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
Texas Court of Appeals
for the Fourteenth District

BRIEF AMICI CURIAE OF TEXAS EAGLE FORUM, DAUGHTERS OF LIBERTY REPUBLICAN WOMEN, HOUSTON, TEXAS, AND SPIRIT OF FREEDOM REPUBICAN WOMEN'S CLUB IN SUPPORT OF RESPONDENT.

STATEMENT OF INTEREST OF *AMICI CURIAE*[*]

Texas Eagle Forum is a nonprofit corporation dedicated to encouraging women and men to participate in the process of self-government and public policy-making so

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties have authored this brief in whole or in part, and no one other than *amici* or their members or their counsel have contributed money or services to the preparation or submission of this brief.

that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. Pursuant to this goal, Texas Eagle Forum researches problems concerning the status of women and their civil, legal, economic and social rights by means of conferences, lectures, study groups, and mailings. Texas Eagle Forum believes that rights of women are best defended and strengthened by a robust concept of sexual complementarity, rather than androgyny or sexual dominance.

Texas Eagle Forum believes that a ruling by this Court that would characterize the Texas statute at issue as legislating adherence to sexual stereotypes and subject to heightened scrutiny under Equal Protection analysis would undermine the progress of women in this country.

Daughters of Liberty Republican Women, Houston, Texas, works to promote better government "of the people, by the people, and for the people," at the local, state, and national levels. The Daughters support legislation that protects and promotes values basic to the American heritage, and essential to the health of the national culture.

Daughters of Liberty Republican Women believe that the Texas statute at issue in this case treats both sexes evenhandedly and is a constitutional exercise of the state's police power.

The Spirit of Freedom Republican Women's Club actively supports the Founding Fathers' vision of a just and moral society. It continues the Republican Party's tradition of supporting full political equality of women as evidenced by the fact that twenty-six of the thirty-six states ratifying the Nineteenth Amendment giving women the right to vote had Republican legislatures.

The Spirit of Freedom Republican Women's Club believes that Section 21.06 is consistent with this country's long history of prohibiting same-sex sodomy and does not violate any provision of the Constitution.

To assist the Court in addressing the issues presented by this case, *amici* submit this brief.

SUMMARY OF THE ARGUMENT

In order to sustain the Petitioners' challenge to the Texas statute, this Court must have greater knowledge of the facts surrounding Petitioners' conduct and the passage of the Texas law than can be gleaned from the present record. The inadequate record justifies dismissal of this case on the basis that the writ of certiorari was improvidently granted. Absent such disposition, the proper standard of review of the Texas statute is rational basis.

Section 21.06 is gender-neutral on its face and applies to men and women in the same manner. The record provides no legislative history of the statute suggesting its passage was motivated by sexual animus, and the history of Texas is one filled with support for the accomplishments of both sexes. In enacting the statute, the state of Texas could rationally seek to promote sexual integration of men and women based upon the complementarity of the sexes, a goal within the constitutional authority of the state.

The ruling of the lower court should be affirmed or the writ should be dismissed as improvidently granted.

ARGUMENT

I. The Inadequate Evidentiary Record in this Case Warrants Dismissal of the Writ of Certiorari as Improvidently Granted.

Before this Court can reach the substantive issues in this case, it must address an important threshold issue. There is no evidence in the record from which this Court could base a ruling on the questions presented by the Petition for Writ of Certiorari. The record reveals only that petitioners pled *nolo contendre* to charges that each engaged in "deviate sexual intercourse with another individual of the same sex" in violation of Tex. Pen. Code Ann. § 21.06 (Vernon 1994). *Lawrence v. Texas*, 41 S.W.3d 349, 350 (Tex. App. – Houston [14th Dist.] 2001) (quoting the statute). The record in this case only shows that the petitioners were adult males who engaged in "anal sodomy." Pet. App. 129a.

The record contains (1) no evidence that the sexual act was consensual and not done by force; (2) no evidence that it was not an act of same-sex prostitution; and (3) no evidence that each of the men had the mental capacity to consent.

Petitioners' primary claim is that this Court should create a fundamental right to engage in private adult consensual same-sex sodomy. This Court should not undertake review of such a claim when it is unclear that the facts of this case present an opportunity for this Court to rule on such an issue. "This Court has often refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955) *citing International Brotherhood of Teamsters v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948); *Rescue Army v. Mun. Court*, 331 U.S. 549 (1947); *Aircraft & Diesel Equipment Corp. v. Hirsch*,

331 U.S. 752 (1947); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450 (1945).

Based upon the inadequate factual record before this Court, at most, Petitioners can make a facial challenge to the Texas law. As such, this Court should apply the standard articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be valid"). Even the Petitioners concede that the Texas law could be enforced against individuals who engaged in public same-sex sodomy, or against those who would engage in sodomy with a same-sex partner who is unable to consent. Pet. Br. at 6. Clearly the law would be enforceable in the context of same-sex prostitution. These applications make the law constitutional under the *Salerno* standard.

Therefore, because the record before this Court does not clearly present the facts of same-sex sodomy performed in private between consenting adults, this Court should either uphold the Texas law under *Salerno* or dismiss the petition as improvidently granted.

II. Section 21.06 Does Not Facially Discriminate on the Basis of Gender.

Section 21.06 prohibits engaging in oral sex or sodomy "with another individual of the same sex." Tex. Pen. Code Ann. § 21.06 (Vernon 1994). Similar to the statute at issue in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1972) that established a hiring preference for veterans, the Texas statute is gender neutral on its face. Neither men nor women may engage in the prohibited conduct. Statutes that do not classify individuals on the basis of race or other criteria that this Court has held

to be constitutionally suspect (e.g. gender, alienage, or illegitimacy) are to be reviewed to determine whether the classification utilized is rationally related to a legitimate state interest. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

Recognizing, however, that even facially neutral laws may hide unconstitutional intentions, the *Feeney* Court went on to inquire whether "a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 442 U.S. at 279. This Court employed the same standard in its review of allegations that imposition of the Georgia death penalty was racially biased. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (a legislative action may violate equal protection if it is taken, at least in part, "because of" rather than "in spite of" its adverse effects upon an identifiable group).

In *Feeney* 98% of all Massachusetts veterans were male at the time of the litigation. *Feeney*, 442 U.S. at 269 n. 21. This fact led the Court to inquire whether the statutory preference for veterans was motivated, at least in part, "because of" its adverse effect upon women. Nothing in the legislative history supported such a conclusion.

Notwithstanding the evidence in *Feeney* that men benefited disproportionately from the statutory preference for veterans, this Court concluded, "[t]he appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex." *Id*. at 281. Therefore the Court concluded that the law was constitutional. *Id.*

This analysis is consistent with that adopted by courts in states having constitutional equal rights provisions.

Reviewing courts have consistently held that laws that are gender neutral on their face are *not* subject to constitutional challenge under a state equal rights provision solely on the basis of proof that the law in question has a disparate impact upon the members of one sex. To establish even a *prima facie* violation of a state equal rights amendment, the party challenging a gender-neutral law must show that the law was enacted with an *intent* to discriminate and not merely with the *knowledge* that some disparity would result. *See Wendt v. Wendt,* 757 A.2d 1225, 1243-45 (Conn. App. Ct. 2000) (unequal division of marital property in divorce proceedings); *People v. Adams,* 597 N.E.2d 574, 585 (Ill. 1992) (mandatory HIV testing of prostitutes); *State v. Spina,* 982 P.2d 421, 437 (Mont. 1999) ("the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose"); *Crabtree v. Montana State Library,* 665 P.2d 231 (Mont. 1983) (veterans preferences in public employment); *Buck v. Commonwealth of Pennsylvania, Dep't of Public Welfare,* 566 A.2d 1269, 1273 (Pa. Commw. Ct. 1989) (party challenging facially neutral rule on the ground that its effects upon a class of women were disproportionately adverse was required to show that the rule was adopted because of, not in spite of, its adverse effects upon an identifiable group); *Arnold v. Dep't of Ret. Sys.,* 875 P.2d 665, 670-71 (Wash. Ct. App. 1994) (prohibiting divorced spouses of law enforcement officers and firefighters from obtaining retirement benefits).

In the present case, there is *no* evidence in the record that §21.06 has adverse effects upon men or women as an identifiable group. Similarly the record is *absolutely devoid* of any showing that §21.06 reflects a legislative purpose to discriminate against women or men. The absence of such evidence may explain why Petitioners relegated the claim that §21.06 employs a gender-based classification to a mere footnote in their brief to this Court. Pet. Br. at 32 n. 24.

In the absence of any evidence showing adverse effects of the statute upon men or women as a class, or any evidence showing a legislative purpose to discriminate against men or women as a class, there is no basis for this Court to determine that §21.06 is a gender-based statute that violates Equal Protection.

III. Characterizing Section 21.06 as a Gender-based Law and Subjecting It to Heightened Scrutiny Would Distort Equal Protection Jurisprudence.

Characterizing §21.06 as a gender-based law would subject it to heightened scrutiny under the Equal Protection Clause. "For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Nguyen v. INS*, 533 U.S. 53, 60 (2001)(internal quotation marks omitted). Heightened scrutiny reflects this Court's sensitivity to the fact "that our Nation has had a long and unfortunate history of sex discrimination" *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)(plurality opinion). Balancing that sensitivity is recognition that "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

Amicus to Petitioners, NOW Legal Defense and Education Fund ("NOW") argues that §21.06 "impermissibly requires adherence to gender stereotypes." NOW Br. at 4. With absolutely no citation to the record or any *factual* statement about Texas or the law at issue, NOW asserts:

> 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 from 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.

NOW Br. at 14-15.

NOW's unsupported allegations of sexism by the state of Texas disregard the physiological reality of sexual difference, the historical reality of respect for women's talents and abilities in Texas, and the lack of any logical connection between a belief that the state may constitutionally prohibit homosexual acts and a belief in male sexual dominance.

The proper standard of review for §21.06 is rational-basis review. Public health considerations provide a rational basis for §21.06. Mr. Lawrence and Mr. Garner were convicted of violating the law because they engaged in anal sodomy. Pet. App. 129a. Anal sodomy poses health risks that do not accompany the act of vaginal penile intercourse because of the differences between the vagina and the anus. "The vagina is surrounded by thick muscular tissue which distends and changes shape to accommodate the erect penis during intercourse." Jeremy Agnew, *Some anatomical and physiological aspects of anal sexual practices*, 12 Journal of Homosexuality, No. 1, 75, 91 (Fall 1985). The nature of these muscles makes them "capable of protecting against

abrasion during intercourse . . . ." *Id.* In contrast, the anus has a far more limited capacity to expand because it is firmly attached to the tailbone, and it is vulnerable to tears at its point of attachment. Because veins and arteries surround the anus, any tears may lead to substantial bleeding. *See* Keith L. Moore, CLINICALLY ORIENTED ANATOMY 385 (2nd ed. 1985). Accordingly, receptive anal sex may cause physical trauma to the anus and the rectum that does not occur with vaginal penile intercourse. The biological distinction between anal sodomy and vaginal penile intercourse evidences that the Texas law is grounded in physical facts, not archaic stereotypes.[1]

Despite the suggestion of NOW that §21.06 was intended to foster a traditional view that women are "naturally dependent on and subservient to men" (NOW Br. At 15), the state of Texas has a long-standing history of respect for the talents and abilities of women. Since its founding in 1883 the University of Texas has been open to both sexes. Texas State Library and Archives Commission, *Votes for Women: The Women's Suffrage Movement in Texas,* <www.tsl.state.tx.us/exhibits/suffrage/battle/page2.html>. In 1919, Texas became the ninth state in the Union and the first Southern state to give women the right to vote by ratifying the Nineteenth Amendment to the United States Constitution. Texas State Library and Archives Commission, *Votes for Women: The Women's Suffrage Movement in Texas* <www.tsl.state.tx.us/exhibits/suffrage/victory/page4.html>. In 1925, Texas was the first state in the Union to have a Supreme Court comprised entirely of women. Debbie Mauldin Cottrell, *All-Woman Supreme Court* in THE HANDBOOK OF TEXAS ONLINE at <www.tsha.utexas.edu/handbook/online/articles/view/AA/jpa1.html>.

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[1] The public health and safety reasons supporting prohibition of same-sex sodomy are explored in greater detail in the amicus brief filed on behalf of the Texas Physicians Resource Council *et al* in support of Respondent.

Texas women have served at the highest elected levels of government, including Governor, State Supreme Court Justice, and United State Senator.[2] In fact, Texas is the only state to have elected two women to serve as governor. *See* Phillip L. Fry, *Governor* in THE HANDBOOK OF TEXAS ONLINE at <www.tsha.utexas.edu/handbook/online/articles/view/GG/mbg3.html>.

This is hardly the history of a people convinced that men are "superior" to women and that women "are naturally dependent on and subservient to men." *Compare* NOW Br. at 14-15.

NOW's allegations, had they any support in the record, Texas history, or logic would seemingly require this Court to distinguish legitimate biological differences between men and women, and questionable stereotypes. However, to paraphrase the Washington Supreme Court:

> To decide important constitutional questions upon a complaint as sterile as this would be apt to erode public respect for the [heightened standard of review for gender-based classifications] and deter rather than promote the serious goals for which it was adopted.

Cf. MacLean v. First Northwest Indus. of America, Inc., 635 P.2d 683 (Wash. 1981)(affirming trial court's refusal to allow amendment of petition to allege "ladies night" discount for basketball tickets violated state's Equal Rights

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[2] *See* Phillip L. Fry, *Governor* in THE HANDBOOK OF TEXAS ONLINE at <www.tsha.utexas.edu/handbook/online/articles/view/GG/mbg3.html>, Justices of the Supreme Court of Texas <www.supreme.courts.state.tx.us/justices.htm>, webpage of United States Senator Kay Baily Hutchison <www.hutchison.senate.gov>.

Amendment). *See also Nguyen v. INS*, 533 U.S. 53, 73 (2001)("Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.")

IV. Section 21.06 has a Rational Basis.

Section 21.06 is premised upon a truth recognized by this Court in *United States v. Virginia*, 518 U.S. 515 (1996). "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . ." *Id.* at 533. This celebration arises from the unique union experienced with the coming together of a man and a woman.

> Human society requires that we learn to value difference within community. In the complementarity of male and female we find the paradigmatic instance of this truth .... [It] invites us to learn to accept and affirm the natural world from which we are too often alienated. Moreover, in the creative complementarity of male and female we are directed toward community with those unlike us. In the community between male and female, we do not and cannot see in each other mere reflections of ourselves. In learning to appreciate this most basic difference, and in forming a marital bond, we take both difference and community seriously.

The Homosexual Movement: A Response by the Ramsey Colloquium, FIRST THINGS, March 1994, at 15, 18. *See also* George Dent, *The Defense of Traditional Marriage*, 15 J. L. & POL. 581, 632-33 (1999).

The truth of this insight is reflected in the marriage laws of the fifty states, each of which permits marriage only

as the union of one man and one woman. These laws are affirmed in federal law by the Defense of Marriage Act. 28 U.S.C. §1738C.

It is this truth that was repudiated by Virginia's anti-miscegenation laws reviewed by this Court in *Loving v. Virginia*, 388 U.S. 1 (1967). Blinded by that state's history of racial separation and a desire to maintain the supposed superiority of whites, Virginia refused to repeal or judicially overturn its century-old ban on inter-racial marriage. *See Loving v. Commonwealth*, 147 S.E.2d 48 (Va. 1966). After reviewing the history of the Virginia statute and the Fourteenth Amendment, this Court struck down the marriage ban as violating Equal Protection. *Loving v. Virginia*, 388 U.S. 1, 6-12 (1967).

The Texas statute before this Court today has no similar history of unconstitutional motivation. Quite the contrary. As noted by the Texas Court of Appeals below:

> [W]e find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender.

Lawrence v. State, 41 S.W. 3d 349, 357-58 (Tex. App.-Houston [14th Dist.] 2001).

There are inherent differences between the sexes. To deny this truth is to deny reality. Section 21.06 is premised upon this truth. It promotes the integration of the sexes, a constitutionally permissible goal.

V. Section 21.06 Furthers the State's Interest in the Protection of Public Morality.

NOW challenges the continuing legitimacy of the state's ability to promulgate and enforce laws to enforce public morality. NOW Br. at 3, 5-7, 10-11, and 24. Yet promotion and protection of public morality is a long established aspect of the states' police power. *E.g.*, *New Orleans Gas v. Louisiana Light*, 115 U.S. 650, 661, 666-72 (1885) *(citing Gibbons v. Ogden*, 9 Wheat 1, 203 (1824)); and *Mugler v. Kansas*, 123 U.S.623, 658-59, 661-65, 668-69 (1887)). Its genesis predates the founding of this nation.

At the end of his second term as president of this nation George Washington said:

> 'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government. Who that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.

George Washington, *Farewell Address in* OUR SACRED HONOR 369 (William J. Bennett ed., 1997).

His successor, John Adams, expressed similar sentiments in a letter to his cousin Zabdiel Adams:

> The only foundation of a free Constitution, is pure Virtue, and if this cannot be inspired into our people, in a greater Measure, than they have it now, They will not obtain a lasting Liberty.—They will only exchange Tyrants and Tyrannies.

John Adams, *John Adams to Zabdiel Adams, June 21, 1776 in* OUR SACRED HONOR 371 (William J. Bennett ed., 1997).

The power to enforce public morality reflects the need to regulate and protect the social atmosphere and environment in much the same way communities need to regulate and protect the physical environment. Both powers are necessary to ensure the continuing health of the community. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62-64 (1973).

Absent this power, it is difficult to imagine on what basis current laws prohibiting bestiality or forbidding sex with minors could be sustained. Although not at issue in this litigation, such laws are the subjects of intense academic debate. *See e.g.* Midas Dekkers DEAREST PET (Paul Vincent trans., W.W. Norton & Co. 1994), and Judith Levine, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2002). If an animal does not evidence pain from sexual contact; if a child seemingly agrees to engage in sex; if "no one is hurt"; from where is the power of the state to forbid such conduct to be derived if the states no longer have the power to enforce public morality?

Rules of law and even the very concept of a "rule of law" are grounded in morality. The issue presented by this case is not whether §21.06 reflects a moral judgment. It plainly does. The issue is whether the people of Texas, through their elected representatives have the right to make such a judgment, in light of the Constitution and this country's historical prohibition of sexual contact by members of the same sex. Absent a radical departure from the present state of the law, (*Bowers v. Hardwick*, 478 U.S. 186 (1986)) the answer is clearly "Yes, the people of Texas may make such a judgement consistent with the Constitution of the United States."

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Respondents, this Court should affirm the judgment of the Texas Court of Appeals for the Fourteenth District, or in the alternative, dismiss this appeal on the basis that the writ was improvidently granted.

Respectfully submitted,

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