No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

vs.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court,[1] NOW Legal Defense and Education Fund ("NOW Legal Defense" or "*Amicus*") submits this brief as *amicus curiae* in support of Petitioners John Geddes Lawrence and Tyron Garner.

NOW Legal Defense is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. NOW Legal Defense is dedicated to the rights of all women and men to live and work free of government-enforced gender stereotypes. NOW Legal Defense has consistently supported the right of lesbians and gay men to be free from discrimination.

Amicus has an interest in this case because it raises the critical issue whether the states may impose criminal liability on the basis of the gender of those who engage in intimate sexual conduct. Because the selective criminal prohibition of Texas Penal Code Section 21.06 ("Section 21.06") perpetuates gender stereotypes by dictating the roles that men and women must assume in intimate relationships, the statute is a harmful affront to gender equality.

SUMMARY OF THE ARGUMENT

Texas is one of only four states that criminalize private, noncommercial acts of sexual intimacy by consenting adults of the same sex, but not by different-sex couples. By mandating that women's intimate relationships shall only be with men and that men's intimate relationships shall only be with women, criminal laws such as Section 21.06 not only classify on the basis of gender on a formal level, but also

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[1] Copies of the parties' letters of consent are filed herewith. Pursuant to Rule 37.6, counsel for *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, or its counsel, has made a monetary contribution to this brief's preparation or submission.

operate to enforce rigid and intrusive norms of gender-appropriate behavior. These norms are grounded in and reinforce underlying stereotypes of men's and women's "proper" roles and are similar to other gender-based stereotypes – built around notions of men's "natural" superiority and women's "natural" inferiority – that this Court has found it impermissible for the law to perpetuate. This Court's gender-discrimination cases make plain that states may not use the power of the law to require adherence to such gender stereotypes. *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). Moreover, criminal prohibitions of consensual, same-sex intimacy warrant particularly careful equal protection scrutiny because they use the threat of arrest, conviction, and punishment to enforce the state's view of what constitutes gender-appropriate conduct.

On its face, Section 21.06 makes criminality turn on the gender of the actors involved in intimate sexual conduct, not on the conduct itself, which the Texas Penal Code separately defines in gender-neutral terms. *See* Tex. Penal Code Ann. § 21.06 (Vernon 1994) (criminalizing certain sexual conduct when engaged in "with another individual of the same sex"). In this case, the only reason Texas subjected Petitioners to arrest, imprisonment, and fines for the conduct in which they engaged in the privacy of one Petitioner's home is that they both are men.

The Texas Court of Appeals ignored the facial gender classification of Section 21.06 on the ground that the statute applies equally to men and women who are sexually intimate with persons of the same gender. *Lawrence v. State*, 41 S.W.3d 349, 359 (Tex. App. 2001). This Court, however, has repeatedly rejected just such "equal discrimination" arguments in the context of laws that discriminate based on race, *see, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964), and has similarly discredited such reasoning in cases dealing with gender classifications, *see Califano v. Westcott*, 443 U.S. 76, 84 (1979). Just as it is no longer subject to

serious debate that laws prohibiting intimacy between members of different races impermissibly discriminate on the basis of race, so it is time for this Court to recognize that laws that criminalize intimacy between members of the same sex impermissibly discriminate on the basis of gender.

The only purported justification that Respondent has offered in support of Section 21.06 is the vague concept of "morality." Respondent, however, has not offered any explanation of what it means by "morality" other than a desire to enforce stereotyped norms of gender-appropriate sexual behavior. As this Court's precedents make clear, the enforcement of gender-role norms is an improper basis for government legislation and thus cannot support the constitutionality of Section 21.06 even under rational basis review. *A fortiori*, Section 21.06 plainly fails to satisfy the heightened scrutiny that applies to laws that discriminate based on gender. A state may not use the power of the law – let alone the particularly coercive power of the criminal law – to enforce its stereotypic preferences regarding gender-appropriate conduct.

For these reasons, and as set forth in more detail below and in the Brief for Petitioners,[2] the Court should reverse the judgment of the Texas Court of Appeals.

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[2] This brief addresses the ways in which Section 21.06 violates the Equal Protection Clause by impermissibly classifying on the basis of gender. *Amicus* also fully endorses Petitioners' arguments that Section 21.06 impermissibly discriminates on the basis of sexual orientation and violates rights of privacy protected by the Due Process Clause of the Fourteenth Amendment by denying adult couples the fundamental right to engage in consensual, non-commercial, intimate sexual conduct in the home.

ARGUMENT

I. Laws That Criminalize Same-Sex Intimate Conduct, Such As Texas Penal Code Section 21.06, Impermissibly Require Adherence To Gender Stereotypes.

By prohibiting certain intimate sexual conduct between persons of the same sex, while permitting the same conduct by different-sex couples, Section 21.06 mandates that consensual adult sexual relationships conform to sex-role stereotypes. These stereotypes, although familiar and deeply rooted, in fact arise from the same sources and operate in a similar manner as other gender stereotypes that this Court has found it impermissible for the law to perpetuate. As explained in detail in Part II below, Section 21.06 imposes this mandate through a gender-based classification that is readily apparent on the face of the statute. The gender classification in Section 21.06 is neither based on physiological differences between the sexes nor designed to compensate for past discrimination or to ensure equal opportunity. *See VMI*, 518 U.S. at 533-34. Rather, Section 21.06 directly enforces the State's view of gender-appropriate behavior: that women may express sexual intimacy only with men, and that men may express sexual intimacy only with women. Moreover, as explained below, these stereotypes are built on a paradigm of inequality that associates men with superiority and dominance and devalues women. In recent cases, this Court has consistently found the enforcement of such sex roles – both for men and for women – to be an improper basis for legislation.

A. For Much Of This Nation's History, Gender Classifications In The Law Served As A Means Of Requiring Adherence To Gender Stereotypes That Were Understood As "Natural," "Moral," And "Traditional."

Throughout "volumes of history," *VMI*, 518 U.S. at 531, the states and the federal government – with the blessing of this Court – used the law to maintain rigid definitions of gender-appropriate conduct and thereby to limit individual opportunity. For example, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), this Court agreed with the Illinois courts that the Illinois Bar could, consistent with the Fourteenth Amendment as then understood, exclude women from the practice of law. *Bradwell*, 83 U.S. at 137-39. The Illinois court had upheld Myra Bradwell's exclusion from the practice of law on the ground that, as a married woman, she could not enter into a binding contract without her husband and thus would be unable to establish contractual relationships with her clients. *Id.* at 131. In a now-infamous concurrence, Justice Bradley emphasized the "natural and proper" differences between men and women, long-embodied in the law, as a basis for denying women the right to practice law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . It is true that many women are unmarried . . . but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution

> of things, and cannot be based upon exceptional cases.

Id. at 141-42 (Bradley, J., concurring).

In invoking "the law of the Creator," Justice Bradley was essentially asserting, like Respondent State of Texas in this case, that the states could invoke a particular view of "morality" to justify legislation enforcing gender stereotypes. Yet "morality" or "nature" is an unsatisfactory justification for state efforts to regulate adherence to traditional sex-role norms, as demonstrated by numerous now-discredited decisions that relied on those grounds. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding law prohibiting most women from bartending on "moral and social" grounds); *Fitzpatrick v. Liquor Control Comm'n*, 316 Mich. 83, 104, 25 N.W.2d 118, 127 (1946) (upholding law prohibiting women from bartending as potentially "conducive of good morals – either those of women themselves or the morals of the customers in such places"), *overruled by Bundo v. City of Walled Lake*, 395 Mich. 679, 238 N.W.2d 154 (1976); *People v. Charles Schweinler Press*, 214 N.Y. 395, 402-04, 108 N.E. 639, 640-41 (1915) (upholding law restricting women's night work, justified as measure "to protect and preserve the health and to some extent the morals of women"); *Adams v. Cronin*, 29 Colo. 488, 496, 69 P. 590, 593 (1902) (upholding prohibition of women's entry to "wine rooms" on basis that "[i]f a discrimination is made against women . . . because of the immorality that would be likely to result if the regulation was not made, the regulation would be sustained"); *In re Goodell*, 39 Wis. 232, 245-46 (1875) ("The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of

law, are departures from the order of nature; and when voluntary, treason against it.").

More recently, in *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld a Florida statute requiring men to register for jury duty while making registration optional for women. *Id.* at 62-63. In so holding, only four decades ago, the Court stated that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, *woman is still regarded as the center of home and family life*." *Id.* (emphasis added). Thus, the Court concluded: "We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own *special responsibilities*." *Id.* at 62 (emphasis added).

Gender-based restrictions imposed by laws such as those at issue in these cases stemmed from, and in turn reinforced traditional notions that "morality" and the "natural order" required women to accept and give primacy to roles as wives and mothers, and required men to protect women in those roles. Decisions such as *Bradwell*, *Goesart*, and *Hoyt* expressly embraced the once commonplace notion that it was both constitutional and proper for the government to use the law as a means of requiring adherence to traditional gender norms.

B. This Court Has In Recent Decades Made Clear That The Equal Protection Clause Prohibits States From Requiring Adherence To Gender Stereotypes.

Notwithstanding a century of its former equal protection jurisprudence, this Court's more recent cases make plain that the Equal Protection Clause does not permit states to require adherence by either men or women to gender stereotypes.

See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (finding equal protection violation in a rebuttable presumption of dependency of female military spouses which was based on "gross, stereotyped distinctions between the sexes"); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (dismissing "old notions" of male and female roles in supporting a family as justification for gender classification); *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976) (finding equal protection violation in statute regarding purchase of alcohol that reflected "social stereotypes" about gender); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (invalidating gender-based distinction for payment of disability benefits that was based on "'archaic and overbroad' generalizations" about gender); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (holding unconstitutional a gender classification in an alimony statute that "carrie[d] with it the baggage of sexual stereotypes"); *Westcott*, 443 U.S. at 89 (invalidating a program providing benefits for children of unemployed fathers but not unemployed mothers as "part of the 'baggage of sexual stereotypes'"); *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994) (finding "an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice").

Indeed, the Court's most recent gender cases recognize that in meeting the burden of providing an exceedingly persuasive justification for gender classifications, the states "must not rely on overbroad generalizations about the different talents, capacities, or *preferences* of males and females." *VMI*, 518 U.S. at 533 (emphasis added). As the Court explained in *VMI*: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (emphasis in original). Accordingly, the fact that most women would not care for an "adversative" model of education was held insufficient to deny those women who

desired and were capable of the demands of such teaching methods the benefits of attending the Virginia Military Institute. *Id.* at 550.

The Court employed similar reasoning in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), to strike down a state law prohibiting men from attending a state-operated nursing school. The Court there made clear that "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.* at 724-25. Courts are required to determine the validity of gender classifications based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 726.

Thus, in evaluating the constitutionality of Section 21.06 under this Court's precedents, it does not matter whether most women would desire, even in the absence of criminal penalties, to form sexual and intimate relationships with men rather than women, or whether most men would desire to form sexual and intimate relationships with women rather than men. *Cf. J.E.B.*, 511 U.S. at 139 n.11 ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."); *Craig*, 429 U.S. at 202 (rejecting gender classification and noting prior cases' rejection of gender as a "decisionmaking factor" even where there were "predictive empirical relationships" between gender and regulations in question). The vast majority of women may never choose to go to a military academy, and the vast majority of men may not elect to pursue nursing as a career. The Equal Protection Clause, however, forbids the government from imposing on every woman, no matter what

her individual preference, what most women would like, or what society believes is a gender-appropriate desire. Equally, the state cannot compel all men to conform to what most men want, or to what society has determined is appropriately masculine. Just as a state cannot limit the opportunities for men to become nurses based on asserted notions of public morality and gender-appropriate behavior, so too is a state prohibited from making it a crime for a man to engage in intimate conduct with another man, or a woman to engage in intimate conduct with another woman, while permitting the same conduct between different-sex couples.

The heightened scrutiny that the Court has come to apply to gender classifications is based not on the notion that there are no differences between men and women, but rather that overbroad generalizations about those differences cannot justify restricting individuals to state-imposed, gender-based roles. *See VMI*, 518 U.S. at 533 ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."); *Orr*, 440 U.S. at 279 (state's "preference for an allocation of family responsibilities under which the wife plays a dependent role" is an invalid justification for sex-based classifications); *cf.* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1557 (1991) (noting the need to "recogniz[e] gender differences in a way that promotes equality and frees both women and men from traditional role limitations"). This Court has repeatedly held that states may not impose gender classifications based on the archaic stereotype that morality requires that women remain in the home; the Constitution similarly precludes Texas from employing such stereotypes under the guise of

"morality" or otherwise – to dictate the roles women or men may fill in their intimate relationships in their homes.[3]

C. Prohibitions Of Sexual Intimacy Between Persons Of The Same Sex Enforce Gender Stereotypes.

Gender-based stereotypes animate laws such as Section 21.06 that prohibit sexual intimacy between persons of the same sex. Indeed, as explained below, prohibitions of same-sex intimate conduct should be understood to reflect "a reaction to the violation of gender norms, rather than simply scorn for the violation of norms of sexual behavior." Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 187.

One need look no further than the history of sodomy laws during the late nineteenth century – during the rise of a so-called "purity movement" in America – for evidence of the profound relationship between prohibitions of intimate sexual relations between persons of the same sex and a felt societal need to maintain rigid gender norms. Although sodomy laws were applicable then to all who committed the proscribed acts, it is no coincidence that such laws were expanded to include oral sex – and that municipalities across the country enacted prohibitions of cross-dressing – during the very period that saw the emergence in American popular understanding of the idea of the "homosexual" as a person characterized by gender "inversion." William N. Eskridge,

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[3] In the Title VII context, this Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), similarly recognized that actions taken to enforce gender stereotypes may amount to impermissible sex discrimination. "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250 (plurality opinion); *id.* at 272-73 (O'Connor, J., concurring) (describing evidence that adverse employment decision was based in part on plaintiff's failure to conform to gender stereotypes as evidence of discriminatory conduct).

Jr., *Gaylaw: Challenging the Apartheid of the Closet* 25-27 (1999). "For both men and women, homosexual behavior came to be seen as a manifestation of 'inversion.' Effeminate men or masculine women violated the prescriptions of gender. The men particularly served as popular symbols of perversion and moral contagion." Law, *supra*, at 202; *see also* Byrne Fone, *Homophobia: A History* 346-48 (2000) (describing perceptions of homosexual men as effeminate, perverse, and potentially destructive of society). Fears of homosexuality were linked with Victorian America's resistance of the attempted entrance by the "New Woman" into the formerly male spheres of education and work; such intrusion was seen as "violat[ing] normal gender categories," as a "fus[ion of] the female and the male," and as "the embodiment of social disorder." Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* 265 (1985).[4] Thus, "[t]he purity movement reflected a heightened middle-class desire to reinforce traditional female gender roles in the face of a generation of 'new women,' educated and economically independent of men." Eskridge, *supra*, at 20.

Section 21.06 likewise embodies and enforces gender norms. Texas's prohibition of same-sex intimacy prescribes a

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[4] For example, in 1875, the Wisconsin Supreme Court justified the exclusion of women from the practice of law as necessary to preserve their purity and public decency:

> It would be revolting . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce . . . . The habitual presence of women [in courts of justice] would tend to relax the public sense of decency and propriety.

Goodell, 39 Wis. at 246.

gendered standard of sexual behavior and proscribes deviation therefrom: men must not do what women are expected to do (engage in sexual intimacy with men), and women must not do what men are expected to do (engage in sexual intimacy with women). "Social science research generally confirms what social experience suggests: a strong aversion to homosexuality is correlated positively with endorsement of traditional sex-based stereotypes. Taboos against 'effeminate' men and 'unfeminine' women grow out of the same gender role assumptions that have limited opportunities for all individuals, irrespective of their sexual orientation." Deborah L. Rhode, *Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. Cal. Rev. L. & Women's Stud. 11, 21 (1995).

Not only do the gender norms underlying same-sex intimacy prohibitions enforce gender stereotypes, but those stereotypes are also themselves deeply rooted in the devaluation of the "female." The stereotypes that make homosexuality's perceived affront to "proper" gender roles so potent are familiar ones that associate the female with the weak and contemptible. These stereotypes insist that men be dominant and that women be subordinate to men.[5] As one author explained:

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[5] In 1949, the writer James Baldwin argued that disdain for homosexuality was directly related to popular notions of the stereotypically masculine man, "whose attitude towards women is the wedding of the most abysmal romanticism and the most implacable distrust." James Baldwin, *Preservation of Innocence*, *in* Zero, Summer 1949, at 14, *reprinted in* Out/Look, Fall 1989, at 40, 43. According to Baldwin, the "debasement [of the homosexual] and our obsession with him corresponds to the debasement of the relationship between the sexes[;]. . . his ambiguous and terrible position in our society reflects the ambiguities and terrors which time has deposited on that relationship." *Id.*, *reprinted in* Out/Look, Fall 1989, at 41; *see also* Fone, *supra*, at 395 ("For Baldwin, homophobia . . . derived not just from hatred of homosexuality, but from sexism.").

> Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate to one's sex is the imputation of homosexuality. The two stigmas – sex-inappropriateness and homosexuality – are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; they appear to be guilty of some kind of insubordination.

Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 129 (1997); *see also* Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 844 (2002) ("Effeminate men and masculine women are often assumed to be homosexual, suggesting that gender and orientation are bundled in popular consciousness – to be gender atypical is to be orientation atypical and vice versa."); *cf.* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 21 (1994) (noting that even in "macho" cultures that stigmatize homosexuality less than the United States, "a sharp distinction is drawn between passivity and activity in sexual relations, and cultural understandings of passive and active operate in gendered terms. Thus, the passive role is both stigmatized and identified with femininity, whereas the active role is socially respectable and identified with masculinity."). By legally prohibiting men from being sexually intimate with other men, the state effectively enforces the notion that men must not "act like women" in a way that undermines the predominant view that men are fundamentally different from, and superior to, women. By legally prohibiting women from being sexually intimate with other women, the state

effectively enforces the notion that female sexuality exists solely for men and that women must not assume "masculine" roles that challenge the traditional view that they are naturally dependent on and subservient to men.

Recent same-sex sexual harassment cases under Title VII further demonstrate the culturally pervasive links between the debasement of stereotypically female traits, hostility toward those who break gender stereotypes, and the notion that sexual conduct between men entails men taking on debased "feminine" roles. Cases following *Hopkins* and this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (recognizing cause of action under Title VII for same-sex sexual harassment), have noted that sex discrimination may be at play where men suffer harassment because they are perceived as departing from gender "norms" by appearing or behaving in what is viewed as a feminine manner. The factual recitals in these cases are remarkably consistent. *See, e.g., Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 259-60 (3d Cir. 2001) (evidence of harassment included threats and use of physical force, as well as harasser calling plaintiff a "sissy" and repeatedly yelling at plaintiff, "everyone knows you're gay as a three dollar bill"), *cert. denied*, 534 U.S. 1155 (2002); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870 (9th Cir. 2001) (harassers referred to plaintiff as "she" and "her," mocked plaintiff "for walking and carrying his serving tray 'like a woman,' and taunted [plaintiff] in Spanish and English as, among other things, a 'faggot' and a '. . . female whore'"); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (harassing comments included "suck my dick," and "so you like it up the ass?"; "[p]ornographic photographs were taped to his work area, male dolls were placed in his vehicle, and copies of Playgirl magazine were sent to his home"); *cf. Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (holding that plaintiff had stated a cause of action for sex discrimination under the Equal Credit Opportunity Act by

alleging that defendant required plaintiff to conform to sex stereotypes before proceeding with a credit transaction). Women perceived as lesbians receive parallel treatment. *See Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (harassing comments by female employer to female employee included "I thought you were the man," "I thought you wore the pants," and "[who wore] the dick in the relationship").

The gender stereotyping at issue in Section 21.06 is as invidious as in the sexual harassment cases described above or the school admissions policies that this Court struck down in *VMI* and *Hogan*. Through imposition of criminal punishment, Section 21.06 seeks to enforce traditional norms of appropriate gender roles. At their core, these norms include the idea that sexual intimacy between two men is a sign of femininity and is debased; that women are to be sexually available to men and are not to express their own sexuality outside of an interaction with a man; and that transgression of gender norms is not merely unorthodox, but criminal. Thus, the statute Respondent defends enforces the very essence of sex-role stereotyping.

D. Gender-Based Criminal Statutes Warrant Particularly Careful Equal Protection Scrutiny.

Criminal prohibitions of consensual same-sex intimacy are particularly suspect because they use the threat of arrest, conviction, and punishment as the tools to enforce gender stereotypes. Courts must be especially vigilant in guarding against equal protection violations – and the harms they cause – in the criminal context. *See, e.g., McLaughlin*, 379 U.S. at 192 ("We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which . . . were intended to secure 'the full and equal benefit of all laws and proceedings for the security

of persons and property' and to subject all persons 'to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'"). As this Court has noted in the race context, "[a]t the very least, the Equal Protection Clause demands that racial classifications, *especially suspect in criminal statutes*, be subjected to the 'most rigid scrutiny.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis added). Gender classifications embedded in criminal statutes likewise merit careful and discriminating scrutiny.[6]

II. Section 21.06 Contains A Facial Gender-Based Classification.

Criminal liability under Section 21.06 turns on a gender classification apparent on the face of the statute. The conduct at issue in Section 21.06, "deviate sexual intercourse," is defined in a separate provision of the Texas Penal Code, Section 21.01(1), in gender-neutral terms as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." Tex. Penal Code Ann. § 21.01(1). It is undisputed that "deviate sexual intercourse," if performed between a man and a woman, is generally legal in Texas. *See Lawrence*, 41 S.W.3d at 357. Section 21.06 imposes criminal sanctions

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[6] As the analysis above suggests, sexual orientation is a characteristic tied to gender – that is, sexual orientation is defined in terms of the gender of person(s) to whom one is sexually or romantically attracted or with whom one is desirous of establishing sexual or romantic relationships. The sociological and physical reality of the interdependence between gender and sexual orientation warrants a closer look at existing distinctions in legal doctrine. As demonstrated herein, sexual orientation discrimination based on gender stereotyping can be understood as a form of gender discrimination warranting heightened scrutiny. In the present case, however, there is no need to decide this issue because, as explained in Part II of this brief, Section 21.06 expressly discriminates on its face on the basis of gender. Moreover, as explained in the Petitioners' Brief, the statute in any event does not survive even rational basis review.

only when "[a] person . . . engages in deviate sexual intercourse *with another individual of the same sex*." Tex. Penal Code Ann. § 21.06 (emphasis added).

Thus, under Section 21.06, criminality turns on the gender of the actors rather than the act. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 211 (1994) ("[I]f prohibited conduct is defined by reference to a characteristic, the prohibition is not neutral with reference to that characteristic."). To make a case under Section 21.06, a Texas prosecutor must prove the gender of each of the participants in the relevant conduct. In fact, gender is the key element of the crime, given that the underlying conduct is not illegal in Texas but for the gender of the participants. Thus, were the gender of either Petitioner Lawrence or Petitioner Garner different, neither of them would have been arrested, charged, convicted, and sentenced under Section 21.06.

A. Section 21.06's Operation With Respect To Gender Parallels The Operation Of Laws That This Court Long Ago Recognized As Facially Discriminatory On The Basis Of Race.

In defining criminality based on the actors' gender, Section 21.06 is akin to the statutes that this Court struck down decades ago for defining criminal conduct based on the actors' races. The seminal case, *McLaughlin*, concerned a Florida law that made it a crime for persons of different races habitually to spend the night in the same room together. *McLaughlin*, 379 U.S. at 185-87. The Florida Supreme Court had upheld the law under *Pace v. Alabama*, 106 U.S. 583 (1883), a case in which this Court had let stand a statute imposing more severe penalties for interracial fornication than for fornication between persons of the same race. *Pace*, 106 U.S. at 583-85. Rejecting the plaintiff's equal protection claim, the *Pace* Court had stated: "[The statute] applies the same punishment to both offenders, the white and the black.

Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. . . . The punishment of each offending person, whether white or black, is the same." *Id.* at 585.

McLaughlin unequivocally renounced the equal-discrimination reasoning of *Pace*. The *McLaughlin* Court explained: "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. . . . Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin*, 379 U.S. at 188-91. As Justice Stewart explained in concurrence, the Florida law at issue criminalized conduct based on race despite its equal applicability to cohabiting persons of different races:

> These appellants were convicted, fined, and imprisoned under a statute which made their conduct criminal only because they were of different races. So far as this statute goes, their conduct would not have been illegal had they both been white, or both Negroes. . . . *I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se.*

Id. at 198 (Stewart, J., joined by Douglas, J., concurring) (emphasis added).

McLaughlin makes clear that statutes that classify conduct based on the race of the participants for the purpose of imposing criminal sanctions are statutes that classify on the basis of race, regardless of whether the statutes apply equally to blacks and whites. *Id.* at 191-92 ("[W]e deal here with a classification based upon the race of the participants . . . .").

The Court reaffirmed this principle in *Loving*, striking down a statute that criminalized interracial marriage. *Loving*, 388 U.S. at 4. The Court had no trouble concluding that the anti-miscegenation statute before it was based on a "racial classification," explaining: "*There can be no question* but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11 (emphasis added). Section 21.06's selective prohibition of "deviate sexual intercourse" operates in the same manner with respect to gender: "deviate sexual intercourse" is "generally accepted" in Texas, but criminal "if engaged in . . . with another individual of the same sex." It should be beyond dispute that the principle animating *McLaughlin* and *Loving* – that courts should subject to rigorous scrutiny attempts by states to impose *criminal penalties* on the basis of race – applies with equal force to review of statutes under which criminal sanctions turn on gender.

This Court's reasoning in *McLaughlin* completely disposes of the conclusion of the Texas Court of Appeals below that Section 21.06 does not discriminate on the basis of sex because it does not disadvantage one gender relative to the other. *See Lawrence*, 41 S.W.3d at 359 (describing Section 21.06 as "gender-neutral on its face" on the ground that it "does [not] impose burdens on one gender not shared by the other"). Indeed, this Court has repeatedly rejected arguments that race- or sex-based classifications should be upheld because they apply equally to all races or sexes. *See, e.g.*, *McLaughlin*, 379 U.S. at 191; *Loving*, 388 U.S. at 8 (rejecting "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"); *see also Shelley v. Kraemer*, 334 U.S. 1, 21 (1948) ("Respondents urge . . . that since the state courts stand ready to enforce

restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws. . . . This contention does not bear scrutiny."); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964) (holding unconstitutional a state law requiring the race of a candidate to appear on the ballot and rejecting the state's argument that "its Act is nondiscriminatory because the labeling provision applies equally to Negro and white"); *Westcott*, 443 U.S. at 84 (invalidating program providing support for children with both a father and a mother in the home where eligibility turned on gender of unemployed parent, and rejecting government's argument that program was not discriminatory because husband and wife in a potentially eligible family unit would be equally affected by a grant or denial of aid); *cf. Hunter v. Underwood*, 471 U.S. 222, 223 (1985) (holding unconstitutional as racially discriminatory an Alabama statute that mandated disenfranchisement of persons who committed "crimes of moral turpitude" and stating that the fact that the statute was intended to discriminate against poor whites in addition to poor blacks "hardly saves [it] from invalidity").

Texas's suggestion that Section 21.06 can escape equal protection scrutiny because it equally discriminates against women who choose female partners and men who choose male partners is fundamentally flawed. Such "equal application" does not negate the existence of an express gender classification here any more than did the "equal application" of the unconstitutional statute in *McLaughlin*.

B. Section 21.06 Facially Discriminates Based On Gender In Two Ways.

Like the statute struck down in *McLaughlin*, Section 21.06 facially discriminates on the basis of gender. It does so in two distinct ways. First, Section 21.06 facially discriminates based on the gender of the *defendant*. But for

the gender of Petitioner Lawrence, he would not have been charged, convicted, or sentenced under Section 21.06 for engaging in "deviate sexual intercourse" with Petitioner Garner. Rarely – and only in circumstances wholly absent here – has this Court upheld a statute that imposed criminal liability based on the gender of the defendant.[7]

Second, Section 21.06 also facially discriminates based on the gender of the defendant's chosen partner. But for the gender of Petitioner *Lawrence*, Petitioner *Garner* would not have been charged, convicted, and sentenced under Section 21.06 (and vice versa). In the race context, this Court has treated as obvious the notion that a statute facially classifies based on race if the statute expressly classifies based on the race of the defendant's third-party associate. For example, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court addressed a program that granted preferences to business owners who either were members of certain racial minority groups or subcontracted with members of those groups. The *Adarand* Court, in remanding for strict scrutiny review, specifically noted that the "case concerns only classifications based explicitly on race." *Adarand*, 515 U.S.

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[7] *Amicus* is aware of only one instance in which this Court upheld a statute under which criminality turned on the gender of the defendant: *Michael M. v. Superior Court*, 450 U.S. 464 (1981). *Michael M.* is readily distinguishable from the present case. First, the statutory rape law at issue in *Michael M.* was aimed at the protection of minors, unlike Section 21.06, which criminalizes conduct between consenting adults. Second, the *Michael M.* Court found that the gender-based classification at issue in that case related directly to physiological differences between men and women, namely, the capacity of women to become pregnant. No such argument can be made with respect to Section 21.06, which relates only to non-reproductive sexual conduct. Third, the 1981 majority opinion in *Michael M.* applied scrutiny there described as "the traditional minimum rationality test" with "'sharper focus,'" *id.* at 468, whereas the Court's current doctrine makes clear that the scrutiny required for facial gender-based classifications is heightened, not simply more sharply focused, *see VMI*, 518 U.S. at 533.

at 213. In other words, the *Adarand* Court recognized that a program that classified contractors according to the race of the business owners with whom they contracted created a racial classification. Similarly, Section 21.06 classifies a person who engages in certain intimate acts as either a criminal or a non-criminal according to the gender of the person's partner. Consistent with *Adarand*, Section 21.06 may be understood not simply as classifying based on the gender of the defendant, but also as classifying based on the gender of the defendant's chosen partner.

The Texas Court of Appeals, however, erroneously concluded that Section 21.06 includes no gender-based classification because "nothing in the history of Section 21.06 . . . suggest[s] it was intended to . . . perpetuate any societal or cultural bias with regard to gender." *Lawrence*, 41 S.W.3d at 358. This Court, of course, required no such showing in *McLaughlin*, and indeed, the Court of Appeals' reasoning conflates the two tests for determining whether a statute classifies based on gender. Under this Court's precedent, proof that Section 21.06 has a gender-discriminatory purpose is not necessary to establish that the statute *facially* classifies based on gender. *Cf. Adarand*, 515 U.S. at 213 ("We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." (citations omitted)).

In any event, as explained above in Part I of this brief, Section 21.06 causes gender-based harms by enforcing a state-sponsored view of gender-appropriate behavior. The clear function of the statute is to prescribe adherence to Texas's preferred sex roles and to prevent individuals from entering into intimate relationships that defy deeply rooted sex-role stereotypes. Like the statute in *Bradwell* that prohibited women from practicing law, Section 21.06 reinforces the antiquated notion that there are separate and

"natural" "spheres and destinies of man and woman." 83 U.S. at 141-42. Indeed, Respondent's effort to justify the law based on undefined notions of morality and family values has no meaning other than as a statement of the State's view that these traditional sex roles should be maintained.

III. Section 21.06 Cannot Survive Rational Basis Review, Let Alone The Heightened Scrutiny Applied To Gender Classifications.

Section 21.06 plainly cannot withstand even the most minimal standard of review under the Equal Protection Clause – for mere rationality – much less any heightened scrutiny. Texas's asserted interest in "preserving the public morals," *Lawrence*, 41 S.W.3d at 354, does not provide a legitimate government objective sufficient to justify Section 21.06's selective imposition of criminal liability on same-sex couples for the same conduct permissibly engaged in by different-sex couples. As explained above, this selective prohibition under the guise of morality serves no purpose other than the preservation of traditional gender roles, which this Court has made clear is not a defensible governmental purpose.

Without question, then, Section 21.06 cannot survive the heightened equal protection scrutiny applied to gender-based classifications. As explained by this Court in *VMI*, gender-based classifications are valid only if the government satisfies its burden of demonstrating that the challenged classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 533 (internal quotation marks omitted). The government must "demonstrate an 'exceedingly persuasive justification' for [its] action." *Id.* at 531. Texas's asserted morality justification for Section 21.06, however, is precisely the sort of purpose that this Court has condemned in its recent jurisprudence as serving to enforce overbroad gender stereotypes.

That the states may not enforce traditional gender roles certainly does not mean that the propagation of gender roles has no place in civil society. Gender roles are regularly developed and learned in families, religious institutions, and other segments of society. There is considerable variation, however, in the gender roles that different families and different religions inculcate. Government coercion, especially through imposition of criminal punishment, simply has no acceptable part to play in that process.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Petitioners, this Court should reverse the judgment of the Texas Court of Appeals for the Fourteenth District.

Respectfully submitted,

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