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

AMICI CURIAE BRIEF OF THE LOG CABIN REPUBLICANS AND LIBERTY EDUCATION FORUM IN SUPPORT OF THE PETITIONERS

C. MARTIN MEEKINS
Counsel of Record
C. RANDOLPH FISHBURN
WHITE & CASE LLP
633 West Fifth Street
Suite 1900
Los Angeles, CA 90071
(213) 620-7700

M. ELAINE JOHNSTON
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036

Counsel for Amici Curiae

178522

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

STATUTES AND REGULATIONS

Cited Authorities

LEGISLATIVE MATERIALS

Page

MISCELLANEOUS

Cited Authorities

Cited Authorities

Page

Cited Authorities

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

AMICI CURIAE BRIEF OF THE LOG CABIN REPUBLICANS AND LIBERTY EDUCATION FORUM IN SUPPORT OF THE PETITIONERS

The Log Cabin Republicans and Liberty Education Forum respectfully submit this brief *amici curiae* in support of the petitioners in this case.[1]

1. Letters from petitioners and respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

The Log Cabin Republicans is a nonprofit corporation organized in 1978 under the laws of the District of Columbia. The largest organization associated with the Republican Party that is dedicated to interests of the gay and lesbian community, the Log Cabin Republicans has over fifty chapters across the United States, including several chapters in the State of Texas. It stands for, among other things, limited government, individual liberty, individual responsibility, free markets, and a strong national defense, as well as the belief that the moral values underlying these principles are consistent with the equal protection of laws for gay and lesbian Americans. Throughout its history, the Log Cabin Republicans and its members have supported political candidates, community activities and educational initiatives that provide equal rights under the law to all Americans, promote nondiscrimination against or harassment of persons who are gay or lesbian, and encourage participation in the Republican Party by gay and lesbian Americans. The membership of Log Cabin Republicans includes both heterosexual and homosexual Republicans.

The Liberty Education Forum was established as an educational research foundation dedicated to advancing the conservative principles of individual liberty, individual responsibilities, free markets and limited government. Since 1996, the Liberty Education Forum has advanced these conservative principles by sponsoring a variety of education publications and programs that endeavor to protect the individual freedoms of gay and lesbian Americans.

SUMMARY OF ARGUMENT

The State of Texas extended its criminal law into the homes of its citizens in an unjustified intrusion into the sphere of protected privacy that the Constitution of the United States creates for certain intimacies expressed in American family life. *Amici* join the Petitioners before this Court to argue that the fundamental privacy rights ensconced in the Bill of Rights and incorporated in the Fourteenth Amendment entitle all Texans under the Due Process Clause of the Fourteenth Amendment to demand that the Texas Legislature provide substantial justification for its intrusion into the intimate lives of some Texans. We believe that it cannot.

Allowing this Texas law to stand would jeopardize longstanding constitutional traditions that have placed the highest value upon both the protection of the American family and the sanctity of the home against governmental intrusion. The mere invocation by the State of Texas of the term "morality" cannot defend a law that so implicates its citizens' most intimate affairs in the most private of realms.

This Court confronted similar issues in *Bowers v. Hardwick*. *See* 478 U.S. 186 (1986). We acknowledge that the text of the United States Constitution has not been altered since that time. Significant social and cultural developments since *Bowers*, though, have resulted in a clearer understanding that members of *all* American families have a fundamental right to enjoy intimate association without fear of government intrusion, and that the variety of American family life that must be protected under that rubric includes gay and lesbian couples. Thus, whatever might have been the presumed propriety of *Bowers* in 1986, it is clear now that its holding must be overturned.

The Texas law challenged here and others like it have survived under the protection of the *Bowers* precedent, which denied to gays and lesbians the heightened-scrutiny protections for their intimate associations, which have been recognized to protect the private, intimate associations of other American families. That precedent must be abjured, and such laws must be subjected to heightened scrutiny, which will require states to offer a far more powerful justification than the one offered here: that the State of Texas has criminalized gay and lesbian relationships simply because a majority of Texas legislators once disapproved of them. Such legislation is "inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by everyone within the United States." *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

Amici also join the Petitioners' argument that the Texas Homosexual Conduct Law violates the Equal Protection Clause of the Fourteenth Amendment because it bears no rational relationship to a legitimate state interest. The Court should hold that mere "morality" cannot justify state-sponsored discrimination against gay and lesbian Americans. *See Romer v. Evans*, 517 U.S. 620 (1996). (*Amici* do not repeat Petitioners' argument in this brief.)

ARGUMENT

The State of Texas has criminalized homosexual conduct in Section 21.06 of the Texas Penal Code ("Homosexual Conduct Law" or "Section 21.06"). Texas threatens to punish such conduct with imprisonment even if engaged in by consenting adults in a committed relationship, behind closed doors in their own home. At issue in this case is whether the

fundamental right to privacy traditionally afforded in American family life really does protect its most intimate of associations.

The Texas Court of Appeal – Fourteenth District found that "homosexual conduct" was not a right "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Lawrence v. State of Texas*, 41 S.W.3d 349, 361 (Tex. App. – Houston [14th District] 2002). The court also concluded that the state's prohibition of homosexual conduct is rationally related to a legitimate state interest, the preservation of public morality. *Id.* at 356.

This Court, in *Bowers*, made some assertions that could provide sanction for the Fourteenth District's conclusions. There the Court refused to recognize that the fundamental rights that the Constitution generally afforded to the American family included protection of certain expressions of intimacy that various states group under the label "sodomy." Perhaps capturing the sentiment of at least some Americans in 1986, Chief Justice Burger characterized instances of that expression undertaken by members of the same sex, though both private and consensual, as "an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature, and 'a crime not fit to be named.'" *Bowers*, 106 U.S. at 197.

Whatever the validity of such calumnies as an expression of the public morality of 1986, they represent today only ethical arcana. The increased social visibility of gays and lesbians since *Bowers* has resulted in a deeper and broader understanding of American family life, one that includes families comprised of gays and lesbians. Indeed, gay and lesbian couples hold "covenant ceremonies" in many of our

Nation's churches and synagogues and celebrate those ceremonies with the community in our newspapers.

These dramatic social and cultural developments have been matched by significant change in demographics, commerce and law since *Bowers*. Today, the public presence of gay and lesbian families in American life is undeniable. A significant number of American businesses recognize an American family that includes gays and lesbians by providing to such families the same employment benefits that are afforded to married heterosexual couples. The laws of many of our state and local governments have moreover matured to support an institution of family comprised of gays and lesbians, including laws that protect gays and lesbians from discrimination and that allow them to adopt children.

Thus, despite Chief Justice Burger's explication of American morality in 1986, it is clear in 2003 that gay and lesbian couples are no longer the targets of disdain and scorn that he described. The Court can no longer deny that the privacy protections generally afforded the American family must necessarily protect too *their* rights to intimate association without eviscerating the privacy protections for all other American families. All of this demands that the Court re-examine its holding in *Bowers* and strike down laws such as the Texas law at issue as an unjustified state intrusion into the private lives of American citizens, an assault on the concept of ordered liberty and a violation of the U.S. Constitution.

I. The Court Should Reconsider *Bowers v. Hardwick* and Recognize that Fundamental and Constitutionally Protected Right to Privacy Protects the Intimate Relationships for *All* American Families from Unjustified State Intrusion.

The foundational commitment of the United States of America was to ensure to "all Men" the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness." Our Framers acknowledged this commitment by constructing a Constitution designed to prevent the majoritarian abuse of power and afford each American a sphere of protected conduct that could not be invaded by any combination of interests. THE FEDERALIST NO. 10 (James Madison). Those protections are included in the Due Process, Privileges or Immunities, and federal-government power-restricting Clauses of the Bill of Rights, as supplemented by the Fourteenth Amendment and construed by this Court. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510, 534-35 (1925); *Poe v. Ullman*, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1962); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Doe v. Bolton*, 410 U.S. 179, 200 (1973); *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carey v. Population Servs. Int'l*, 431 U.S. 679, 684-85 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 501-03 (1977); *Cruzan v. Director*, *Missouri Dep't. of Health*, 497 U.S. 261, 278-79 (1990); *Planned Parenthood v. Casey*, 505 U.S. 833, 846-51 (1992); *Prince v. Massachusetts*, 321 U.S. 158 (1994); *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *see also Corfield v. Coryell*, 6 Fas. Cas. 546 (C.C.E.D. Pa. 1823) (no. 2320).

This Court has made clear that the right to private relationships within families is one of the inalienable rights ensconced in the Bill of Rights guaranteed to all Americans, and is applicable to the states through the Fourteenth Amendment. The Court has provided the highest level of constitutional protection under the Due Process Clause of the Fourteenth Amendment to American family life because family "is deeply rooted in this Nation's history and tradition" and contributes so powerfully to the happiness of individuals. *Moore*, 431 U.S. at 503 (plurality opinion); *see Prince*, 321 U.S. at 166 (1994). The "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ.*, 414 U.S. at 639-40. This protection arises because the Constitution prevents government "from standardizing its [citizens] by forcing all to live in certain narrowly defined family patterns." *Id.* at 506 (plurality opinion).

The Court has afforded these constitutional protections within a broad context of American family life. In *Griswold*, the court defined the family as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold*, 381 U.S. at 486. The Court in *Moore* in fact warned of "cutting off any protection of family rights at the first convenient, if arbitrary boundary the boundary of the nuclear family."[2] *Moore*, 431 U.S. at 502 (plurality opinion).

This Court's recognition that the family is not a cause, not a polity, not a project has been supplemented by an explanation of what a family is: at its heart, it is an *intimate* association.

2. Notwithstanding its *Bowers* holding, the Court traditionally has rejected a narrow analysis of fundamental rights afforded to the family. *See*, *e.g.*, *Moore*, 431 U.S. at 504-05.

The Court has thus consistently recognized that a right to familial association must include a right to intimate association. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). The State of Texas, for one, also recognized the importance of intimate association for some when it amended the Texas Penal Code to legalize sodomy for heterosexual couples.[3]

The Texas Homosexual Conduct Law and others like it in Oklahoma, Missouri, and Kansas stand for the principle that the fundamental right to intimate associations in family life is afforded only to those who adhere to an ideal of family once held by the Texas Legislature.[4] The Texas law, by its terms, applies only to same-sex couples. Broader sodomy laws that apply (at least facially) to all Americans remain on the books in nine other American states.[5] While these broader laws do not

3. The legislature only singled out "'the private homosexual acts of consenting adults'" for continued criminalization out of "'fear [] [of] a backlash against the entire Penal Code [revision] should such acts be decriminalized.'" *Baker v. Wade*, 553 F. Supp. 1121, 1151 (N.D. Tex. 1982) (quoting Von Beigel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 HUMAN RIGHTS 23 (1977)), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *rehearing en banc denied*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

4. *See* OKLA. STAT. tit. 21, § 866 (as applied to exclude heterosexual conduct, *see Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986)); MO. REV. STAT. § 566.090; KAN. STAT. ANN. § 21-3505(a)(1).

5. ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3); FLA. STAT. ANN. § 800.02; IDAHO CODE § 18-6605; LA. REV. STAT. ANN. § 14:89; MISS. CODE ANN. § 97-29-59; N.C. GEN. STAT. § 14-177; S.C. CODE ANN. § 16-15-120; UTAH CODE ANN. § 76-5-403(1); Va. CODE ANN. § 18.2-361(A).

facially discriminate against gays or lesbians, they too are unconstitutional. All of these laws constitute an unconstitutional attempt to enforce its view of family life by propelling the criminal law deep into the American home without even claiming to vindicate the state interests of protecting public decency, protecting vulnerable persons, or restricting coercive commercial trade in activities offensive to public morality.

In response to any constitutional concern, the State of Texas merely suggests that gay and lesbian Texans should avail themselves of the legislative process to win their fundamental rights. Patty Reinert, *Supreme Court Takes Houston Sodomy Case*, HOUS. CHRON., Dec. 3, 2002 at 1. But the fundamental right of privacy reserved to all citizens by the United States Constitution enjoys protection from the vagaries of the political process; it is thus no answer to tell those deprived of their privacy rights to protect them in the political arena.

Were Texas a political subdivision of the United Kingdom, which recognizes a parliamentary government where the legislative will is supreme, its position might be correct, but American states must attend to the radically different form of government that the United States has developed: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections. . . ." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Amici thus believe that this case presents to the Court an important opportunity for it to clarify that the privacy protections the Court has explicated for the expression of

intimate relationships in American family life, and to strike down laws that violate that privacy protection for some Americans without even pretending to vindicate an articulated state interest.

Should the Court fail to overrule *Bowers* and allow the State of Texas to so intrude upon the most intimate of relationships of its citizens in the most private of realms,

> then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material. Virtually all the intimacies, privacies and autonomies of life would be regulable by the legislature – not necessarily by the legislature of this year or last year, but, it might be, by the legislature of a hundred years ago, or even by an administrative board in due form thereunto authorized by a recent or long-dead legislature.

Charles Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32 (1970).

A. Protection of a Broadly Defined Family Is Implicit in the Concept of Ordered Liberty for All Americans.

The Court has long recognized certain rights to be fundamental to the concept of ordered liberty for all Americans because "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept

largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). Among those rights implicit in the ordered concept of liberty, the Court has consistently acknowledged a "private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166; *see also Roe* at 152-153; *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1973); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Affirming such values of American liberty long before the Court's progeny of *Griswold*, Justice Brandeis wrote:

> 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 satisfaction 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 men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

The Court has not limited these constitutional protections only to Americans who are married. Since *Griswold*, this Court has recognized that all Americans, regardless of status,

possess the same liberty interest to make their own intimate choices in "matters so fundamentally affecting a person." *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972); *see also Casey*, 505 U.S. at 898; *Carey*, 431 U.S. at 685. Neither do those activities and relationships lose their intimate status when engaged in for reasons other than procreation. In fact, the Court has reasoned that certain fundamental rights arise not just because they touch upon childbearing, but because they arise solely in the context of a "field that by definition concerns the most intimate of human activities and relationships." *Carey*, 431 U.S. at 685.

The protections of American family life have not been limited by an immutable constitutional view of the American family. *See*, *e.g*., *Troxel*, 530 U.S. at 63 ("The demographic changes of the past century make it difficult to speak of an average American family. [It] varies greatly from household to household"); *id*. at 85 (Stevens, J., dissenting); *id*. at 98-101 (Kennedy, J., dissenting); *Michael H. v. Gerald D.*, 491 U.S. 110, 133 (1989) (concurring opinion of O'Conner and Stevens, J.J.) (Recognizing "enduring 'family' relationships may develop in unconventional settings"); *Stanley*, 405 at 651 (Even "family relationships unlegitimized by a marriage ceremony").

In short, this Court has long recognized that the U.S. Constitution protects a broadly defined concept of American family life and the intimate relationships implied by the existence of those families – not as a function of reproduction, but as a function of the inherent right of each individual to form the intimate connections of his or her own choosing.

B. Intimate Relationships Occupy a "Private Realm of Family Life the State Cannot Enter."

Consistent with the ideals of liberty and the pursuit of happiness, the Court has consistently recognized that paramount to the security of liberty protected by the Bill of Rights are "choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the state because [of] the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts*, 468 U.S. at 617-618. "[T]he constitutional shelter . . . reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecti[on] . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619; *see also Quiltoin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Cleveland*, 414 U.S. at 639-40; *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545. The Court has further held that personal affiliations entitled to such protection were those exemplified in family relationships. *Roberts*, 468 U.S. at 619.

Paramount to the protection of choosing and maintaining intimate human relationships is sexual intimacy, which constitutes "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I*, 413 U.S. at 63; *see Bowers*, 106 U.S. at 205 (dissenting opinion) (quoting *Roberts*, 468 U.S. at 619) (the "ability independently to define one's identity that is central to any concept of 'liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment of close ties with others'"). Sexual intimacy is in fact necessary to form

and nurture intimate relationships central to families of all Americans, regardless of sexual orientation.[6]

This Court, even when some find a certain type of American family unpopular or immoral, has kept a citizen's right to choose with whom one forms intimate relationships elevated from government's reach. *See*, *e.g.*, *Loving*, 388 U.S. at 12. Justice Jackson explained for this Court,

> we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [Freedom] to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

West Va. Bd. of Educ., 319 U.S. at 641-42.

The U.S. Constitution therefore reserves to all Americans the inalienable right to choose those with whom they make their most intimate of associations and maintain that relationship free from unjustified state intrusion.[7]

6. *See*, *e.g.*, L. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples*, SEXUALITY IN CLOSE RELATIONSHIPS 177-91 (K. McKinney & S. Sprecher eds. 1991).

7. This Court has, of course, recognized the right of private organizations to develop their own rules of associational exclusion in contexts much less intimate, much less central to human happiness, and thus much less constitutionally protected than the associations at issue in this case. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (Cont'd)

So important is this right that the Court has found that the First Amendment broadly protects *all* "those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Rotary Int'l*, 481 U.S. at 545.

It is therefore deeply rooted in our Nation's rich tradition that all Americans are entitled to be free from the reach of a criminal law predicated solely on the state's desire to dictate the consensual, private, physical, and emotional interactions undertaken between citizens in the privacy of their homes. For if the Due Process Clause of the Fourteenth Amendment has any meaning, it must protect a "private realm of family life which the state cannot enter." *Moore*, 431 U.S. at 499 (plurality opinion) (quoting *Prince*, 321 U.S. at 166).

(Cont'd)
(2000). Because that case presented a situation in which the private organization wished to *exclude* gays from association, a decision upholding laws like Section 21.06 would directly suggest that gay and lesbian Americans lack *for their most intimate associations* fundamental protections that can be employed by heterosexual Americans in *casual* association to exclude gays and lesbians. So far from rendering sexual orientation a protected category, then, the Court would declare that gays and lesbians are, and may be treated as, a pariah class against whom – but never for whom – the rights of private association may function.

C. Social and Cultural Developments Since 1986, and a Decent Regard for the Rights of All Americans, Require that this Court Revisit its *Bowers* Holding.

Despite the recognition of previous fundamental rights afforded in American family life, particularly the right to form intimate associations, the Court in *Bowers* refused to recognize such rights extended to gay and lesbian Americans. Rather, the Court found that "[n]o connection between family, marriage or procreation on the one hand and homosexual activity on the other hand has been demonstrated, either by the Court of Appeals or by respondent." *Bowers*, 106 U.S. at 191.

As the quote above indicates, *Bowers* embraces the notion that gay and lesbian relationships and their intimate associations do not deserve the fundamental privacy protections provided to heterosexual relationships and their intimate associations. *Bowers* was wrong when written, as a signatory of the majority opinion subsequently acknowledged. *See* John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, 302-05 (Charles Scribner's Sons, 1994). In the seventeen years since that decision, however, American culture and mores have developed in a manner that belies that conclusion and renders it inappropriate to the world of the twenty-first century.

The Court must therefore reconsider its prior denial of the fundamental constitutional right to privacy to an entire class of Americans – gays and lesbians – in light of the revolution in American cultural development in the last twenty years. This Court has an obligation *now* to give full meaning to an essential aspect of liberty, thereby correcting the failure of an earlier generation and a gross injustice to a

class of American citizens. *See*, *e.g.*, *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Roe*, 410 U.S. at 861-63; *Loving*, 388 U.S. at 12; *Meyer*, 262 U.S. at 402; *Casey*, 505 U.S. at 847-48. Indeed, the very foundation upon which *Bowers* was built has been shown to be false. *See Casey*, 505 U.S. at 862-63.

Since *Bowers*, our Nation has come to acknowledge and respect that American family life includes gay and lesbian relationships.[8] The 2000 United States Census in fact counted at least 600,000 households of unmarried same-sex partners, living in 99.3% of American counties.[9] Gay and lesbian relationships are regarded as enduring, providing long-term and deep sustenance to each member of the couple. *See*, *e.g.*, Bryant & Demian, *Relationship Characteristics of American Gay and Lesbian Couples*, 1 J. GAY & LESBIAN SOC. SERVS. 101 (1994).

Gay and lesbian couples moreover celebrate commitments to their relationships in our Nation's churches and synagogues.[10] Furthermore, in the long-standing

8. Gaiutra Bahadur and Andy Alford, *A New Haven for Gay Couples: The Suburbs Census Shows Lesbians Lead Exodus from Cities to Newly Accepting Areas*, AUS. AMER. STATESMEN, Aug. 22, 2001 at A1; Anna Quindlen, *The Right to Be Ordinary: Weddings, Scouting, Surviving – Gay Men and Lesbians Are More Than What They Do in Bed*, NEWSWEEK, Sept. 11, 2000 at 82.

9. Kelley Davenport, *Family is Love*: *There are 600,000 Same-Sex Couples Heading Households in the United States*, *According to Latest Census*, STATE J.-REG. (SPRINGFIELD ILL.), Sept. 20, 2002 at 6A. This figure is likely understated because of current U.S. Census Bureau methodology.

10. *See*, *e.g.*, Laurie Goodstein, *Church Allows Same-Sex Ceremonies*: *Presbyterian Ministers May Now Conduct "Holy*

(Cont'd)

American tradition of celebrating such events with the community, they now celebrate their unions in our Nation's newspapers.[11] In its announcement to publish such events, the New York Times wrote, "[i]n making this change, we acknowledge the newsworthiness of a growing and visible trend in society toward public celebrations of commitment by gay and lesbian couples – celebrations important to many of our readers, their families and friends." *Times Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 18, 2002 at A30. Gay and lesbian relationships cannot therefore be dismissed "as a mere collection of unrelated individuals." *Smith*, 431 U.S. at 844; *cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Since *Bowers*, both commerce and law have changed dramatically to recognize family relationships formed by gay and lesbian Americans. Leading businesses have recognized the importance of gay and lesbian families by providing domestic partnerships employment benefits equal to those of heterosexual married couples. *See*, *e.g.*, Thomas A. Stewart, *Gay in Corporate America*, FORTUNE, Dec. 16, 1991 at 42; Jeremy Quittner, *Paths to Success; Companies With the Best Sexual Orientation Rules*, *The Advocate*, Oct. 23,

---

(Cont'd)

Union" Services for Gay Couples, ORANGE COUNTY (CAL) REG., May 25, 2000 at A5; Carlyle Murphy and Bill Broadway, *D.C. Church Authorizes Same-Sex Unions*, WASH. POST, Dec. 10, 2001 at B1; Dennis M. Mahoney, *Church to Allow Same-Sex Ceremonies*, COLUMBUS DISPATCH (OHIO), Nov. 18, 2000 at 1A.

11. In an undeniable trend, over 180 newspapers in United States communities now publish announcement of gays and lesbians "unions." *See*, *e.g.*, Monty Phan, *Newspapers Announce Gay Unions*, THE MIAMI HERALD, Aug. 21, 2002 at C3.

2001 at 28. Today, nine states, the District of Columbia, and 129 municipalities offer government-sponsored domestic-partner benefits. In recognition of the sheer number of family relationships formed by gays and lesbians, the American Law Institute has devoted an entire chapter to domestic partnership in its most recent work on family law. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (A.L.I. 2002).

Like other American families, many gay and lesbian couples adopt and raise children even though they cannot together procreate. *See*, *e.g.*, Sean Jensen, *Former Viking Esora Tuaolo Has Found Peace Since He Said He Was Gay*, ST. PAUL PIONEER PRESS (MINN.), Nov. 17, 2002 at 1C (Mr. Tuaolo and his partner are the adoptive parents of twins); Harriet Barovick, *Rainbow Network: As Gay Families Increase*, *So Do Support Services Designed Just For Them*, TIME, April 15, 2002 at F10. In support of these families, the vast majority of every state permits gays and lesbians to adopt children individually, jointly and/or through second-parent adoptions.[12]

Recognizing that American family life includes gays and lesbians but acknowledging the lingering animus towards them, an ever-increasing number of states and municipalities, including at least four cities in Texas, have now added sexual orientation to laws barring discrimination in housing, employment, public accommodations, and other areas.[13]

12. *See*, *e.g.*, *American Academy of Pediatrics*, *Co-Parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (Feb. 2002).

13. 1999 Cal. Stat. 592; CONN. GEN. STAT. § 46, 81(a) *et seq.*; D.C. CODE ANN. § 1-2541(c) (1981); 1991 Haw. Sess. Laws 2; 2001 (Cont'd)

Even the executive branch of the United States government respects that American family life includes homosexuals and that gays and lesbians are deserving of protection from discrimination, notwithstanding the families they choose to form.[14]

Indeed, this Court has itself acknowledged that "it appears that homosexuality has gained greater societal acceptance" since the days of *Bowers*. *Boy Scouts of Am.*, 520 U.S. at 660. As demonstrated by these undeniable, dramatic changes in American culture and mores, *Bowers* no longer represents an accurate statement of the national mind, much less the constitutional law.

As conservative organizations that recognize the importance of reliance upon precedent and strict construction, *amici* do not support "judicial activism" or decisions that create "constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers*, 478 U.S. at 194. Overturning *Bowers*, however, will not be an act of judicial activism, nor will it create rights out of whole

(Cont'd)

Md. Laws ch. 340; 1989 Mass. Legis. Serv. 516 (West); 1993 Minn. Sess. Law Serv. ch. 22 (West); 1999 Nev. Stat. ch. 410; 1997 N.H. Laws ch. 108; 1991 N.J. Sess. Law ch. 519 (West); 2002 N.Y. Laws ch. 2; 1995 R.I. Pub. Laws ch. 95-32; 1992 Vt. Acts & Resolves 135; 1981 Wisc. Laws ch. 112; Austin, Tex., CODE, Vol. I, tit. VII (2001); Dallas, Tex. Municipal Ordinance No. 24927 (2002), amending Dallas, Tex. CODE ch. 15B; Fort Worth, Tex., CODE, ch. 17, art. III (2001); Houston, Tex., CODE ch. 2, tit. XIV (2002).

14. *See* Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969), as amend by Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June 2, 1998) (adding "sexual orientation" to the non-job-related grounds upon which an employment decision cannot be based).

cloth.[15] *Bowers* itself worked the unwarranted judicial activism by excluding a class of people – gays and lesbians – from a set of long-established constitutional rights without the slightest textual support for its conclusions. The Constitution does not make gays and lesbians second-class citizens. It does not, of course, mention sexuality at all. Any attempt, like that of *Bowers*, then, to deprive gays and lesbians of certain rights provided to other Americans itself works judicial activism – the particularly ugly judicial activism of writing into the Constitution the notion that "We, the Majority of Justices, disapprove of gays and lesbians, and therefore exclude them from otherwise universal protections."

The fundamental right to privacy guaranteed all Americans must stand as a "necessary corollary of giving individuals freedom to choose how to conduct their lives" – and with whom – "is acceptance of the fact that different individuals will make different choices." *Bowers*, 478 U.S. at 205-06 (Blackmun, J., dissenting). *Bowers* denied erroneously a fundamental constitutional right of American citizens over and against the state for which no countervailing rights of other individuals were at stake. *See also West Va. Bd. of Educ.*, 319 U.S. 624, 630 (1943); *Brown v. Bd. of Educ*., 347 U.S. 483, 494-95 (1954). In his dissent to *Bowers*, Justice Blackmun wrote:

> The fact that individuals define themselves in a significant way through their intimate sexual

15. No matter the basis for the Court's *Bowers* holding, *Amici* do not "believe that . . . judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Rochin v. State of California*, 342 U.S. 165, 171-72 (1952).

> relationships with others suggests, in a nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom to choose the form and nature of these intensely personal bonds.

Id. at 205 (Blackmun, J., dissenting).

Indeed, "[u]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Moore*, 431 U.S. at 499.

D. The Texas Homosexual Conduct Law and Others Like It Constitute an Unjustified State Intrusion on Ordered Liberty; and If the Rights of All Americans to Undertake Intimate Expressive Conduct Is to Be Protected, All "Sodomy" Laws Must Be Struck Down.

Recognition of the fundamental right to privacy for Americans to express their most intimate of family associations does not end the constitutional inquiry as "[n]ot all governmental intrusion is of necessity unwarranted." *Casey*, 505 U.S. at 875 (opinion of O'Connor, Kennedy, and Souter, J.J.). The Court must also consider whether laws like the Texas Homosexual Conduct Law further a compelling state interest without imposing an undue burden on those affected. *Id.* at 878. *See also Thornburgh*, 476 U.S. at 828-29. Such considerations require that this Court not only invalidate the specific Texas statute before it, but that the Court strike down all laws that purport to illegalize "sodomy."

There exists no countervailing state interest for these laws comparable to those weighed by this Court in other recent cases involving fundamental liberties.[16] The lower court in fact recognized that the justification urged by Texas was a generalized and amorphous interest in "moral values," though the state has been unable or unwilling to delineate the specific public values at stake.[17] *Lawrence*, 41 S.W.3d at 354. Moreover, the means with which Texas and other states have chosen to advance their "interests" unduly burden the fundamental right of all Americans to life, liberty, and the pursuit of happiness for they use "the full power of the criminal law," *Poe*, 367 U.S. at 548 (Harlan, J., dissenting), to enforce their aesthetic whims.[18] These statutes must fall.

Neither are such laws that are facially neutral with regard to forbidding "sodomy" acceptable. Because these laws define sexual intimacy in such a way that makes criminal virtually any form of intimate expression available to same-sex couples, they condemn *de facto* gay and lesbian relationships. The Court would work the profoundest nullity to forbid Texas to regulate "sodomy" for gay and lesbian,

16. *See*, *e.g.*, *Casey*, 505 U.S. at 871-79 (opinion of O'Connor, Kennedy, and Souter, J.J.) (potential human life); *Troxel*, 530 U.S. at 73 (plurality opinion of O'Connor, J.) (welfare of children); *Cruzan*, 497 U.S. at 280-281 (existing human life).

17. *Amici* further believe that other debunked justifications for such laws (e.g., such as public health concerns) veil an animus or bias towards gays and lesbians and do not constitute a compelling interest to so burden the fundamental right of Americans to express their most intimate of family associations.

18. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L.L. REV. 103 (2000).

but not for heterosexual, couples but effectively allow other states to criminalize virtually all intimate expressive conduct of which gays and lesbians couples are capable.

Meanwhile, the Court, as noted above, has already extended the privacy protection to intimate heterosexual conduct that occurs out of wedlock and for purposes other than for procreation. No constitutional explanation can now exist, then, for this Court to differentiate among kinds of private, consensual, intimate expressions between couples, except procreation-regarding distinctions the Court has long since rejected or those based upon the biased, uniformed, and repudiated view of same-sex intimacy express by Chief Justice Burger in *Bowers*.

The thinly-veiled interests promulgated by these states, as exemplified by the State of Texas, and aimed at forcing a view of American family life on all citizens cannot support laws that represent a crack in the foundational commitment of the Untied States of America. The Texas Homosexual Conduct Law and all others like it infringe upon the most personal of liberties guaranteed to all Americans by the U.S. Constitution and should be struck down.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge that *Bowers* be overruled and the judgment of the Texas Court of Appeals – Fourteenth District be reversed.

Respectfully submitted,

C. MARTIN MEEKINS
Counsel of Record
C. RANDOLPH FISHBURN
WHITE & CASE LLP
633 West Fifth Street
Suite 1900
Los Angeles, CA 90071
(213) 620-7700

M. ELAINE JOHNSTON
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036

Counsel for Amici Curiae