

In The  
Supreme Court of the United States

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JOHN GEDDES LAWRENCE AND TYRON GARNER,  
*Petitioners,*

v.

STATE OF TEXAS,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The Court Of Appeals Of Texas  
Fourteenth District**

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**AMICUS BRIEF OF STONEWALL LAW  
ASSOCIATION, PARENTS, FAMILIES, & FRIENDS  
OF LESBIANS & GAYS, TEXAS HUMAN RIGHTS  
FOUNDATION, LESBIAN/GAY RIGHTS LOBBY, GAY  
& LESBIAN ADVOCATES & DEFENDERS,  
NATIONAL CENTER FOR LESBIAN RIGHTS,  
& HUMAN RIGHTS CAMPAIGN  
IN SUPPORT OF PETITIONERS**

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## INTERESTS OF AMICI CURIAE

The amici<sup>1</sup> share an interest in challenging Texas Penal Code § 21.06, the so-called “Homosexual Conduct Law,” which criminalizes certain sexual conduct for same-sex couples but not heterosexual ones. The amici are the Stonewall Law Association of Greater Houston; Parents, Families, and Friends of Lesbians and Gays of Houston; the Texas Human Rights Foundation; Lesbian/Gay Rights Lobby of Texas; Gay & Lesbian Advocates & Defenders; the National Center for Lesbian Rights; and the Human Rights Campaign.<sup>2</sup> Amici are a diverse group of local, state, and national organizations united by a commitment to equality for gay men and lesbians. Their work on behalf of gay and lesbian citizens includes prosecuting impact litigation, lobbying state and federal governments for non-discriminatory laws, educating the public through research and information initiatives, and providing legal and other support to persons affected by discrimination on the basis of sexual orientation.

The amici know all too well that discrimination is often rationalized by reference to same-sex sodomy laws like the one Petitioners have asked this Court to review. These organizations and their members have a special interest in ensuring that rights guaranteed by the United States Constitution are not undermined by laws like § 21.06, which contains an unwarranted sexual orientation- and sex-based classification and unfairly authorizes government intrusion into the private lives of certain

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<sup>1</sup> 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, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> More detailed statements of interest from the amici are included in the attached Appendix.

citizens. The amici therefore support Petitioners application for a writ of certiorari.

### **SUMMARY OF THE ARGUMENT**

It is critically important that the Court review the constitutionality of Texas's Homosexual Conduct Law, which criminalizes the sexual conduct of same-sex partners but permits heterosexual couples to engage in the very same acts without penalty. Such laws, whether or not enforced, have devastating effects on gay and lesbian citizens and their families. By singling out gays and lesbians as sexual criminals, § 21.06 and other same-sex sodomy laws stigmatize gays and lesbians and thereby legitimize discrimination, hatred, and even violence against them.

The huge burden that same-sex sodomy laws impose on the most private aspect of the lives of gay and lesbian citizens also merits this Court's attention. Although the law targets only same-sex couples, the objective data show that the specific sexual behavior targeted by the law is widely practiced by heterosexuals as well. There is no credible evidence that the sexual expression of gay men and lesbians is somehow deviant or detrimental. To the contrary, there is ample evidence that, as with heterosexuals, sexual intimacy is vital to the health and well-being of gay and lesbian adults and is an important component of stable, loving same-sex relationships.

Nor is it possible to identify any justification for same-sex sodomy laws that could balance these substantial harms. The traditional justification – that homosexuality poses a moral threat against which society must be defended – cannot withstand scrutiny. Despite what their proponents say, same-sex sodomy laws have little to do with “traditional morality.” For example, not until 1974 did Texas first single out gays and lesbians for special condemnation.

Because the Homosexual Conduct Law targets a politically disfavored group and imposes unique and substantial harms on that group, the law simply cannot be reconciled with our highest constitutional values. This Court should grant certiorari.

## ARGUMENT

### **I. The direct and indirect harms caused by same-sex sodomy laws make gay and lesbian Americans second-class citizens.**

This Court should grant certiorari to consider the constitutionality of the Homosexual Conduct Law, Texas Penal Code § 21.06,<sup>3</sup> because the harms that the law inflicts on homosexual citizens of Texas are real and substantial. Although courts and commentators have sometimes presumed that sodomy laws are harmless because such laws are rarely enforced,<sup>4</sup> this presumption is fundamentally flawed.<sup>5</sup> In fact, even when unenforced,

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<sup>3</sup> Texas's Homosexual Conduct Law prohibits certain sex acts only when performed by same-sex partners. That law provides:

- (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
- (b) An offense under this section is a Class C misdemeanor.

TEX. PEN. CODE ANN. § 21.06 (Vernon 1999). “Deviate sexual intercourse” is defined as “any contact between any part of the genitals of one person and the mouth or anus of another person” or “the penetration of the genitals or the anus of another person with an object.” *Id.* § 21.01.

<sup>4</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring) (“The history of nonenforcement [of the statute] suggests the moribund character today of laws criminalizing this type of private, consensual conduct.”).

<sup>5</sup> See Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 648 (2001) (arguing that “the relevant legal actors . . . are encouraged to

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criminal laws nevertheless may have profound effects on society.<sup>6</sup> Laws such as Texas's Homosexual Conduct Law harm gay and lesbian citizens by inhibiting mental and emotional health, providing justification for a wide range of private and official discrimination, and facilitating anti-gay violence.<sup>7</sup>

First and most fundamentally, the Homosexual Conduct Law and other laws like it interfere with healthy mental and emotional development.<sup>8</sup> As scientific and sociological literature on the subject demonstrates,<sup>9</sup> sexual expression is a vital component of personal psychological well-being.<sup>10</sup> It is likewise essential to healthy intimate

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conclude that sodomy laws do not really matter"); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000) (undertaking a case study of sodomy laws to illustrate "how the mere existence of an 'unenforced' criminal law creates a criminal class whose members are treated as felons, even though they have been convicted of no crime").

<sup>6</sup> See Leslie, *supra* note 5, at 103.

<sup>7</sup> Of course, Texas's Homosexual Conduct Law *was* enforced in this case, thus negating any comfort that gays and lesbians in Texas may take from the supposed "history of nonenforcement," *Hardwick*, 478 U.S. at 198 n.2, of similar statutes in other states. Gay and lesbian Texans presently are subject to an immediate threat of prosecution, which causes fear and anxiety to them as well as their families, friends, colleagues, employers, and others in the heterosexual community.

<sup>8</sup> See Leslie, *supra* note 5, at 116-21.

<sup>9</sup> This Court considered evidence of such harms in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Court considered the detrimental psychological and emotional effects of school segregation on blacks. The Court looked to psychological and sociological journals to examine the social and personal implications of denying blacks equal educational opportunities. Just as the Court noted that "the impact is greater when [school segregation] has the sanction of the law," this Court should consider the harmful psychological and social impact that upholding the Homosexual Conduct Law will have on gay and lesbian Americans. *See id.* at 494.

<sup>10</sup> EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 360 (1994)

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relationships between adults;<sup>11</sup> in both heterosexual and homosexual relationships, sex functions to strengthen the partners' interpersonal bonds and as an expression of the couple's feelings for each other.<sup>12</sup> The Homosexual Conduct Law necessarily takes a psychological toll on gay and lesbian Texans by intruding into this most personal of activities and by penalizing intimate relations so fundamental to healthy adulthood.<sup>13</sup> Indeed one federal court has recognized that the Homosexual Conduct Law has a negative effect on the mental health of gay and lesbian Texans.<sup>14</sup>

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(national study by University of Chicago finding persons who have sexual experiences report higher levels of happiness than those who have no sexual experiences); WILLIAM MASTERS & VIRGINIA JOHNSON, *HUMAN SEXUAL INADEQUACY* (1970); John Gonsiorek & J.R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 161-76 (John Gonsiorek & James Weinrich eds., 1991).

<sup>11</sup> See, e.g., PEPPER SCHWARTZ & PHILIP BLUMSTEIN, *AMERICAN COUPLES* 193, 201 (1983) (“[A] good sex life is central to a good overall relationship.”).

<sup>12</sup> *Id.* at 201, 205-06; DAVID MCWHIRTER & ANDREW MATTISON, *THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP* 262 (1984).

<sup>13</sup> Gonsiorek & Rudolph, *supra* note 10; Anthony R. D’Augelli, *Developmental Implications of Victimization of Lesbian, Gay, and Bisexual Youth*, in *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 187, 191 (Gregory M. Herek ed., 1998) (describing the psychological consequences of stigmatization on gay, lesbian, and bisexual youth).

<sup>14</sup> As that court explained in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev’d*, 769 F.2d 289 (5th Cir. 1985):

[T]he existence of these criminal laws, even if they are not enforced (like § 21.06), does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals – fear of arrest, loss of jobs, discovery, etc. – can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials.

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Moreover, the Homosexual Conduct Law is psychologically harmful because it “fuel[s] internalized homophobia in some homosexuals, including . . . self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophecies about one’s own inferiority.”<sup>15</sup> And sodomy laws necessarily inhibit – indeed all but turn into self-incrimination – what has been demonstrated to be a psychologically necessary action for many gays and lesbians: that of “coming out” to friends and family by revealing a previously repressed or hidden sexual orientation.<sup>16</sup> By encouraging gays and lesbians to repress or hide their sexual orientation with the threat of criminal sanction, the Homosexual Conduct Law in fact encourages conduct that may be unhealthy both mentally and physically.<sup>17</sup>

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*Id.* at 1130. The district court’s findings were based upon the testimony of a psychiatrist and a sociologist “whose qualifications as experts in the field of homosexuality were outstanding and whose testimony was very credible [and consistent with] the positions adopted by various medical and psychiatric associations.” *Id.* at 1129, 1132.

<sup>15</sup> Leslie, *supra* note 5, at 117 (quoting Brief of Amici Curiae American Psychological Association and the American Public Health Association in Support of Respondents at 7, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)).

<sup>16</sup> See, e.g., S. Hammersmith & M. Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 *SOCIOMETRY* 56, 78 (1973) (concluding that “having . . . ‘settled into’ a homosexual identity . . . leads to better psychological adjustment as indicated by a more stable, positive self-image, fewer anxiety symptoms, and less depression”); J. Leserman et al., *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 *J. APPLIED SOC. PSYCHOLOGY* 2193, 2205 (1994) (presenting findings that “better psychological health [is] related to gay self-acceptance, participating in gay organizations and groups, socializing with other gay men, and parental disclosure and acceptance of being gay”).

<sup>17</sup> See, e.g., G. Herek, *Why Tell If You’re Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals’ Attitudes Toward Lesbians and Gay Men*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 197, 211 (G. Herek et al. eds., 1996) (noting that “closeted gay women and men may experience a painful discrepancy between their public

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The Homosexual Conduct Law also enables individuals and institutions to cite the fact that “homosexual conduct” is illegal in order to rationalize all manner of discrimination against gay and lesbian Texans. Because some forms of sexual expression by gays and lesbians are illegal, the argument goes, the people who participate in them are criminals. Employers, bureaucrats, school administrators, lawmakers, litigants, and others routinely use such logic to support disadvantaging gays and lesbians. For example, those who advocate depriving gays and lesbians of full citizenship have claimed that the Homosexual Conduct Law justifies closing the public library to gay groups;<sup>18</sup> denying permanent residence to a homosexual immigrant;<sup>19</sup> depriving gay parents of custody of their children;<sup>20</sup> prohibiting gays from fostering or adopting

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and private lives,” causing them to feel “they are living a lie,” and further noting that not coming out can “create considerable strain for lesbian and gay male couples, who must hide or deny their relationship to family and friends,” which ultimately “may have a deleterious effect on psychological adjustment”); S. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 HEALTH PSYCHOLOGY 243 (1996) (finding that “those who concealed the expression of their homosexual identity experienced a significantly higher incidence of cancer . . . and several infectious diseases”).

<sup>18</sup> Associated Press, *Gay Rights Supporters’ Meeting Site Draws Protest*, DALLAS MORNING NEWS, Jan. 15, 1996, at 8D (describing protesters’ objection to a gay group’s meeting in the San Antonio public library because gays “engage in deviant conduct that is illegal under the state penal code”).

<sup>19</sup> See, e.g., *In re Naturalization of Longstaff*, 538 F. Supp. 589, 590-92 (N.D. Tex. 1982) (rejecting plea of homosexual immigrant because he had violated the Homosexual Conduct Law and therefore lacked good moral character), *aff’d*, 716 F.2d 1439 (5th Cir. 1983).

<sup>20</sup> Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, HOUSTON CHRON., June 27, 1994, at A11 (reporting that common tactic of vilifying homosexual parent in custody battle is “give[n] . . . teeth” by § 21.06); cf. *Jilek v. Chatman*, 613 S.W.2d 558 (Tex. Civ. App.—Beaumont 1981, no writ) (relying, in part, on evidence

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children;<sup>21</sup> banning gay and lesbian student groups on college campuses;<sup>22</sup> opposing protection of gays and lesbians from discrimination in employment;<sup>23</sup> and denying gay and lesbian Texans protection under proposed hate crime legislation.<sup>24</sup>

Indeed, such laws routinely are used in civil litigation – particularly in the areas of family law and public employment law – to disadvantage gay people who have never even been charged, let alone convicted of any

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of father's admitted bisexuality and history of same-sex relationships to uphold order transferring custody from father to mother).

<sup>21</sup> Polly R. Hughes, *Bill Would Ban Gay Texans From Adopting Children*, HOUSTON CHRON., Dec. 11, 1998, at A38 (noting that the sponsor of a bill to prohibit gays from fostering or adopting children in state custody relied on Homosexual Conduct Law); *see also* Mike Ward, *Gay Groups Urge Veto of Penal Code With Sodomy Law*, AUSTIN AM. STATESMAN, May 29, 1993, at B10 (reporting that conservative groups had favored retention of the sodomy ban in the revised penal code because the law serves as a basis for denying gay and lesbian couples the right to adopt).

<sup>22</sup> Bruce Tomaso, *Stephen F. Austin Senate Bans Gay Group*, DALLAS MORNING NEWS, Nov. 2, 1994, at 1A (quoting student leader who said that student government voted to ban gay student group because “[w]e felt they’re in contradiction to Texas state law”); *see also* *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1320 n.4 (5th Cir. 1984) (quoting university administrator’s argument that “it would be most inappropriate for a state institution officially to support a [gay] student organization which is likely to incite, promote and result in acts contrary to and in violation of the Penal Code of the State of Texas”).

<sup>23</sup> Ginger D. Richardson, *Gay Rights Effort Likely to Be Tabled*, FT. WORTH STAR-TELEGRAM, Jan. 19, 1999, at 1 (reporting that city council member killed a measure to add gays and lesbians to Fort Worth antidiscrimination ordinance because it would be at odds with Homosexual Conduct Law).

<sup>24</sup> Stephanie E. Griest, *Hate Crimes Act Named for Byrd Heads for House*, AUSTIN AM. STATESMAN, Mar. 12, 1999, at B10 (quoting state lawmaker who opposed extending protections to gays and lesbians because “the act of homosexuals is illegal” [sic]).

crime.<sup>25</sup> In the area of family law, the presumption that a gay parent is violating a state sodomy law motivates the outcome in many custody decisions.<sup>26</sup> *See, e.g., Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (upholding restrictions on lesbian mother’s visitation rights, reasoning in part that “the conduct inherent in lesbianism is illegal in Alabama” and that the mother’s “[e]xposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them”); *Bottoms v. Bottoms*, 457 S.W.2d 102, 108 (Va. 1995) (noting that, although “a lesbian mother is not *per se* an unfit parent,” “[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . ; thus, that conduct is another important consideration in determining custody”). Similarly, sodomy statutes have been used as a basis for denying public employment to homosexuals.<sup>27</sup> *See, e.g., Childers v. Dallas Police Dep’t*, 513 F. Supp. 134, 142-43 n.13 (N.D. Tex. 1981) (“The overriding reason that the Plaintiff was not hired [as a storekeeper for the property storeroom of the Dallas Police Department] was because he admitted to engaging in homosexual conduct prohibited by Texas penal statutes.”). Thus the mere presence in a state’s criminal code of a statute like the Homosexual Conduct Law is enough to stigmatize gay and lesbian citizens.<sup>28</sup>

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<sup>25</sup> *See* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 813-14 (2001).

<sup>26</sup> *See generally id.* at 822, 831-36.

<sup>27</sup> *See generally id.* at 836.

<sup>28</sup> The stigmatization that follows from criminalizing sex acts between same-sex partners should not be underestimated. In Texas, merely saying that another is homosexual is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *see also Plumley v. Landmark Chevrolet*, 122 F.3d 308, 310 (5th Cir. 1997) (same).

By stigmatizing gays and lesbians as “outlaws,” the Homosexual Conduct Law and its counterparts in other states also contribute to an atmosphere of hatred and violence that puts gay men and lesbians at risk. As one scholar has observed, “the relationship between homosexual sodomy laws and homophobic violence is not merely coincident, but coordinate: the criminalization of homosexual sodomy and criminal attacks on gay men and lesbians work in tandem.”<sup>29</sup> In Texas, for example, gays and lesbians are among the most frequent victims of bias-motivated crimes, including rape, robbery, murder, assault, intimidation, and vandalism.<sup>30</sup> Gay and lesbian youth, in particular, routinely are tormented with epithets, bullied, and even attacked by their peers,<sup>31</sup> often with severe consequences for their physical and mental health.<sup>32</sup> Sodomy laws facilitate such violence by providing a means for its perpetrators to “rationalize their violence

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<sup>29</sup> Gregory Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. INTERPERS. VIOLENCE 316 (1990).

<sup>30</sup> According to recent hate crime statistics, only blacks were more often the victims of hate crimes. Texas Dept. of Public Safety, *Crime in Texas* (1997); see also Griest, *supra* note 24, at B10 (recounting personal stories of sister of a gay man who had been shot three times and set on fire; prominent lesbian whose neighbor threatened to kill her; minister who found a rainbow flag burning on church lawn).

<sup>31</sup> For example, one recent study concluded that gay, lesbian, and bisexual teens report “significantly greater exposure to violence” than their peers, are three times as likely to miss school because they feel unsafe, and are twice as likely to have been injured or threatened with a weapon at school. Anne H. Faulkner & Kevin Cranston, *Correlates of Same-Sex Sexual Behavior in a Random Sample of High School Students*, 88 AM. J. PUB. HEALTH 262, 263-64 (1998).

<sup>32</sup> D’Augelli, *supra* note 13, at 189-91; Gary Remafedi, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH 57 (1998) (concluding that homosexual and bisexual teenagers are at greater risk of suicide than other teens).

as vigilante enforcement of sodomy laws.”<sup>33</sup> Such laws further promote anti-gay violence by deterring homosexual victims of bias-motivated crimes from reporting those crimes to the police; “[t]his underreporting, and the consequent lower risk of arrest, encourages attacks against gay citizens.”<sup>34</sup>

The link between the existence of sodomy laws on the books and the psychological and social harms described above is not merely speculative. Findings from recent empirical research show that laws like the Homosexual Conduct Law do, in fact, cause serious psychological and social harm to individuals, groups, and social institutions, even if unenforced.<sup>35</sup> One empirical study found that an “unenforced” sodomy law:

- “bolstered [gays’ and lesbians’] parents’ fear and hostility towards homosexuality”;<sup>36</sup>
- supported “hostility and threats posed by individuals outside the family”;<sup>37</sup>
- “fractured” the “relationship many people have to the law and to the police force in general,” causing lesbians and gays to not “rely on

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<sup>33</sup> Leslie, *supra* note 5, at 124 (“Many anti-gay attackers perceive themselves as performing legitimate law enforcement by bashing gay people who elude prosecution under state sodomy laws.”).

<sup>34</sup> *Id.* at 125.

<sup>35</sup> Goodman, *supra* note 5. Goodman’s empirical study is an ethnographic study that compared groups of South African gays and lesbians before and after the repeal of South Africa’s sodomy laws. *Id.* at 647-48. South Africa was chosen because it gave an opportunity for an examination of “the social effects of sodomy laws . . . in a legal regime in which sodomy laws existed under similar conditions as they do in the United States.” *Id.* at 647. “[L]ike their American counterparts, [the South African sodomy laws] were generally not enforced.” *Id.* at 679.

<sup>36</sup> *Id.* at 692.

<sup>37</sup> *Id.* at 694.

the police for problems that arise in situations even tangentially related to their sexual identity;”<sup>38</sup>

- caused “an internal schism within those lesbian and gay individuals who wish to view themselves as law-abiding members of society;”<sup>39</sup> and
- played “a significant role in strengthening anti-gay ideologies in other institutions of cultural authority.”<sup>40</sup>

Overturing § 21.06 and similar statutes is essential not only to removing the barriers to full citizenship for gay men and lesbians, but also to changing the environment of hatred and bigotry that leads to violence. This Court should reject any suggestion, therefore, that the Petitioners’ constitutional challenge is somehow trivial. The direct and indirect harms that laws like the Homosexual Conduct Law cause to gay and lesbian Americans are immeasurable.

## **II. The Homosexual Conduct Law and other laws like it simply cannot be justified by appeals to “morality.”**

Section 21.06, with its discriminatory bias against same-sex intimacy, finds no support in “traditional” notions of morality. To the contrary, it is only relatively recently that such acts have been proscribed solely between people of the same sex.<sup>41</sup> Before the concept of a

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<sup>38</sup> *Id.* at 708, 732.

<sup>39</sup> *Id.* at 732.

<sup>40</sup> *Id.* at 663.

<sup>41</sup> Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 539 (1992) (tracing historical evolution of the term “sodomy” – from a catchall description of all non-procreative sex to the modern

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unique “homosexual identity” gained currency in late nineteenth- and early twentieth-century American culture,<sup>42</sup> “sexual touchings between men were determined to be licit or illicit according to criteria that applied equally to heterosexual practices. . . . Although illicit sexual acts were seen as sinful, immoral, criminal, or all three, before the 1870s illicit sexual acts between men were not seen as fundamentally different from, or necessarily worse than, illicit acts between a man and a woman.”<sup>43</sup>

Even today, of the thirteen states that outlaw sodomy, nine apply their sodomy bans to both gay and non-gay people alike.<sup>44</sup> Only four states, including Texas, punish

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usage as a synonym for anal intercourse, particularly between two men – and documenting the attendant shifts in American law).

<sup>42</sup> Scholars have observed that, although same-sex relationships have been documented throughout history, the concept of homosexuality (or, for that matter, heterosexuality) as a defining characteristic of one’s identity is relatively recent. Comparing modern Western notions of sexual identity to those of antiquity, for example, one scholar reports: “[T]he currently fashionable distinction between homosexuality and heterosexuality (and similarly between ‘homosexuals’ and ‘heterosexuals’ as individual types) had no meaning for the classical Athenians: there were not, so far as they knew, two different kinds of ‘sexuality’. . . .” David M. Halperin, *Is There a History of Sexuality?*, reprinted in *LESBIAN AND GAY STUDIES READER* (Henry Abelove et al., eds., 1993). Making a similar point about American history, another scholar notes that “colonial society lacked even the category of homosexual or lesbian to describe a person,” though colonial court records refer to incidents of sexual acts between two women or two men. John D’Emillio, *Capitalism and Gay Identity*, in *LESBIANS, GAY MEN, AND THE LAW* 26, 28 (William Rubenstein ed., 1993). It was only in the 1920s and 1930s that American scientific literature began describing homosexuality “as a condition, something that was inherent in a person, a part of his or her ‘nature.’” *Id.* at 29.

<sup>43</sup> Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1088 (1988).

<sup>44</sup> See ALA. CODE § 13A-6-65 (1994); FLA. STAT. ANN. § 800.02 (1992); IDAHO CODE § 18-6605 (1997); LA. REV. STAT. ANN. § 14:89  
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solely same-sex conduct,<sup>45</sup> and Texas's ban on "homosexual conduct" is only 28 years old.

The legislative history of Texas's Homosexual Conduct Law demonstrates just how recently discrimination against gay people has surfaced in American law. The first Texas sodomy statute, enacted in 1860, was interpreted to prohibit bestiality and anal sex, whether committed by husband and wife, unmarried heterosexuals, or homosexuals. *See Baker v. Wade*, 553 F. Supp. 1121, 1148 (N.D. Tex. 1982) (citing Tex. Pen. Code art. 342 (1860)), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *Pruett v. Texas*, 463 S.W.2d 191 (Tex. Crim. App. 1970). In 1943, the statute was amended to prohibit all oral and anal sex. Tex. Pen. Code art. 524 (1943). It was not until 1974 that the Texas Legislature repealed the general prohibition on sodomy. That year the Legislature enacted the Homosexual Conduct Law, for the first time criminalizing consensual relations only between people of the same sex. *Id.* § 21.06 (Vernon's 1999). The common misconception that gays and lesbians have "always" been singled out and their sexual relations criminalized is belied by the facts.

Defenders of these modern-day same-sex sodomy statutes often resort to the position (as the State of Texas did below) that homosexuality is *malum in se*, inherently wicked or evil by its very nature.<sup>46</sup> But the outdated stereotype of gays and lesbians as perverted and morally corrupt has long been discredited. Modern research

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(1986); MISS. CODE ANN. § 97-29-59 (1973); N.C. GEN. STAT. § 14-177 (1993); S.C. CODE ANN. § 16-15-120 (1998); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (1996).

<sup>45</sup> KAN. CRIM. CODE ANN. §§ 21-3501(2), 21-3505 (1995); MO. ANN. STAT. §§ 566.010, 566.090 (1999); OKLA. STAT. ANN. tit. 21, § 886 (1999).

<sup>46</sup> BLACK'S LAW DICTIONARY (6th ed. 1990).



demonstrates not only that homosexuality is “normal” (*i.e.*, a natural orientation for some people),<sup>47</sup> but also that gays and lesbians are productive, well-adjusted citizens.

Substantial scientific and psychological research has shown that homosexuality is not an “abnormal” condition.<sup>48</sup> Because of these studies, the American Psychiatric Association removed homosexuality as a mental illness from the Diagnostic and Statistical Manual of Mental Disorders in 1973.<sup>49</sup> Subsequent research has confirmed that gays and lesbians show no more psychopathology than heterosexuals.<sup>50</sup> “Indeed, virtually all systemic study

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<sup>47</sup> Recent studies have confirmed that the number of gay men and women is between two and ten percent of the general population. *See, e.g.*, Stuart Michaels, *The Prevalence of Homosexuality in the United States*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, 55-56 (Robert P. Cabaj & Terry S. Stein eds., 1996).

<sup>48</sup> For example, as early as 1957, one landmark study concluded that homosexuality is “within the normal range, psychologically.” Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 30 (1957); *see also* Robert B. Dean & Harold Richardson, *Analysis of MMPI Profiles of Forty College-Educated Overt Male Homosexuals*, 28(6) J. CONSULTING PSYCHOL. 483, 485 (1964) (finding no significant difference between functioning heterosexuals and homosexuals); Marcel T. Saghir et al., *Textbook of Homosexuality: III. Psychiatric Disorders and Disability in the Male Homosexual*, 126(8) AM. J. PSYCHOL. 1079, 1086 (1970) (study of 35 unmarried heterosexual men and 89 gay males finds “an absence of striking differences”).

<sup>49</sup> AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1973) (“DSM-II”). The World Health Organization followed suit in its International Classification of Diseases, dropping the term homosexuality as a diagnosis in 1992. *See* Michael King & Annie Bartlett, *British Psychiatry and Homosexuality*, 175 BRITISH J. OF PSYCHIATRY 106, 106 (1999).

<sup>50</sup> Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 142 (1991) (review of dozens of studies shows no relationship between gay or lesbian sexual orientation and psychopathology); James Krajeski, *Homosexuality and the Mental Health Professions: A Contemporary History*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, *supra*

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has shown sexual orientation to be independent of psychopathology.”<sup>51</sup>

Nor is there any scientific reason to view the sexual practices of gay and lesbian couples as anything other than healthy and normal.<sup>52</sup> The sexual conduct of gays and lesbians is comparable to that of heterosexuals. The sexual activity that is the subject of the Homosexual Conduct Law is widely practiced by heterosexuals as well as homosexuals. Approximately 75% of both heterosexual men and heterosexual women have engaged in oral sex. Twenty-five percent of heterosexual men and 20% of heterosexual women have experienced anal intercourse.<sup>53</sup> Despite the widespread incidence of this conduct, it is *illegal* only if engaged in by people of the same sex.

Scientists and social workers also have focused on the ability of gay men and lesbians to function in society. Research repeatedly has shown that gay and lesbian parents have the same quality of parenting skills as heterosexual parents and that children raised by gay and

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note 47, at 20 (finding that, beginning in the 1960s, many studies that used standardized psychological instruments began to provide a “firm research basis for the finding that homosexuality does not equate with psychopathology”).

<sup>51</sup> BERTRAM J. COHLER & ROBERT M. GALATZER-LEVY, *THE COURSE OF GAY AND LESBIAN LIVES: SOCIAL AND PSYCHOANALYTIC PERSPECTIVE* 294 (2000).

<sup>52</sup> For example, the transmission of disease, particularly HIV, is not peculiar to same-sex intercourse. *See, e.g., Gryczan v. Montana*, 942 P.2d 112, 124 (Mont. 1997) (noting that “heterosexual contact is now the leading mode of HIV transmission in this country”); *Kentucky v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992) (rejecting HIV transmission as justification for Kentucky’s “sodomy” law because there was no distinction “between male-male and male-female anal intercourse as a method of preventing AIDS”).

<sup>53</sup> LAUMANN ET AL., *supra* note 10 at 318-19 (national survey of sexual practices published by the University of Chicago).

lesbian parents are as well-adjusted as children raised by heterosexual parents.<sup>54</sup> “As with heterosexual parents, the ability of gay and lesbian parents to foster the healthy development of their children appears to be more related to unique family dynamics and other contextual factors and less tied to parents’ sexual orientation than society would have us believe.”<sup>55</sup> Contrary to prevalent myths and stereotypes, moreover, gay men and women are no more likely than heterosexuals to commit child sexual abuse. For example, in a study of 269 children seen for sexual abuse, researchers found that only one adult offender could be identified as a lesbian and that only one offender could be identified as a gay man. In contrast, 77% of abuse against girls and 74% of abuse against boys was committed by the adult male heterosexual partner of a female family member.<sup>56</sup> Same-sex sodomy statutes cannot be

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<sup>54</sup> See Bonnie M. Mucklow & Gladys K. Phelan, *Lesbian and Traditional Mothers’ Responses to Adult Response to Child Behavior and Self Concept*, 44 PSYCHOL. REP. 880 (1979) (finding no differences between lesbian and heterosexual mothers in self-concept, maternal attitudes, or responses to slides of children’s behaviors); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) (review of 30 studies showed “no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents”); Charlotte J. Patterson & Raymond W. Chan, *Gay Fathers and Their Children*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, *supra* note 47, at 383 (available data suggest that five to ten percent of children of gay fathers, about the same percentage as those raised by heterosexuals, grow up to be gay or bisexual).

<sup>55</sup> Jorge C. Armesto, *Developmental and Contextual Factors That Influence Gay Fathers’ Parental Competence: A Review of the Literature*, 3 PSYCHOL. OF MEN AND MASCULINITY 67 (2002) (citations omitted) (explaining further that “children of gay and lesbian parents do not appear to differ from children of heterosexual parents in terms of gender identity development, sex role behavior, sexual orientation, mental health, self-concept, or intelligence”).

<sup>56</sup> Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 41-42 (July 1994); *see also* Edward P.

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justified with the argument that discrimination against homosexuals or proscriptions on consensual, same-sex sexual activity are necessary for the welfare of society.<sup>57</sup>

Lesbians and gay men are a diverse and capable group of people. “[T]he gay male and lesbian community is diverse and multiethnic and differs by gender, socioeconomic status, and few generalizations apply across cultural borders. . . . Research on mental health has documented that as individuals, couples, and a social community, gay men and lesbians do not show lower levels of adjustment.”<sup>58</sup> Far from posing a threat to society, gay men and lesbians continuously have made unique and significant contributions.<sup>59</sup>

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Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, 58 *CHILD WELFARE* 127, 133 (1979) (finding abuse of boys by peer-oriented homosexual males is “scarce”); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, in *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 87, 89 (Barbara McComb Jones et al., eds., 1980) (finding no abuse of boys by peer-oriented homosexual males; instead, the study found that offenders either have been sexually attracted exclusively to children during their lives or are heterosexual males frustrated by their relationships).

<sup>57</sup> See American Psychiatric Ass’n, Fact Sheet: Gay and Lesbian Issues (1996) (calling for nondiscrimination on the basis of sexual orientation); American Psychol. Ass’n, Resolution of the American Psychological Association Council of Representatives (1975), <<http://www.apa.org/pi/lgbpolicy/homepage.html>> (same); Lesbian and Gay Issues, 38(3) *NASW News* (National Ass’n of Social Workers), Mar. 1993, at 15 (“NASW will support the repeal of all laws against any form of consensual adult sexual activity.”); American Ass’n of Sex Educators, Counselors, and Therapists, Code of Ethics (1993), <<http://www.aasect.org/code.htm>> (calling for nondiscrimination on the basis of sexual orientation).

<sup>58</sup> Linda Garnets & Douglas Kimmel, *Lesbian and Gay Male Dimensions*, in *PSYCHOLOGICAL PERSPECTIVES ON HUMAN DIVERSITY IN AMERICA* 143, 174-75 (Jacqueline D. Goodchilds, ed., 1991).

<sup>59</sup> See, e.g., T. COWAN, *GAY MEN AND WOMEN WHO ENRICHED THE WORLD* (1988) (discussing achievements of various individuals believed

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As the Kentucky Supreme Court held when striking down Kentucky's ban on consensual sexual relations between same-sex partners:

In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform. . . . We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

*Kentucky v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992). Same-sex sodomy laws cannot be squared with the Constitution's requirement that all citizens receive equal treatment under the law. This Court should grant the writ of certiorari and address the important constitutional issues raised by these laws and the burdens they impose on gay and lesbian Americans.

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to be gay, lesbian, or bisexual, including authors, mathematicians, politicians, economists, scientists, and artists).

**CONCLUSION**

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

The Stonewall Law Association of Greater Houston (“Stonewall Lawyers”) is a non-profit bar association founded in 1990 for the purpose of promoting human rights and, in particular, the rights of gay, lesbian, bisexual, and transgender citizens of Texas. Its members include attorneys, law professors, law students, and local lawmakers. Many of the organization’s members have been in the position of defending a gay or lesbian client’s rights – in the workplace, at school, as parents – against an assault justified on the grounds that “homosexual conduct” is criminal in Texas.

Parents, Families, and Friends of Lesbians and Gays of Houston, Texas (“P-FLAG”) is the local chapter of an international, grassroots organization founded by parents of gays and lesbians to support, educate, and advocate for the families and friends of gays and lesbians, as well as for gays and lesbians themselves. P-FLAG actively promotes the health and well-being of gays and lesbians and their families and friends through monthly meetings, public awareness campaigns, speaker panels for educational and corporate institutions, scholarships to deserving high school seniors and college students, lobbying and testifying at legislative hearings, and individual support via a telephone hotline and the Internet. P-FLAG parents regularly suffer with their children the harms that come from discrimination based on their son’s or daughter’s sexual orientation, including harassment, violent crimes, vandalism, threats, and loss of employment. The mere existence of same-sex sodomy statutes (no matter how rarely enforced) exacerbates these problems, as the statutes often are used to rationalize and excuse such discrimination.

The mission of the Texas Human Rights Foundation (the “Foundation”) is to end discrimination against lesbian, gay, bisexual, and transgendered persons, and persons with HIV and AIDS, through public education,

high impact litigation, and legal assistance. The Foundation sponsors a hotline for Texans who have questions about their rights or need legal help because of discrimination, and it publishes a widely distributed resource booklet, *AIDS & the Law*, in both English and Spanish. As part of its litigation strategy, the Foundation funded two earlier legal challenges to Texas's same-sex sodomy statute. The Foundation believes that Petitioners' case presents this Court with an important opportunity finally to resolve whether same-sex sodomy statutes are unconstitutional.

The Lesbian/Gay Rights Lobby of Texas ("LGRL") works toward the elimination of social, legal, and economic discrimination based on sexual orientation through lobbying, education and research directed toward the Texas Legislature and other state governmental agencies. LGRL has advocated for the rights of gay and lesbian Texans on issues such as discrimination in the workplace and in public schools and colleges, hate crime legislation, and increased protections and services for people living with HIV. During the 2001 legislative session, LGRL once again lobbied for the repeal of Texas's Homosexual Conduct Law. Due in part to LGRL's efforts, the bill to repeal § 21.06 was voted out of the House Criminal Justice Committee, but it was not brought to a vote before the legislative session adjourned. The Texas Legislature does not reconvene until 2003.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest law firm founded in 1978. GLAD's mission is to secure and advocate for the legal rights and interests of lesbians, gay men, and bisexuals, and it does so through litigation and public education in the six New England states. GLAD has considerable legal expertise in the area of civil rights and civil liberties for gay men, lesbians, and bisexuals. Throughout its nearly 25-year history, GLAD has represented individuals who have been charged with violating laws regulating intimate conduct in several states. GLAD challenged the Massachusetts sodomy law



in *GLAD v. Reilly*, 436 Mass. 132 (2002) as well as the Rhode Island law, *State v. Lopes*, 660 A.2d 707 (R.I. 1995). GLAD believes these laws impose a stigma on gay people and that persons charged under these laws face a serious risk of harm to their physical safety as well as to their professional livelihood if they are publicly identified.

Since 1977 the National Center for Lesbian Rights (“NCLR”) has advocated for fairness and equality for lesbians under the law. NCLR’s legal advocacy extends to gay men, bisexual and transgendered individuals as well, primarily in the areas of family security and protection, elder law, rights of youth and fair immigration policy. NCLR has witnessed first-hand the ravages of “homosexual conduct” laws on the fair and objective application of the law to lesbians and gay men in this country. From child custody cases to employment or protection of youth from harassment, such laws are deployed to deny lesbians and gay men equal treatment under the law.

The Human Rights Campaign (“HRC”) is America’s largest gay and lesbian organization, with over 450,000 members nationwide. HRC lobbies lawmakers for fairer laws, educates the public through information initiatives, helps define the national debate on public policies important to gay and lesbian Americans, and through its bipartisan PAC, works to elect fair-minded candidates to public office. HRC is dedicated to ensuring that gay, lesbian, bisexual and transgender Americans can be open, honest and safe at home, at work, and in the community.

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