No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

REPLY BRIEF

PAUL M. SMITH
WILLIAM M. HOHENGARTEN
DANIEL MACH
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

MITCHELL KATINE
WILLIAMS, BIRNBERG & ANDERSEN, L.L.P.
6671 Southwest Freeway, Suite 303
Houston, TX 77074
(713) 981-9595

RUTH E. HARLOW
Counsel of Record
PATRICIA M. LOGUE
SUSAN L. SOMMER
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

The Court should not, as urged by Respondent, stay its hand and refuse even to consider whether the Texas legislature can constitutionally target same-sex couples and criminalize their expressions of sexual intimacy. Where, as here, a State exempts the majority from onerous regulation of its behavior while barring the same behavior for a disfavored group of citizens, a just political resolution is particularly unlikely and constitutional concerns are particularly acute. Moreover, Respondent's position ignores the ongoing, concrete harms caused by this law and others like it. Those harms burden not only Petitioners, who were convicted for their consensual sexual conduct in a private home, but also the many other gay men and lesbians who suffer the stamp of "criminal" and the wide-ranging discrimination that sodomy laws are used to justify. The Court should review the Texas statute and Petitioners' convictions under the federal Equal Protection Clause and the federal right of privacy.

I. Texas Ignores the Compelling Harms and Important Constitutional Questions That Strongly Warrant Review.

As the Brief in Opposition confirms, this case cleanly presents the issue of the constitutionality of Texas's "Homosexual Conduct" law, Section 21.06, which criminalizes consensual, adult sexual activity for same-sex couples only. Petitioners' federal constitutional challenges were pressed in the state courts, were adjudicated there on the merits, and are properly presented here. Br. in Opp. 1-4; Pet. 5-8. For compelling reasons, the Court should not bypass this opportunity to consider Petitioners' challenges on the merits.

The State does not even address the fact that laws like Section 21.06 impose grievous harms on all gay and lesbian citizens, which is itself sufficient reason for review. Here, Petitioners were arrested in a private home, jailed, prosecuted, and punished. They are convicted criminals merely for participating in activity that their heterosexual neighbors can engage in without penalty. But even in the absence of prosecution, Section 21.06 brands gay and lesbian Texans as

criminals. That is no mere abstract harm. Rather, the classification in this law is used to justify myriad additional forms of serious and concrete discrimination against lesbians and gay men in employment, parenting, and other facets of everyday life. *See* Pet. 13-16. Same-sex-only prohibitions in three other states have the same effects, and even the facially neutral sodomy laws of an additional nine states are frequently cited to justify adverse treatment of gay and lesbian citizens. *Id.* The Court should not close its eyes to the reality that these laws make lesbians and gay men second-class citizens, with wide-ranging repercussions.

Texas's plea for the Court to decline review, in favor of legislative debate, also fails to recognize that this case presents the very situation where the democratic process is least likely to correct itself. The democratic majority does not bear the burdens it has imposed on a disliked minority. Texas has long since repealed the law criminalizing "deviate sexual intercourse" as to heterosexual couples, but continues to impose criminal sanctions for such conduct only on homosexual couples. *See* Pet. 2-3. It is in this situation that federal judicial review is most necessary.

The State's position is also internally contradictory. Texas points to the fact that most States historically had criminal sodomy laws as a reason to deny review. Br. in Opp. 8. But it then argues that the wave of invalidations and repeals of consensual sodomy laws in many States – instead of supporting constitutional scrutiny – "only diminishes the apparent need for federal intervention in an issue which is properly being resolved on a state-by-state basis." *Id.* at 11. Under that reasoning, there is never an appropriate time for this Court to undertake federal constitutional review. Now is the right time, however, because a significant handful of States, including Texas, resist state judicial or legislative remedies for these discriminatory and invasive laws. Federal judicial review is the only remedy available in those States.

Only *this* Court can provide full federal review. The lower federal courts do not have appellate jurisdiction to review the constitutionality of state-court criminal convictions under laws like Section 21.06. Further, only this Court can revisit its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Review is warranted not only to reconsider *Bowers*'s actual privacy holding, but also and independently to end the improper use of that ruling in the equal protection context. Both the Brief in Opposition and the decision below illustrate this problem when they import *Bowers* and other holdings about *evenhanded* laws into consideration of Petitioners' equal protection claim. Br. in Opp. 14-17; Pet. App. 13a-18a. *Bowers* did not decide any equal protection question, *see* 478 U.S. at 196 n.8, yet it is still being read by state and lower federal courts, even after *Romer v. Evans*, as allowing *discriminatory* laws that are grounded solely on bare disapproval – the majority's moral condemnation – of gay people. Courts are misconstruing *Romer* as limited to its facts, rather than as an exposition of "conventional and venerable" principles, 517 U.S. 620, 635 (1996), and are continuing to sanction illegitimate discrimination against gay Americans. *See* Pet. 17 n.20.

This Court, contrary to Texas's arguments, should not be dissuaded from taking up its vital role in the elaboration of the meaning of federal constitutional rights. That role is critical here to remedy serious harms and to redress erroneous limitations on equal protection and the right of privacy.

II. Far from Being "Unassailable," the Equal Protection Ruling Below Conflicts with *Romer* and a Central Mandate of the Equal Protection Clause.

Texas and its courts have failed to adhere to a core tenet of federal equal protection, a tenet wholly ignored by the Brief in Opposition: one group of people may not be singled out for adverse legal treatment based on the bare disapproval of that group by the majority. *Romer*, 517 U.S. at 634-35; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-48 (1985);

United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). This Court has repeatedly admonished that government may not subject gay people or any other group to special limitations simply "to make them unequal to everyone else." *Romer*, 517 U.S. at 635. It is illegitimate for a state to enact distinctions justified only by "animus toward the class [that the distinction] affects." *Id.* at 632. Whether couched as morality, fear, political expediency, or bias, mere negative attitudes alone are not a legitimate basis under the Equal Protection Clause for punishing one group but not others for the same conduct. *See Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-48; *Moreno*, 413 U.S. at 534; *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[1]

There is a critical distinction, under the Equal Protection Clause, between evenhanded regulations of conduct for all and laws that impose their burdens only on a distinct subgroup. Absent a fundamental right, evenhanded prohibitions of certain behavior generally may be justified on the ground that the majority finds the behavior immoral. Of course, American law often embodies or relates to moral precepts. But under the guarantee of equal protection, a bare decision to treat one group more harshly – without any concrete public purpose or the invocation of other factors properly cognizable by government – is repugnant. *See Cleburne*, 473 U.S. at 448; *Moreno*, 413 U.S. at 534-35. Labeling disapproval of the group "moral" does not change the fact that the majority simply wants to establish a more onerous rule for that group than it is willing to live under itself. A moral desire to discriminate has never been upheld. If the moral views of a majority favoring

---

[1] Petitioners contend that Section 21.06 violates the Equal Protection Clause under any level of scrutiny. This Court has never ruled on whether classifications based on sexual orientation warrant more skeptical review, and that question need not be addressed here if, as in *Romer*, Section 21.06 fails rational basis review. However, the factors warranting heightened skepticism are present when the government employs a sexual orientation-based classification. Pet. 21-22.

discrimination sufficed to justify discriminatory laws, then any unequal rule treating a disfavored minority more harshly could be upheld as legitimate and rational – including the constitutional provision struck down in *Romer*.[2]

Nor can the State now rewrite this criminal law to make it one that evenly applies to all. In the same breath as Texas tries to argue that the "Homosexual Conduct" law does not target those with a gay (same-sex) sexual orientation, it admits that those who are "exclusively heterosexual" are not burdened by the law in any way. Br. in Opp. 12. That admission is just another way of saying that those who are not heterosexual, and thus are gay or bisexual, *are* targeted by the law. The State's argument is no more persuasive than the contention that a law that bans writing with the left hand is not targeted at left-handed persons.[3]

The State's fleeting attempts to recast its justification for the law as something other than the majority's condemnation also do not satisfy even the lowest level of equal protection scrutiny. First, arguing that the classification does what it is

---

[2] *See* Pet. App. 70a-71a (Anderson, J., dissenting) ("[E]qual protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. Indeed, the equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression.") (internal citations omitted).

[3] Respondent also obscures the nature of the classification struck down in *Romer*. *See* Br. in Opp. 18-19. Colorado Amendment 2 prohibited any state action "whereby homosexual, lesbian or bisexual orientation, *conduct, practices* or *relationships* . . . entitle[d] any person or class of persons to have . . . [any] claim of discrimination." *Romer*, 517 U.S. at 624. The references to homosexual conduct, practices and relationships created a scheme of discrimination along sexual orientation lines, just as the overt reference to orientation did. Likewise, Section 21.06's distinct prohibition on same-sex sexual activity, or "Homosexual Conduct," discriminates on the basis of sexual orientation.

written to do – punish only same-sex couples for their intimacy – does not justify it. Texas's statement that "a statute which renders such conduct illegal is obviously related to the goal of discouraging the conduct," Br. in Opp. 19, does nothing more than confirm that the legislature enacted the statute it intended to enact. This tautology offers no rationale for the discriminatory classification drawn, and is utterly non-responsive to the equal protection question. *See Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) ("[t]he Equal Protection Clause requires more of a state law than" affirmation and application of the rule it has established; it requires justification of "the nature of the class singled out").

Second, Texas's passing references to "biological reproduction" and "a marital relationship" bear no relation to and cannot possibly justify the challenged classification. Section 21.06 draws a classification that concerns "deviate sexual intercourse," including oral and anal sex, Tex. Pen. Code § 21.01(1). The law allows different-sex couples to choose those forms of intimacy but prohibits them for same-sex couples. But regardless of the composition of the couple, those acts cannot accomplish biological reproduction. Similarly, whether a couple is married, plans to marry, or could marry bears no relation to this classification and cannot justify it. Heterosexuals are as free to participate in oral or anal sex within an adulterous relationship, in a "one-night stand," or with a long-term unmarried partner, as they are within a marriage.[4]

To let Texas's approach to equal protection stand would be to gut the federal constitutional promise that no group will be

---

[4] Texas correctly steers clear of the "rationales" for Section 21.06 put forward by its *amicus* Pro Family Law Center, whose approach rests on the very group-based stereotypes and prejudices that equal protection condemns. The classification employed in Section 21.06 is wholly unrelated to diminishing HIV transmission or enhancing mental health. Any impact of the law is to harm, not help, true public health initiatives.

subjected to illegitimate and arbitrary discrimination. The Court should grant review on the first question presented to disentangle equal protection analysis from the language of *Bowers* and to remedy the widespread injuries imposed by same-sex-only consensual sodomy laws.

III. The Court Should Take This Opportunity to Reconsider Its Anomalous and Harmful Decision in *Bowers*.

The palpable invasion of privacy and liberty that occurred in this case highlights the need to revisit *Bowers*. Petitioners began an evening as private citizens secluded in Lawrence's home, and ended the evening being hauled off to jail for prosecution and conviction as criminals for their consensual sex. The government scrutinized Petitioners' most intimate behavior and publicly condemned them for it. Criminal laws that permit the government to exercise this extraordinary level of intrusion into and control over private sexuality between consenting adults confront gay men and lesbians in the four states with same-sex-only prohibitions, and heterosexuals as well in nine other states.

In sanctioning this intrusiveness, *Bowers* is out of step with Americans' firmly rooted and broadly shared expectations of personal privacy. Those expectations are reflected in the legislative repeals and state court invalidations of sodomy laws summarized in the Petition. Pet. 24 & n.26. All adults in 37 States – and all adult heterosexuals in Texas and the three other States with discriminatory consensual sodomy bans – can rightly take for granted that their decisions to engage in oral or anal sex are not subject to scrutiny by the police and punishment as crimes, but rather are matters reserved for their own judgment and autonomy. *Bowers* reflects a distorted application of the Court's privacy jurisprudence and a departure from more recent decisions reinforcing the sanctity of the home. That ruling contradicts the fundamental understanding of American citizens that the government has

no place in their bedrooms, intruding into the most intimate bonds and the most personal choices of couples.

There is no forum but this Court where Petitioners' federal right of privacy claim can be heard on the merits. The State offers no persuasive ground for the Court to refuse that hearing. As the Court has frequently noted, *stare decisis* is not an "inexorable command" – especially in constitutional cases – and does not prevent the Court from reconsidering earlier decisions that "are unworkable or badly reasoned." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996). There is no pretense here that rigid adherence to *stare decisis* is necessary to advance a reliance, public safety, or other important interest. At most, Texas claims a prerogative to express its disapproval of homosexuality through this punitive and intrusive law. But some matters should be "place[d] . . . beyond the reach of majorities and officials." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

Texas argues that *Bowers* was correctly decided based upon a historical tally of criminal laws. It urges that two recent decisions, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), support such a method of fundamental rights analysis. But in neither of those decisions did the Court focus exclusively on historical legal treatment of the claimed right, defined at the narrowest level. In *Glucksberg*, the Court was "confronted with a consistent and almost universal tradition that has long rejected the asserted right, *and continues explicitly to reject it today*." 521 U.S. at 723 (emphasis added); *see also id.* at 716, 728.[5] Similarly, even the

---

[5] Moreover, only four Justices fully endorsed the lead opinion's approach in *Glucksberg*. Although Justice O'Connor joined the lead opinion, she wrote separately to express reservations that the lead opinion's approach could prove inadequate to analyze the claimed fundamental right under somewhat different facts. *See id.* at 736-38 (O'Connor, J., concurring); *see also id.* at 738-52 (Stevens, J., concurring in judgment); *id.* at 752-89 (Souter, J., concurring in judgment); *id.* at 789 (Ginsburg, J., concurring in judgment); *id.*

plurality opinion in *Michael H.*, relied upon by Texas, gave weight not only to the historical denial of the parental right at issue, but also examined whether the law recognized such a right "in modern times." 491 U.S. at 125; *id.* at 127 ("[w]e are not aware of a single case, old or new, that has done so"); *see also id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (rejecting "imposition of a single mode of historical analysis" in defining liberty interests protected by the Due Process Clause). Finally, Respondent simply ignores *Casey*, a landmark post-*Bowers* decision in which the Court firmly rejected the view that laws in effect when the Fourteenth Amendment was ratified can categorically preclude recognition of a right as fundamental. *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 847 (1992) ("such a view would be inconsistent with our law").

In contrast to the unanimous and unbroken legal traditions found by the Court in *Glucksberg* and *Michael H.*, laws criminalizing private sexual intimacy between consenting adults have been overwhelmingly *rejected* in modern times. Almost three-quarters of the States have repealed or invalidated their sodomy laws. Pet. 23-24. And very few laws, historical or modern, *ever* targeted only same-sex couples, as Texas does. *Id.* at 3-4 & n.2. The contemporary process of repeal and invalidation of such laws, which has continued apace since *Bowers*, reflects an understanding that this is an area in which government may not tread without a compelling reason. *Id.* at 24-25. Accordingly, recent state high court decisions have rejected *Bowers*'s conclusion that no fundamental right is at issue. *See id.*[6]

---

at 789-92 (Breyer, J., concurring in judgment). The lead opinion in *Glucksberg* also considered at length the extremely weighty interests justifying laws against doctor-assisted suicide. *Id.* at 728-35.

[6] Because only this Court can overrule *Bowers*, the state courts have of necessity found that the fundamental right to privacy protects citizens from the intrusion of consensual sodomy laws only under their respective state

The contemporary rejection of these intrusive laws also reflects an increasingly robust and accurate understanding of gay and lesbian people and the meaningful adult relationships they enter into as same-sex couples – loving relationships in which sexual intimacy plays the same very important role as it does for heterosexual couples. Indeed, under most consensual sodomy laws, the right of privacy is at stake for *all* couples. To give that right proper respect, *Bowers*'s narrow, erroneous focus on "homosexual sodomy" for purposes of assessing the fundamental interests at issue requires fresh consideration here.

Contrary to the straw man erected by Respondent, Petitioners are not contending that developments since *Bowers* have created a fundamental right where none existed 16 years ago. Rather, the greater knowledge and the legal developments since *Bowers* indicate that *Bowers* itself was wrongly decided. Petitioners, after a gross invasion of their human dignity, have persevered up through all levels of the state courts in arguing that their convictions under Section 21.06 are incompatible with federal fundamental rights. In this stark case of criminal convictions for intimate conduct in the home, the Court should reconsider *Bowers*.

CONCLUSION

The petition for writ of certiorari should be granted.

---

constitutions, not under the federal Constitution. Texas suggests that there is a difference in scope between federal and state constitutional protections that somehow counsels against reconsideration of *Bowers*. Br. in Opp. 9-11. In reality, however, States have been unwilling to follow the reasoning of *Bowers* because it is inconsistent with longstanding state legal traditions – traditions *Bowers* purported to respect. This widespread rejection of the underpinnings of *Bowers* only further demonstrates the need to reconsider that decision.

Respectfully Submitted,

Paul M. Smith
William M. Hohengarten
Daniel Mach
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

Mitchell Katine
WILLIAMS, BIRNBERG & ANDERSEN, L.L.P.
6671 Southwest Freeway, Suite 303
Houston, TX 77074
(713) 981-9595

Ruth E. Harlow
Counsel of Record
Patricia M. Logue
Susan L. Sommer
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, NY 10005
(212) 809-8585

Counsel for Petitioners

Dated: November 5, 2002