is a value worth pursuing notwithstanding the misery and sacrifice of freedom which it involves." H.L.A. Hart, *Law, Liberty and Morality* 57 (Stanford University Press 1962).

Consistent with these jurists, the prevention of harm has been the traditional way that this Court has justified the State's use of the police power:

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

D. The Police Power Does Not Extend to the Promotion of Private Morality.

1. Traditionally, the police power allows regulation only of *public* morality.

We acknowledge that the promotion of public morality has been included as a part of the police power. But even under this description, the power extends only to *public* morality. *See, e.g.*, *Nashville, Chattanooga & St. Louis Ry. v. Walters,* 294 U.S. 405, 429 (1935) ("police power embraces regulations designed to promote *public* convenience or the general welfare, and not merely those in the interest of *public* health, safety, and morals") (emphasis added). The State promotes public morality by providing for such things as education, lauding good conduct, and rewarding public service. In addition, the State is the guardian of public spaces such as streets and parks and may constrain conduct there, such as public fornication or intoxication. Such actions, though permitted behind closed doors, wrongfully interfere with the use and enjoyment of the public sphere by reasonable members of the community.

There is a crucial difference, however, between promoting public morality and protecting the sensibilities of reasonable members of the community while in the public sphere – something that falls under the police power of state – and criminalizing private consensual conduct that harms neither the individuals involved nor the general public – something that is outside the bounds of the police power. The State's power to promote public virtue and govern conduct in public spaces ends when individuals conduct their private lives behind closed doors in ways that harm no one. *Cf. People v. Onofre*, 415 N.E.2d 936, 941 (N.Y. 1980) (holding that law prohibiting sodomy by any unmarried persons did not advance public morality

and instead "impose[d] a concept of private morality chosen by the State").

Legal scholars of the police power agree that it is limited to the protection of public, not private, morality. Certainly, as discussed above, scholars like Cooley and Tiedeman rejected the notion that government could regulate private morality. More contemporary scholars agree. Prominent legal scholar H.L.A. Hart is certainly not known for his narrow view of government power. Yet he concluded that legislation like Texas' prohibition on private, consensual, noncommercial, non-harmful sexual conduct exceed the police power of government. "[T]he fundamental objection to coercing moral standards in private is that a right to be protected from the bare knowledge that others act immorally cannot be acknowledged by anyone who recognizes liberty as a virtue." Hart, *supra*, at 46. Isaiah Berlin, another respected scholar, explained "no public end can be promoted by restricting purely private conduct." Isaiah Berlin, *J.S. Mill and The Ends of Life* 192 (Oxford University Press 1969).

Indeed, even well-known conservative scholar John Finnis agrees that criminalizing such private sexual conduct lies outside the power of government. Finnis testified for the government at the trial court level in the case that became *Romer v. Evans* and believes that homosexuality is immoral, yet he concludes that, when conducted in private, it is a *private*, not public, moral issue.

> [I]t is one thing to maintain that the political community's managing structure, the state, should deliberately and publicly identify, encourage and support the truly worthwhile (including moral virtue) . . . It is another thing to maintain that that rationale requires or authorizes the

> state to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state's laws.

John Finnis, *Law, Morality, and Sexual Orientation*, 69 Notre Dame L. Rev. 1049, 1076 (1994). Private morality simply lies beyond the police power.

2. In practice, government rarely attempts to legislate private morality.

Given that the police power traditionally extends only to the prevention of harm and the protection of morality in the public sphere, it is not surprising that instances of government attempts to regulate purely private, but purportedly immoral, conduct are few and far between. Indeed, the only other laws that appear to prohibit private, consensual, noncommercial, non-harmful activity are those prohibiting "fornication" or sex between unmarried persons and those prohibiting possession of obscenity.[4] While the Court has declined to rule on the constitutionality of fornication laws as applied to adults, *see Carey v. Population Services Int'l*, 431 U.S. 678, 694 n.17 (1977), we believe that fornication laws, like sodomy laws, exceed the boundaries of the police power.

The Court's treatment of obscenity plainly illustrates its skepticism on the extent of government power into the

[4] Other morally grounded restrictions involve commercial conduct (prostitution, sale of sexual devices), public conduct (public nudity, public sex), conduct with harmful effects (drug use), or conduct that violates a contract (adultery).

arena of purely private conduct. Obscenity receives very little protection by the First Amendment; indeed, it receives none at all within the public sphere. Commercial distribution of obscenity is not protected by the First Amendment, and states may lawfully prohibit its sale and distribution. *Roth v. United States*, 354 U.S. 476, 485 (1957). However, the Court struck down a prohibition against the mere possession of obscene material. *See Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969). The Court held that what a person did in his home, without harm to others and with no commercial element, was immune from government regulation. *Id.* at 564 ("also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"). In other words, the challenged statute was beyond the police power.

While premarital sex and possession of obscenity both occur within the private sphere, the prohibition against polygamy, discussed in the dissent to *Romer*, addresses *public* issues. *See Romer v. Evans*, 517 U.S. 640, 644-45 (1996) (Scalia, J. dissenting). It is legal in nearly every state, including Texas, for an unmarried man to live with more than one woman and even to engage in sexual relations with them.[5] Indeed, it does not become illegal polygamy until he seeks or asserts state sanction of more than one marriage. *See, e.g.*, Tex. Pen. Code § 25.01(a)(1)(B) & (b) (person commits bigamy by marrying

[5] Only a handful of states prohibit unmarried people from living together in a relationship. *See, e.g.*, Miss. Code Ann. § 97-29-1; N.D. Cent. Code § 12.1-20-10; Va. Code Ann. § 18.2-345. Texas does not prohibit such relationships.

another person or living with another person "under the appearance of being married," which is defined as "holding out that the parties are married"). It is the *holding oneself out to the public* and thus claiming that one has received government approval and all its attendant legal consequences that changes an otherwise legal arrangement into a criminal one.[6]

Polygamy may also give rise to various other harms, including difficulties with child and family support, complex problems of entitlement to state financial and tax benefits, and messy issues of inheritance and estate law. Even if each of these problems might be surmountable, they still necessitate the involvement of state enforcement and judicial action. Marriage intersects with the public sphere in innumerable ways, and thus laws applying to it are not solely an expression of pure moral sentiments.

While the police power may be broad, it extends only so far as an individual's actions have a deleterious, concrete impact on themselves or others. It does not extend to purely private, non-harmful activities that may be matters where there are moral disputes or different views, but no concern of the body politic as a whole. *Cf. Pennsylvania v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) (rejecting criminalization of certain private heterosexual conduct because enforcing "a majority morality on persons

[6] All states prohibit marrying another when one is already married. Some have laws stating simply that. *See, e.g*, Idaho Code § 18-1101. Some states have laws like Texas', while other states prohibit "purporting" to marry or cohabiting with another person when one is already married. *See, e.g.*, Georgia Code Ann. § 16-6-20; Utah Code Ann. § 76-7-101.

whose conduct does not harm others . . . . is not properly in the realm of the temporal police power").

E. A Free Society Cannot Allow a State to Forbid Private Behavior Based Solely on a Majority Opinion of Proper Moral Conduct, Like the One at Issue in this Case.

The lower court held that the Texas legislature "found homosexual sodomy to be immoral." *Lawrence v. State of Texas*, 41 S.W.3d 349, 356 (Tex. Ct. App. 2001). The court then held that this legislative declaration, alone, provided sufficient basis for the State to criminalize private, non-harmful conduct. *Id.* Texas made no claim that the defendants' activities caused any harm to anyone. Nor did Texas make any effort to explain how the regulation of private, consensual, non-commercial activity affects *public* morality. The lower court decision thus sets a breathtakingly dangerous precedent. If a legislative declaration of morality gives the State the power to invade peoples' homes and demand private conformity to majority norms, liberty can be invaded without any meaningful constraint.

The State, in its briefing below, admitted that the nature of such legislative declarations is capricious. The State declared that "morality is a fluid concept." State's Appellate Brief, Texas Court of Appeals, June 21, 1999 at 8. History is replete with examples of the legislative view of morality as "a fluid concept." Those who killed Socrates and Christ, for example, "perceived them to be purveyors of wicked falsehoods" and plainly immoral. Isaiah Berlin, *Four Essays on Liberty* 185 (Oxford University Press 1969). Such "fluid concepts" of morality are inconsistent with the rule of law and cannot support a wholesale invasion by government into the sphere of private action.

Liberty cannot survive if the legislature demands that people behave in certain ways in their private lives based on majority opinions about what is good or moral. Erasmus noted that "mere numbers in approval do not make for the justness of a measure." Desiderius Erasmus, *The Education of a Christian Prince* 221 (Trans. Lester Born, Norton 1964) (1540). Several centuries later, H.L.A. Hart stated that:

> Mill's essay *On Liberty*, like Toqueville's book *Democracy in America*, was a powerful plea for a clearheaded appreciation of the dangers that accompany the benefits of democratic rule. The greatest of the dangers, in their view, was not that in fact the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they should do so.

H.L.A. Hart, *Law, Liberty and Morality* 77-78 (Stanford University Press 1962). As Hart points out, the Nazi criminal code allowed for the punishment of any act that was contrary to "sound popular feeling." Act of June 28, 1935 (cited in Hart, *supra*, at 12).

And of course, the Founders believed wholeheartedly that majorities had no right to impose their beliefs on minorities. In Federalist 10, Madison articulated his concern:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally from friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the

> rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

The Federalist No. 10 (Madison), *supra*, at 48-49.

If private conduct is subject to majority approval, then there are no limits at all on the police power. Government would have the authority to ban or regulate all private, consensual sexual activities. It could outlaw unconventional sexual activity by married or unmarried opposite-sex couples.[7] Under the exact same justification as this law, it could ban same-sex hugging and hand-holding. *See Schochet v. Maryland*, 541 A.2d 183, 206 (Md. 1988) (Wilner, J. dissenting), *rev'd*, 580 A.2d 176 (Md. 1990). It could ban actions considered by nearly everyone to be immoral, like behaving as if nothing is wrong while planning to desert or infidelity in a nonmarital but purportedly monogamous relationship. It could ban other sexual activities considered by many to be immoral, like premarital sex. And it could ban activities considered by a minority of people (though perhaps a majority in some towns) to be immoral like singing, dancing, card-playing, or unmarried men and women socializing without their parents present.

Such prohibitions may sound unlikely, but the hope for government restraint and prudence has never been

[7] While perhaps this Court would find the prohibition, as applied to married couples, to impinge unduly on marital relations, the prohibition would not actually fall outside the police power if the Court adopts the idea that the police power encompasses the ability to enforce moral opinions.

thought to be a sufficient safeguard for liberty. Certainly the Founders did not believe that.

> It is vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The Federalist No. 10 (Madison) at 48.

Rather than rely on the "vain" hope of government self-restraint, or "fluid concepts" of government power in the name of morality, this Court should determine whether this prohibition is within the police power of the State of Texas. To be within this power, the prohibited activity must have some tangible, real-world public effects. The statute must be shown to prevent harmful conduct or protect morality in the public sphere.

Here, the State of Texas may not ban purely private, noncommercial, non-harmful, consensual activity on the sole grounds that it doesn't like such activity. The state cannot simply redefine as "public" what is otherwise obviously private. That is what Texas has tried to do here, and for this reason, its statute exceeds the power of government.

II. TEXAS' STATUTE CANNOT SURVIVE RATIONAL BASIS REVIEW.

As explained above, this Court can and should hold that the Texas statute lies outside the police power. That ruling would eliminate the necessity to even examine the law under the rubric of rational basis review. A law can exceed the police power while still advancing a legitimate government interest. For example, both stress and poor eating habits have a negative effect on public health, which is typically considered a legitimate government interest. Yet under our earlier analysis, regulations requiring daily relaxation and healthy home cooking would exceed the limits of government power.

However, the police power analysis can also inform the application of the rational basis test.[8] In our political system, the police power extends to the prevention of harm and the protection of public morality. Texas' statute advances neither of those goals and no legitimate government interest. It is instead an attempt to impose a moral code on private behavior. Moreover, Texas' law has no factual relationship to any interest within the police power of government. For both of these reasons, it violates equal protection.

[8] Rational basis scrutiny is traditionally associated with the Equal Protection Clause of the Fourteenth Amendment and this clause is indeed implicated by the differential treatment by this statute of persons of the same sex as compared with persons of different sexes. However, a rational basis for legislation must always exist, so this analysis applies also to, for example, Due Process and Commerce Clause cases as well.

A. The Texas Statute Does Not Advance a Legitimate Governmental Interest.

This Court has broadly defined what constitutes a legitimate government interest. Yet it also has recognized that there are some interests that a government may not lawfully pursue.[9] The overriding theme to all of these seemingly disparate rulings is that it is illegitimate to use the power of government to accomplish what are essentially private ends – whether those ends involve financial gain or the vindication of personal, private beliefs or prejudices. A law must have a legitimate *governmental* interest to survive constitutional scrutiny.

Legislation supported by a moral position alone, with no other justification, has no connection to the public interest. It simply enshrines a particular moral view.

[9] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (government bodies may not seek to force some people to pay for a public benefit when that burden should be borne by public as a whole); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (tax statute that discriminated against out-of-state insurers violated equal protection because "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (cities may not enact laws in order to cater to the prejudices of local citizens); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Zobel v. Williams*, 457 U.S. 55, 63 (1982) ("to reward citizens for past contributions . . . . is not a legitimate state purpose"); *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (government officials may not make crucial decisions affecting the rights of others when that decision may be colored with personal or institutional gain); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (bare desire to harm a politically unpopular group not a legitimate government interest).

Without any connection to the public sphere, the law becomes simply an exercise of *private* moral judgment. The question then becomes which faction will gain sufficient influence to convince the legislature to force others to comply with the particular moral view to which the faction ascribes. The whole structure of our society and Constitution is designed to prevent political war of faction against faction.

While certainly the judiciary should not judge between competing moral positions, a legislature also cannot make private choices for a minority of its citizens, unless their private moral choices cause some harm or have some impact on the public sphere. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (government does not have "the right to control the moral content of a person's thoughts").

As *Loving v. Virginia*, 388 U.S. 1 (1967), starkly demonstrates, majority sentiment cannot be the sole basis for legislation. Prior to the *Loving* decision, the majority of states in the United States had laws banning interracial marriage and a majority of people supported such laws. *See Naim v. Naim*, 87 S.E.2d 749, 754 (1955), *vacated on other grounds*, 350 U.S. 891 (1955). The fact that a majority holds a particular moral belief or that the belief has been consistent in our history cannot, without more, serve to sustain a law. Forcing private compliance with a particular moral position, even one of a majority of citizens, simply is not a legitimate purpose of government.

B. It Is Impossible to Analyze Whether the Texas Statute is Rationally Related to its Goals.

Even in the absence of finding a fundamental right, this Court still requires that there be an actual connection, grounded in facts, between a legitimate governmental purpose of a regulation and the real world. *See Romer v. Evans*, 517 U.S. 620, 633-35 (1996). Looking at that connection allows courts to evaluate if the law is rational. This analysis of the factual connection between a law and its purpose appears in all rational basis cases, whether the Court upholds or strikes down the law in question. This Court applied the same type of rational basis analysis in both *Glucksberg* and *Cleburne*, but it was unable to perform that analysis in *Bowers* and it cannot apply it here.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), this Court first rejected the notion that there is a fundamental right to assisted suicide and then analyzed whether Washington's prohibition against assisted suicide survived rational basis analysis. The Court identified a number of specific state interests including preserving and protecting life, *id.* at 728-29, protecting the integrity and ethics of the medical profession, *id.* at 731, protecting vulnerable groups from pressure and prejudice, *id*. at 732, and preventing any potential movement toward euthanasia, *id*. at 733. It also discussed how, *as a factual matter*, the prohibition against assisted suicide related to these legitimate government interests, referring to various studies and other materials. *Glucksberg* thus follows the classic pattern of the rational basis test: identifying the legitimate governmental interest and then connecting the prohibition to those interests.

Examining the connection of the law to its purpose also allows the Court to make sure that the law was not enacted for an improper purpose. In *Cleburne*, for instance, while the government claimed at least some legitimate purposes, promoting certain zoning and safety regulations, the fact that the city permitted all sorts of other similar businesses in the same area but attempted to ban only this one indicated that the motives were in fact dislike toward a particular group of people, rather than the purported legitimate interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-6 (1985).

There is no way to evaluate the rationality of a law without some kind of connection to facts. *Bowers v. Hardwick*, 478 U.S. 186 (1986) perfectly illustrates the dilemma caused by legislation that is grounded solely on assertions about private morality. The rational basis analysis takes up a single paragraph of the opinion. It states that "majority sentiments" are an appropriate basis for legislation and concludes that the statute survives rational basis analysis.[10] *See id.* at 196. The only inquiry in *Bowers* was whether the legislature could legitimately condemn homosexual sodomy. Once the Court decided that "majority sentiments" were a valid basis for legislation, that

[10] The *Bowers* majority opinion also asserts that there are many laws that represent moral choices. *Id*. However, the opinion earlier identifies only the prohibitions against adultery, incest, and other sexual crimes. *Id*. at 196. Adultery breaches a marriage contract and harms another party. Sexual crimes like rape or sex with children of course also harm another person, and, as discussed in the *Bowers* dissent, even adult incest is prohibited because the closeness of family relationships make true consent almost impossible. *Id*. at 209 n.4 (Blackmun, J., dissenting).

ended the inquiry. Moral sentiment is an interest incapable of refutation. It isn't falsifiable, at least not in a court of law.

The *Bowers* court did not, and indeed could not, examine "the relation between the classification adopted and the object to be attained." *See Romer v. Evans*, 517 U.S. 620, 631 (1996). The Texas appellate court followed the same rubric, holding that morality was a legitimate basis for legislation and not attempting to look at the relationship of the law to its purpose. *Lawrence v. State of Texas*, 41 S.W.3d 349, 356 (Tex. Ct. App. 2001). The conflation of the two parts of the rational basis test, while improper, is certainly understandable. There are no facts to which a court could refer, because the legislation has no goal other than the codification of majority sentiment. If there is no objective way to determine where state power ends other than what the majority wants, then the law is self-justifying. It is not possible to subject such a law to rational basis analysis, and thus laws like this one avoid judicial scrutiny altogether.

In contrast, objective judicial analysis can occur when the government must assert a legitimate governmental interest – an interest in preventing harm or governing activity in the public sphere – and must use facts to support a rational relationship between the law and its purpose. Legislation with an exclusively moral purpose is impervious to rational basis analysis, and that fact in itself indicates that the law is not legitimate.

CONCLUSION

We urge that the Court begin by looking at whether the contested government action falls within the police power. If the law does not address an activity that causes harm or impacts the public, it is beyond the power of the government to regulate, regardless of whether the specific liberty interest is deemed fundamental. Texas' statute attempts to regulate purely private morality and thus exceeds the police power. Furthermore, we ask this Court to find that the imposition of private moral beliefs is not a legitimate basis for legislation. Because such legislation cannot be tested in any objective fashion under the rational basis test, it is unconstitutional and cannot survive.

Respectfully submitted,

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