No. 02-102

In The Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF OF AMICUS CURIAE AMERICAN FAMILY ASSOCIATION, INC., AMERICAN FAMILY ASSOCIATION CENTER FOR LAW & POLICY, PARENTS INFORMATION NETWORK, INC., DBA AFA OF ALABAMA, COLORADO FEDERATION FOR DECENCY, INC., DBA AFA OF COLORADO, HOOSIERS FOR DECENCY, INC., DBA AFA OF INDIANA, FOR THE CHILDREN COMPANY, INC., DBA AFA OF MICHIGAN, NEW YORK FOUNDATION FOR EDUCATION ON THE FAMILY, INC., DBA AFA OF NEW YORK, CHRISTIAN ACTION LEAGUE OF NORTH CAROLINA, INC., DBA AFA OF NORTH CAROLINA, OREGON PRESERVATION OF THE JUDEO-CHRISTIAN FAMILY ASSOCIATION, INC., DBA AFA OF OREGON, FAMILY POLICY NETWORK, INC., DBA AFA OF VIRGINIA, AND WEST VIRGINIA FAMILY FOUNDATION, DBA AFA OF WEST VIRGINIA, AND NEW ORLEANS ASSOCIATION FOR MORALITY AND DECENCY, INC., DBA AFA OF NEW ORLEANS, IN SUPPORT OF THE STATE OF TEXAS, RESPONDENT

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INTEREST OF AMICI CURIAE[1]

American Family Association, Inc. (AFA) is a nonprofit organization incorporated in 1977 under the name of National Federation for Decency, Inc. AFA operates as a leader of citizen and church participation to promote traditional American morals and apply the Biblical ethic in society. AFA has tens of thousands of supporters in all 50 states, as well as dozens of affiliate organizations that seek to preserve community integrity by means of public participation and community involvement. AFA also has over 200 radio stations nationwide, as well as some 140,000 individuals and churches who subscribe to its monthly newsletter, the AFA Journal.

In addition, AFA serves as the umbrella organization of American Family Association Center for Law & Policy ("Law Center"), a non-profit legal organization founded in 1989. The Law Center engages in constitutional litigation throughout the country, defending traditional American morals, including the defense of laws and initiatives opposing special rights for homosexuals and the erosion of restraints on homosexual conduct. AFA Law Center attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts.

Parents Information Network, Inc., dba AFA of Alabama, Colorado Federation for Decency, Inc., dba AFA of

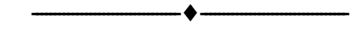
[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

Colorado, Hoosiers for Decency, Inc., dba AFA of Indiana, For the Children Company, Inc., dba AFA of Michigan, New York Foundation for Education on the Family, Inc., dba AFA of New York, Christian Action League of North Carolina, Inc., dba AFA of North Carolina, Oregon Preservation of the Judeo-Christian Family Association, Inc., dba AFA of Oregon, Family Policy Network, Inc., dba AFA of Virginia, and West Virginia Family Foundation, dba AFA of West Virginia, are state affiliates of AFA national. New Orleans Association for Morality and Decency, Inc., dba AFA of New Orleans is a local affiliate of AFA. Each operates in its respective state and community to educate, motivate and activate the community and society on moral issues affecting the family and society.

Citizens for Community Values, based in Cincinnati, Ohio, is a grassroots organization of citizens who are concerned for the well-being of the community, the strength of its families, and the future of its children. It exists to promote Judeo-Christian moral values, and to reduce destructive behaviors contrary to those values, through education, active community partnership, and individual empowerment at the local, state and national levels.

Florida Family Association is a nonprofit organization that seeks to improve the nation's moral environment, primarily by means of educating both consumers and corporate America regarding the harmful effects of pornographic media.

The proper resolution of this case is a matter of substantial organizational concern to all amici because it threatens to undermine the traditional morality that serves as the foundation of America's nuclear family.



SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to American jurisprudence: Whether a state legislature may constitutionally enact morals legislation as it deems best for its citizens, or whether instead this Court may override the duly elected legislators and supplant its policy decisions on a matter of morality with those of this Court's unelected Justices?

At issue here is the constitutionality of Tex. Penal Code § 21.06 (Vernon 1994), which prohibits same-sex sodomy. The State of Texas has defended its constitutionality on the ground of preserving public morals. *See Lawrence v. State of Texas*, 41 S.W.3d 349, 354 (Tex. Ct. App. 2001) (*en banc*). Petitioners argue that the rational basis test cannot be satisfied on the basis of morals alone. Brief for Petitioners at 26-28.

This brief will argue that Texas is well within the historical tradition of the law in legislating to preserve the morals of its citizens. Preserving the morals of its people is itself a sufficient justification for the law. Nonetheless, the Texas law serves additional purposes such as protecting the institutions of marriage and the family, preserving the moral ecology, and protecting the well-being of those who seek to engage in harmful conduct.

Finally, for this Court to second-guess the legislature's judgment on a morals law proscribing conduct that has been proscribed for hundreds of years would transgress the limits of the Court's authority and wreak havoc on our federalist structure.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

As a threshold matter, the issue of whether the Record contains sufficient evidence to permit this Court to rule on the questions presented must be addressed. Because the Record does not contain sufficient evidence, the writ should be dismissed as improvidently granted.

Petitioners, adult males who engaged in anal sex,[2] pleaded *nolo contendre* to the charges that they performed "deviate sexual intercourse with another individual of the same sex" and so violated § 21.06. The Record contains no evidence to support Petitioners' assertions[3] that they consented to the sexual act, or that it involved no exchange of money or anything else of value, or that it occurred out of public view. Indeed, the Record fails even to support the representation that Petitioners are homosexuals.

Petitioners nevertheless urge the Court, *inter alia*, to overrule a seventeen-year-old precedent (*Bowers v. Hardwick*[4]). Because the Record simply fails to provide the essential foundation and framework to address these weighty matters, this Court should decline to decide them.[5]

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[2] Pet. App. 129a.

[3] *See* Cert. Pet. 2-3.

[4] 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986).

[5] Alternatively, the Court should decide the case as a facial challenge only. In that case, Petitioners "must establish that no set of circumstances exists under which the Act would be valid." *United States*

(Continued on following page)

II. PETITIONERS' ARGUMENT IS ITSELF A MORAL ARGUMENT, AND THIS COURT "SHOULD NOT JUDGE BETWEEN COMPETING MORAL POSITIONS."

A. Petitioners and Their Amici Denounce the Statute in Moral Terms.

Petitioners and their amici attack and ridicule the State's rationale that section 21.06 is a morals law. They assert the State's law in reality reflects only "bare negative attitudes" toward homosexuals,[6] and equate it with "blatant bias."[7] Similarly, amici argue that the law was borne of nothing more than "animus, ignorance, and stereotype,"[8] and that it "reinforces prejudice, discrimination, and violence" against homosexuals.[9]

Use of these pejorative terms to describe section 21.06 suggests that Petitioners' claims themselves are moral claims. Petitioners and their amici appeal to justice. As Professor Robert George has observed: "Inasmuch as principles of justice are moral principles, the case made by contemporary critics of morals legislation is unabashedly moralistic." ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 4 (Oxford: Clarendon Press, 1993).

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v. Salerno, 481 U.S. 739, 845 (1987). It is plain that the Texas statute could validly be enforced in some circumstances (e.g., where deviate sex takes place in public). Thus, under a facial analysis, the statute easily passes constitutional muster.

[6] Brief of Petitioners at 10.

[7] *Id.*

[8] Brief amici curiae ACLU, et al. at 1.

[9] Brief amici curiae American Psychological Association, et al. at 3.

B. Petitioners Ask the Court to Substitute Its Morality for That of the Legislature.

Petitioners urge this Court to declare section 21.06 unconstitutional because, *inter alia*, the claim that the law preserves the morals of its citizens is "tautological, illegitimate, and irrational." Brief for Petitioners at 33. To declare section 21.06 unconstitutional would be to declare that same-sex sodomy is not immoral. It would be to substitute Petitioners' (and this Court's) notion of morality for that of the State of Texas and its duly elected legislature.[10]

As one of Petitioners' amici candidly conceded, "certainly the judiciary should not judge between competing moral positions." Brief amicus curiae Institute for Justice at 25.[11] Because Petitioners ask this Court to do precisely that, the judgment below should be affirmed.

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[10] It should be noted that same-sex sodomy was outlawed in all 50 states until 1961, when Illinois adopted the American Law Institute's (ALI) Model Penal Code, "which decriminalized adult, consensual, private, sexual conduct." *Bowers*, 478 U.S. 186, 193 n.7. The revolutionary nature of the ALI's single-handed rewrite of American common law, and its unseemly reliance on the now-discredited Kinsey reports, has been well documented. *See* JUDITH A. REISMAN, KINSEY: THE RED QUEEN & THE GRAND SCHEME 187-258 (Institute for Media Education, Inc. 1998).

[11] The debate over the morality or immorality of same-sex sodomy raises ultimate issues of the existence and identification of objective moral good. Any such undertaking should be left to the legislature, whose duty it is "to declare what the law shall be." *State of Arizona v. Woods*, 942 P.2d 428, 434 (Ariz. 1997) (internal quotation marks and citation omitted).

III. ENACTING LAWS TO PRESERVE AND PROTECT THE MORALS OF THE PEOPLE IS SQUARELY WITHIN THE WESTERN LEGAL TRADITION.

A. Guiding Citizens to Good Morals is a Central Purpose of the Law.

Petitioners assert that Texas' reliance on the preservation of morals amounts to nothing more than empty words, and that the State has "no distinct harm or public interest other than a pure statement of moral condemnation." Brief for Petitioners at 26. In effect, Petitioners argue that Texas' justification of preserving the morals of the people is irrational. On the contrary, the Western legal tradition has long recognized that one of the primary purposes of the law is to steer the people to good morals.

Over 2300 years ago, Aristotle opined that "virtue must be the care of a state which is truly so called. . . ." ARISTOTLE, POLITICS Bk. 3, Pt. IX (Benjamin Jowett, trans. in 2 THE COMPLETE WORKS OF ARISTOTLE, Princeton, 1984) This concept of the purpose of government is central to the Western tradition: "It is, above all, the belief that law and politics are rightly concerned with the moral well-being of members of political communities that distinguishes the central [Western] tradition from its principal rivals." GEORGE, *supra* 20.

In order to achieve that end, it is sometimes required that means of legal coercion be employed. As Aristotle recognized, those given over to the pursuit of base passions are not persuaded to do good merely by argument. They will not naturally avoid the wrong and embrace the right. Rather, they must be coerced by the law: "For the many naturally obey fear, not shame; they avoid what is

base because of penalties, not because it is disgraceful." ARISTOTLE, NICOMACHEAN ETHICS Bk. 10 (David Ross, trans., Oxford University Press 1980) (hereafter NIC. ETHICS). It is therefore necessary in many cases for the law to forbid what is morally wrong and affirmatively require what is morally right.

This is not to say, however, that every vice must be prohibited by law. It is sometimes necessary for wise legislators to frame the criminal law to fit the peculiar character of the people governed. As Thomas Aquinas counseled: "Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain. . . ." ST. THOMAS AQUINAS, SUMMA THEOLOGICA PRIMA SECUNDAE, Quest. 96, art. 2 (Fathers of the English Dominican Province, trans., 2d rev. ed., 1920); *see also* ST. AUGUSTINE, DE ORDINE, ii. 4 (noting that a society may occasionally need to tolerate prostitution, not because of any supposed right to engage in it, but "so that men do not break out in worst lusts") (quoted in GEORGE, *supra* 33 n.40).

Aquinas most surely did not hold that there is any moral right among those whose conduct would otherwise be proscribed to engage in immoral acts. Instead, he saw, as the Texas legislature may have seen, that "[t]he purpose of human law is to lead men to virtue, not suddenly, but gradually. . . . Otherwise, these imperfect ones, being unable to bear such precepts, would break out into yet greater evils." AQUINAS, SUMMA THEOLOGICA, PRIMA SECUNDAE, Quest. 95, art. 1. Provoking the people to resentment and rebelliousness by requiring too much of them will "enflame their passions and *make them less virtuous.*" GEORGE, *supra* 32.

B. Private Immorality Causes Public Harm.

The lower court correctly applied the rational basis standard of review. *Lawrence*, *supra*, 41 S.W.3d at 354. Under the rational basis test, a law survives constitutional scrutiny if there is any conceivable basis for its enactment. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1444-1446 (2d ed. 1988) (describing the "rational basis" or "conceivable basis" test); *see also*, *e.g.*, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466, 66 L.Ed.2d 659, 101 S.Ct. 715 (1981) (sustaining a milk packaging regulation under the rational basis test because "the Minnesota Legislature could rationally have decided that [the regulation] might foster greater use of environmentally desirable alternatives" (emphasis deleted)).

1. No man is an island.

The notion that the law ought to be concerned only with "public morals" and not "private morals," as advanced both by Petitioners and certain amici,[12] is fundamentally flawed. It is premised on the false notion that any individual can truly separate himself from the rest of society. But all of life teaches precisely the opposite. "No man is an island, entire of itself; every man is a piece of the continent, a part

[12] *See especially* Brief amicus curiae Institute for Justice at 14-18. The argument is echoed in slightly different form by Petitioners, *see* Brief *passim* (arguing that Constitution recognizes right to engage in "private consensual sexual choices"), and other amici (*e.g.,* Brief amici curiae ACLU, et al. at 3-4 (arguing that "principle of personal autonomy" animated this Court's previous privacy cases).

of the main."[13] Our very interconnectedness militates strongly against any notion that private acts have no impact on others.

It has never been the case that private consensual conduct is *ipso facto* off limits to the law. On the contrary, the law has always been presumed to reach such conduct, absent extraordinary and compelling circumstances not present here. Indeed, the very fact that sodomy has been prohibited by the criminal law for centuries is significant. As Sir William Blackstone observed, "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals considered merely as individuals: public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity." 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (1765). Blackstone noted further that "[i]n all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community." *Id.*[14]

A similar argument was raised under virtually identical circumstances in *Bowers* and squarely rejected. 478 U.S. 186, 191 ("the position that any kind of private sexual

[13] JOHN DONNE, MEDITATION XVII (from DEVOTIONS UPON EMERGENT OCCASIONS, 1624) (quoted in 1 NORTON ANTHOLOGY OF ENGLISH LITERATURE 1107 (5th ed.1962)).

[14] The crime is described by Blackstone simply as "the infamous *crime against nature.*" *Id.* at *216.

conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."); *accord, Washington v. Glucksberg*, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S.Ct. 2258 (1997) (holding there is no protected right to commit suicide); *Potter v. Murray City*, 760 F.2d 1065, 1070-1071 (10th Cir.), *cert. denied*, 474 U.S. 849 (1985) (no constitutional privacy right to practice polygamy).

2. Marriage and the family are harmed by private immorality.

Among other interests, the State of Texas may have been concerned for the erosion of the institutions of marriage and the family. Professor George writes,

> The institutions of marriage and the family have plainly been weakened in cultures in which large numbers of people have come to understand themselves as 'satisfaction seekers' who, if they happen to desire it, may resort more or less freely to promiscuity, pornographic fantasies, prostitution, and drugs. Of course, recognition of the public consequences of putatively private vice . . . [means that] societies have reason to care about what might be called their 'moral ecology.'

GEORGE, *supra* 37.[15]

[15] In fact, so obvious is the public harm occasioned by private sexual vice, even prominent liberal thinkers have urged abandonment of the arguments put forth by Petitioners to the effect that private consensual conduct does not cause public harm. *See* WILLIAM A. GALSTON, LIBERAL PURPOSES 285 (Cambridge University Press, 1991) (cited in GEORGE, *supra* 37 n.47).

3. The moral environment is harmed by private immorality.

In addition to the concrete physical harms that can be caused by private vices, morals laws may prevent *moral* harm, both to the potential wrongdoer and to the community at large. Just as "[a] physical environment marred by pollution jeopardizes people's physical health; a social environment abounding in vice threatens their moral well-being and integrity." GEORGE, *supra* 45.

The injury caused to the public by same-sex sodomy was well understood in the past. Blackstone, having spent several pages immediately prior on rape and abduction, introduces the section on sodomy as dealing with an offense "of a still deeper malignity," "the very mention of which is a disgrace to human nature." BLACKSTONE, *supra* *216. Plainly, this crime is of a different magnitude.

4. Future generations are harmed by private immorality.

The law serves as a schoolmaster. "Law can also serve a symbolic or educational function separate from direct behavioral modification." Erik Luna, *Symposium, The Model Penal Code Revisited: Principled Enforcement of Penal Codes*, 4 Buff. Crim. L. Rev. 515, 536 (2000). In this respect, the lack of enforcement of section 21.06 is not significant.[16] "The legislature enacts a criminal law for its symbolic message and the judiciary acquiesces to the statutory provisions – but the executive branch selectively enforces

[16] Professor Luna cites as an example a Colorado statute forbidding adultery which provides no penalty. *Id.* at 531 n.76.

the law due to resource limitations, ... " *Id.* at 539-40. Aristotle and Augustine saw the powerful role law can play in reinforcing the teachings of parents and other leaders in the community. It can play an equally powerful role in destroying the moral health of a society when it usurps the parents' and cultural leaders' place and sets itself up as the primary moral tutor.

The morality of a society is not formed in a vacuum. Parents cannot succeed in raising their children in accordance with good morals without outside support. For any parent to be effective in passing good morals on to her children, there must be assistance from the community as well. If "public authorities fail to combat certain vices, the impact of widespread immorality on the community's moral environment is likely to make the task of parents who rightly forbid their own children from, say, indulging in pornography, extremely difficult." GEORGE, *supra* 27; *see also* ARISTOTLE, NIC. ETHICS Bk. 10.

5. The well-being of the individuals involved is harmed by private immorality.

Another interest often overlooked in analysis of the issue of public harms occasioned by private immorality is that of the well-being of those engaged in the immoral behavior. The enormous price in terms of illness, disease and death resulting from the conduct proscribed by section 21.06 is well documented.[17]

[17] *See, e.g.,* R.S. Hogg, S.A. Strathdee, K.J. Craib, M.V. O'Shaughnessy, J.S. Montaner and M.T. Schechter, *Modelling the Impact of HIV Disease on*

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But even aside from the health issue, it has been almost universally recognized that restraint is the *sine qua non* for social harmony. "Human society requires the direction and restraint of many impulses. Few of those impulses are more powerful or unpredictable than sexual desire." The Ramsey Colloquium, *The Homosexual Movement: A Response by the Ramsey Colloquium*, 41 First Things 15-21 (March 1994). Laws such as section 21.06 may seem severe to those struggling with strong sexual urges, but the restraint they encourage is beneficial in the end.[18] American jurisprudence long ago rejected Hume's notion that "reason is, and ought only to be, the slave of the passions." 2 DAVID HUME, A TREATISE OF HUMAN NATURE pt.3, sec. III (1740).

6. The sanctity of marriage is threatened by private immorality.

In *Glucksberg*, the Court credited as a legitimate state interest the concern that "permitting assisted suicide will start it down the path to voluntary and perhaps even

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Mortality in Gay and Bisexual Men, 26 International Journal of Epidemiology 657-661 (1997) (finding that 95% of HIV deaths were distributed to gay and bisexual men, and that life expectancy at age 20 for gay and bisexual men ranged from *34.0 years to 46.3 years*).

[18] In this sense, laws prohibiting same-sex anal and oral sex may be seen as motivated not by any animus against those whose conduct is banned, but by "a sense of the equal worth and human dignity of those people, whose conduct is outlawed precisely on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity, along with that of others who may be induced to share in or emulate their degradation." John Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 Columbia L. Rev. 433, 437 (1987).

involuntary euthanasia." 521 U.S. at 732. The Court was persuaded by Washington's argument that a decision in favor of the physicians there could not be limited to competent, terminally ill adults, such as the patients presented before the Court. Consequently, "what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain." *Id.* at 733.

A similar concern for the potentially cataclysmic consequences of a decision in favor of Petitioners is served by the State of Texas' ban on same-sex sodomy. Under the rationale advanced by Petitioners and their amici, there is left no principled basis to limit the right to only same-sex consenting adults acting in the privacy of their own home. If two consenting adults have a constitutional right to practice anal sex, why should the right not extend to prostitutes having sex for hire with presumptively consenting partners? Why should three, or five, or for that matter eighteen consenting adults not have a constitutional right to consensual group sex? Why should a father and daughter who freely and lovingly consent to engage in intercourse not have a constitutional right to do so? And what of those whose orientation draws them to sex with animals? The State of Texas has a legitimate interest in preventing the erosion of barriers protecting the sanctity of marriage.

Section 21.06 serves all of these legitimate interests. It thus easily satisfies the rational basis test.

C. Any interest in personal autonomy does not extend so far as to invalidate a long-standing criminal prohibition.

1. *Glucksberg* recognized the limits of personal autonomy.

In *Glucksberg*, as here, the Court was confronted with private, consensual conduct between adults. Relying on this Court's decisions in *Planned Parenthood v. Casey*[19], and *Cruzan v. Director, Missouri Dept. of Health*[20], as do Petitioners here, the physicians in *Glucksberg* asserted a fundamental liberty interest in "personal autonomy" and "self-sovereignty."[21] The Court refused to transform the limited protections afforded such interests into an absolute and unlimited right: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that *any* and *all* important, intimate, and personal decisions are so protected." 521 U.S. at 727 (emphasis added).

The Court further held that the Washington statute easily met the low bar of the rational basis test. It noted, too, that "[t]o hold for respondents, we would have to reverse centuries of legal doctrine and practice." *Id.* at 723.[22]

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[19] 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674(1992).

[20] 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

[21] 521 U.S. at 724.

[22] The Court in *Glucksberg* gave considerable weight to the historical prohibitions against assisted suicide. *See id.* at 710-719. The prohibitions against same-sex sodomy here are at least as ancient. *See, e.g., Bowers*, 478 U.S. at 192 ("Proscriptions against that conduct [consensual sodomy] have ancient roots.").

2. Personal autonomy should not intrude on the broad discretion accorded the states to enact morals legislation.

As a matter of sound policy, imposition of a limit on the reach of morals laws on the basis urged by Petitioners must be rejected. That there are limits to a state's police power is certain. But the discretion afforded the states in the exercise of that power to protect the health, safety and morals of its citizens is, and of necessity must be, exceedingly broad. While "the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.'" *Holden v. Hardy*, 169 U.S. 366, 392, 18 S.Ct. 383, 42 L.Ed. 780 (1897) (quoting *Lawton v. Steele*, 152 U.S. 133, 136, 14 S.Ct. 499, 38 L.Ed. 385 (1894)); *see also Barbier v. Connolly*, 113 U.S. 27, 31, 5 S.Ct. 357, 28 L.Ed. 923 (1885) ("neither the [14th] amendment – broad and comprehensive as it is – nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity").

Further, the argument in favor of personal autonomy only begs the question, personal autonomy to what end? Autonomy is not itself a basic good. Rather, it is good only insofar as it is a means to other goods: "Autonomy is

valuable only if exercised in pursuit of the good." JOSEPH RAZ, THE MORALITY OF FREEDOM 381 (Oxford: Clarendon Press, 1986). The act here for which protection is sought can hardly be considered as good in itself. Certainly it is not so esteemed in the eyes of the duly elected representatives of the State of Texas.

IV. STRIKING THE STATUTE WOULD DESTROY THE ONGOING POLITICAL DEBATE ON HOMOSEXUAL RIGHTS AND UNDERMINE THIS COURT'S OWN MORAL AUTHORITY.

To accept Petitioners' arguments and strike the statute would disrupt and prematurely terminate the ongoing national debate on homosexual rights. It would also fundamentally alter the Court's role.

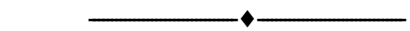
> The conception of the judicial role that [Chief Justice John Marshall] possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law *is*," *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (emphasis added) – not what the law *shall be*. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W. BLACKSTONE, COMMENTARIES 69 (1765).

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 107, 125 L.Ed.2d 74, 113 S.Ct. 2510 (1993) (Scalia, J., concurring) (emphasis in original).

Striking the statute would thereby jeopardize this Court's own moral authority. *See Bowers*, 478 U.S. 186, 191 (expressing concern that "announcing rights not readily identifiable in the Constitution's text . . . [may be perceived as] the imposition of the Justices' own choice of values on the States . . .").

One of Petitioners' amici asserts that "[a]n elective despotism was not the government we fought for."[23] Whatever the truth of that claim, it is certain that we did not fight for an *unelected* despotism, which would result should the Court superimpose its own view of morality on the duly constituted legislature of the State of Texas.

This Court wisely refrained from prematurely foreclosing the debate about assisted suicide in *Glucksberg*. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." *Glucksberg*, 521 U.S. at 735. It should do the same here.



[23] Brief for amicus Institute for Justice at 6 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA) (quoted in THE FEDERALIST No. 48 (Madison) at 278-79 (Clinton Rossiter ed., 1961)).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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