No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER

Petitioners,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

BRIEF OF *AMICI CURIAE* REPUBLICAN UNITY COALITION AND THE HONORABLE ALAN K. SIMPSON IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Republican Unity Coalition ("RUC") is a national organization of conservative Republicans committed to making sexual orientation a "non-issue" within the Republican Party and throughout the Nation. The Co-Chairmen of the RUC are Charles C. Francis and Donald Capoccia. As described in its credo, the Cody Statement, the RUC believes in limited government, free markets, a strong national defense, personal responsibility, and tolerance of diversity. Formed in 2000, the RUC raises money for and educates Republican candidates for public office who share its vision of a nation committed to legal equality for all, regardless of sexual orientation.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

The RUC's interest in this litigation is simple: It wants gay Americans to be treated like all other Americans who contribute to the richness and diversity of this Nation. This case is an opportunity to confirm that the constitutional command of equal protection requires that gays be treated as equal to all other citizens under the law, subject to neither special preferences nor special disabilities. Such equality reaffirms the Nation's highest traditions without sacrificing the basic moral principles that make our country good as well as great. This case is about neither special entitlement nor the expansion of substantive rights, but rather it is about the unabashedly conservative commitment to our society's truly fundamental values of equality and inclusion, as enshrined in the Constitution. Guaranteeing all citizens – gay or straight – equal rights and responsibilities under the law is the surest way of fulfilling this Nation's deep moral commitment to equality and of giving all Americans a stake in preserving the health and stability of our society.

The Honorable Alan K. Simpson, United States Senator (Ret., R-Wyo.), served 18 years in the United States Senate before retiring in 1997. He currently serves as Honorary Chairman of the RUC. Senator Simpson graduated from the University of Wyoming Law School, served as the assistant to the attorney general of Wyoming, served 13 years in the Wyoming House of Representatives and was director of Harvard University's Kennedy School of Government. Senator Simpson's interest in this litigation is that he supports the principle of equality under the law, regardless of an individual's sexual orientation.

STATEMENT

Acting on a false report of a "weapons disturbance" filed by a malicious neighbor, sheriff's officers entered the home of petitioner Lawrence and interrupted petitioners having sex. Because both petitioners were male, they were charged with

the offense of Homosexual Conduct as proscribed by the Texas Penal Code § 21.06.[2]

Petitioners were convicted and their motions raising constitutional privacy and equal protection challenges to the Homosexual Conduct law were rejected. A panel of the Court of Appeals reversed on the ground that the law violated the Texas Equal Rights Amendment. Pet. App. 86a-92a. The *en banc* Court of Appeals, however, reinstated the convictions, rejecting all of petitioners' arguments, including their privacy and equal protection challenges under the Federal Constitution.

The *en banc* Court of Appeals disposed of petitioners' privacy challenge by citing *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). Pet. App. 24a-31a. Regarding the equal protection challenge, the Court of Appeals viewed the statute as applying to homosexual "conduct" rather than "orientation," and held that it survived rational-basis review because it "advances a legitimate state interest, namely, preserving public morals." Pet. App. 13a.

The Texas Court of Criminal Appeals declined to review the case and this Court thereafter granted certiorari.

SUMMARY OF ARGUMENT

This *amicus* brief addresses only the first question presented by the petition for certiorari: Whether petitioners' convictions under the Texas Homosexual Conduct law "violate the Fourteenth Amendment guarantee of equal protection of the laws?" Under the circumstances of this case, the

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[2] That section makes it unlawful for a person to engage "in deviate sexual intercourse with another individual of the same sex." Tex. Pen. Code Ann. § 21.06 (Vernon 1994). "Deviate sexual intercourse" is defined in Texas 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." Tex. Pen. Code Ann. § 21.01 (Vernon 1994).

State's asserted interest in public morality is insufficient to deny one class of citizens (gay persons), but not others similarly situated, a life of physical affection and intimacy.[3]

One of the most important and least appreciated functions of the Fourteenth Amendment's Equal Protection Clause is to provide a structural check against the majority oppressing those with whom the majority disagrees. The Framers were acutely concerned with the threat of such oppression by majority "factions" and sought to mitigate that threat by encouraging a diversity of smaller and competing political interests or factions that would make it difficult to form an oppressive political majority. That solution was incomplete, however, and the Equal Protection Clause later provided a textual complement to the competition of factions by requiring that all legislation apply equally to the majority and to the minority. The Constitution ties the fates of minorities and majorities together, preventing selective oppression. The structural check of equal protection thus safeguards all political minorities – and thus all citizens – without regard to whether they are in a suspect class or are merely on the unsuccessful side of a particular political debate.

Under even the most basic level of equal protection scrutiny, Texas's Homosexual Conduct law lacks a rational relation to a legitimate legislative end. While preserving public morality, in general, is a legitimate state interest ordinarily sufficient to withstand rational-basis scrutiny, stand-alone moral claims uncoupled from other policy interests are insufficient bases for legislative classifications if they are accompanied by substantial indicia of animus against a class of persons. Such substantial indicia of animus can be found in the structure and history of the legislative classification itself, the

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[3] This brief uses the word "gay" to describe persons whose emotional and sexual attraction is to members of the same sex. Similarly, this brief uses the word "straight" to describe persons whose emotional and sexual attraction is to members of the opposite sex.

consistency of application of the asserted moral interest, and the practical operation and ramifications of the law. Because animus against a class is an invidious and impermissible basis for legislative classification, such animus will offset or negate the weight of otherwise potentially valid moral claims and require the State to provide a basis for classification beyond its own non-falsifiable assertions of moral interest. Bare assertions of morality, without more, simply cannot overcome the constitutional infirmity of basing legislative classifications on group animus.

In this case, the statute's inconsistent treatment of identical physical acts by gay and straight couples, combined with its context and history, provide ample indicia of animus toward gays as a class, and thus render insufficient the State's asserted moral interests for purposes of rational-basis review.

First, same-sex-only prohibitions on particular sexual conduct are a recent and novel innovation, well divorced from the traditional moral and legal condemnation of such conduct regardless of the relative sex of the couple involved. By taking the uniform historical prohibitions on sodomy and abolishing them for all but the small political minority of gay couples, Texas betrays an animus toward gay couples rather than a concern for preserving "traditional" morality.

Second, the advancement of positive knowledge regarding homosexuality, and the abandonment of debunked policy arguments used against homosexuals, suggest that Texas's lingering moral claims may simply mask vestigial prejudice based on old stereotypes and myths. Texas offers none of the old canards about homosexuality, nor any new harms-based justifications, in support of its law. The State's retreat to a non-falsifiable and fundamentally circular assertion of a moral interest in the law as passed is another indication of animus.

Third, the selective and inconsistent application of traditionally uniform sexual morality indicates animus toward the

narrow class of gay persons. At the same time Texas targeted gay couples under its Homosexual Conduct law, it decriminalized sodomy between opposite-sex couples and decriminalized bestiality. While Texas need not address all of its moral concerns at once, when it forbids lesser offenses to its claimed morality while revoking restrictions on equal or patently greater moral offenses, that provides another indication of animus as the determining factor in how it now selectively applies its traditionally uniform morality.

Fourth, infrequent prosecution suggests a minor concern at best with the morality of the *conduct* at issue. The few instances of enforcement are utterly random or, worse yet as in this case, the result of personal vindictiveness. The primary practical use of the statute, however, seems to be as a basis for discrimination against gays in unrelated contexts. The infrequency of the direct enforcement of the law against specific conduct combined with its invocation to deny gays equal treatment in areas unrelated to the prohibited conduct reflect animus toward gays as a class.

Fifth, the broad ramifications of the law and the fundamental deprivations suffered by it targets, combined with its narrow focus on a single class of citizens, stand as indicia of a pervading animus toward gays as a class rather than merely a straight-forward concern for preserving traditional sexual morality.

With so many indicia of animus toward gays as a class, Texas must offer some further and more readily tested interest beyond its non-falsifiable assertions of morality. While morality alone can indeed be a legitimate interest, when assertions of moral interests are coupled with substantial indications of animus against a class of persons such assertions cannot by themselves sustain the constitutionality of a legislative classification. Because Texas can offer no such further legitimate justifications for its law, the Homosexual Conduct law violates the Equal Protection Clause.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE IS A STRUCTURAL CHECK ON LEGISLATION BY MAJORITY FACTIONS.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause has long been correctly understood to protect politically vulnerable groups from governmental discrimination and to preclude certain personal traits from being legitimate bases for legislative classifications. *See, e.g.*, *Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989) (race); *Reed* v. *Reed,* 404 U.S. 71 (1971) (sex); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938) (discrete and insular minorities). But it also serves the purpose of checking oppressive laws in general by requiring that the burdens the majority impose on a minority it must also impose on itself.

A. The Structural Function of the Equal Protection Clause.

The Framers of our Constitution recognized the danger of majority "factions" imposing unjust and discriminatory laws. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 54-55 (Van Doren ed., Easton Press Edition 1979). Madison correctly recognized that "the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 58 (emphasis in original). One means of countering those effects is to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 59. The "greater security" is to be found in a "greater variety of par-

ties, against the event of any one party being able to outnumber and oppress the rest." *Id.* at 62.

Acting as a textual complement to Madison's "republican remedy" of having a "variety of parties," *id*., the Equal Protection Clause plays a significant role in checking "schemes of oppression" by any majority faction. In its more general role of ensuring that all legislative classifications apply broadly and equally, the Clause thus implements the overall constitutional scheme of limited government and structural checks and balances. As Justice Jackson so aptly noted more than a half-century ago:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency v. *New Yor*k, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). That structural approach to constraining majority factions safeguards the liberty of *all* persons, not merely of selected groups or minorities.

Many of the current members of this Court have, in a wide variety of contexts, recognized the wisdom of Justice Jackson's views. *See, e.g.*, *Hill* v. *Colorado*, 530 U.S. 703, 731 (2000) (Stevens, J., joined by Rehnquist, C.J, and O'Connor, Souter, Ginsburg, and Breyer, JJ.) ("Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory gov-

ernmental motive.") (citing and quoting Jackson concurrence); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., joined by O'Connor and Souter, JJ., concurring) ("the uniform general treatment of similarly situated persons * * * is the essence of law itself") (citing and quoting Jackson concurrence); *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764-65 (1994) (Rehnquist, C.J., joined by Blackmun, O'Connor, Souter, and Ginsburg, JJ.) (citing and quoting Jackson concurrence).

Justice Jackson's vision of the checking function of equal protection is especially important where the Constitution lacks any categorical restriction on the particular substance of a law. As Justice Scalia has recognized in the context of rejecting a constitutional right to die, the absence of a substantive due process right in any particular area does not leave us wholly vulnerable to oppressive laws. "Our salvation [from oppressive laws not categorically prohibited by the Constitution] is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan* v. *Director*, *Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

Justice O'Connor has made the related point, in a subsequent right-to-die case, that we can have most faith in the fairness of the democratic process where we will all be similarly affected by the legislative product of that process. *Washington* v. *Glucksber*g, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring) ("Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between" the competing interests at stake regarding assisted suicide). But the corollary to such faith in the process when "[e]very one of us" will face the consequences is a severe skepticism when the burden of the law is wildly unequal and when the vast majority of the pub-

lic is intentionally immunized from the restrictions imposed upon a minority.[4]

In order to fulfill the structural function of the Equal Protection Clause, courts must keep a vigilant watch for laws that restrict the liberty of only a narrow class of persons, thereby escaping the natural political checks arising from the broad and equal application of legislative burdens. Such laws undermine our faith in the political process that begat them and are less likely and less quickly remedied because they are insulated from the balanced operation of that process as envisioned by the Framers of the Constitution and the Fourteenth Amendment.

B. Meaningful Rational-Basis Review

Having the structural role of the Equal Protection Clause firmly in mind, we can turn to the baseline rational-basis test with the recognition that it is more than a rubber stamp on legislative conduct. Though facially similar to the rational-basis test applied under "substantive" due process, "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), and hence the legitimacy and scope of judicial inquiry into unfair classifications are more firmly grounded than in the due process context.[5]

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[4] *See Minneapolis Star and Tribune Co.* v. *Minnesota Comm'nr of Revenue*, 460 U.S. 575, 585 (1983) (per O'Connor, J.) (recognizing the political constraints imposed by equal application of burdensome laws: "We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. *See* [Jackson concurrence]. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.")

[5] In *Bowers* the parties did not raise, and this Court therefore did not address, any Equal Protection Clause challenge or the ways in which equal protection analysis would differ from substantive due process analysis. 478 U.S. at 196 n. 8.

Under the Equal Protection Clause, this Court can and does engage in meaningful inquiry into the legitimacy of the ends to be accomplished and the means by which a particular classification is claimed to serve those ends. As it is typically described, the rational-basis test requires that all legislative classifications "bear[] a rational relation to some legitimate end." *Romer* v. *Evans*, 517 U.S. 620, 631 (1996) (*citing Heller* v. *Doe*, 509 U.S. 312, 319-320 (1993)). A classification may not be drawn "on the basis of criteria wholly unrelated to the objective" of a statute, but rather "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed*, 404 U.S. at 75-76 (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)).

Regarding the ends sought by legislation, this Court has repeatedly confirmed that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare * * * desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). The desire to disadvantage a class of persons is constitutionally impermissible animus. *Romer*, 517 U.S. at 634-35. Such animus, when reflected in a legislative classification devoid of any testable connection between means and ends, is fatal to the classification's constitutionality.

Finally, in order that the equal protection guarantee be fully realized, this Court and others have not only the right, but the obligation, to engage in the *substantive* analysis inherent in the concepts of equality, rationality, and arbitrariness. Unlike in the due process context, where substantive limits are inferred from sources other than the text of the Due Process Clause itself, the Equal Protection Clause contains an express textual command that persons be treated "equal[ly]" by the law. "Equality" is necessarily a substantive concept in

itself and requires subsidiary substantive judgments as to whether any purported differences in persons are in fact sufficiently substantial and valid as to support otherwise unequal treatment. Far from being on uncertain ground in making a substantive evaluation of a state's purported interests and distinctions, the Court is on textual bedrock when it enforces the Equal Protection Clause. The Court is not "discover[ing]" any "new" rights, *Bowers*, 478 U.S. at 194, but rather applying well-supported requirements of equality to novel legislative classifications. Applying the Constitution's command of "equal protection of the laws" is thus well rooted in the Constitution's "language" and "design," founded upon "express constitutional authority," and threatens this Court with neither "vulnerability" nor "illegitimacy." *Id*. at 194-95.

That the constitutional command of equal protection inevitably requires the politically independent judiciary to make some substantive determinations that run contrary to the judgment of the politically responsive branches of government is not a flaw, but a virtue. It is the very purpose of the federal judiciary in such instances to check the legislature's act by enforcing the higher constitutional command. As this Court noted with regard to the First Amendment, the very purpose of *constitutional* limits on government "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 638 (1943). Equal protection of the laws, no less than the "right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights[,] may not be submitted to vote; [it] depend[s] on the outcome of no elections." *Id*.

II. THE ASSERTED PUBLIC-MORALITY INTEREST IN THIS CASE DOES NOT SATISFY RATIONAL-BASIS REVIEW.

The statute at issue in this case traces its origins to 1860, when Article 342 of the Texas Penal Code outlawed "the abominable and detestable crime against nature" committed with "mankind or beast." 1860 TEX. CRIM. STAT. art. 342. The law applied to both straight and gay couples, *Lewis* v. *State*, 35 S.W. 372 (Tex. Ct. Crim. App. 1896) ("Woman is included under the term 'mankind'"), and to anyone engaging in interspecies sexual behavior.[6] In 1943, the law was amended to prohibit oral sex, but still continued to apply to straight and gay couples and to bestiality. 1943 Tex. Sess. Law Serv. Ch. 112, § 1 (Vernon).

Prior to 1973, therefore, the hallmark of Texas law had been a uniform prohibition of particular *acts*, regardless of the relative sex of the participants. Sodomy, as it was popularly known, was forbidden to all couples. In 1973, however, Texas abandoned its uniform proscription of sodomy, and simultaneously decriminalized bestiality as well. *Donoho* v. *State*, 643 S.W.2d 698, 699 (Tex. Ct. Crim. App. 1982). But just as it had abandoned its legislative interest in private sexual conduct in general, the legislature created a new category of "deviate sexual conduct" that could be performed by all couples regardless of their relative sex, but then proscribed such conduct uniquely for the class of same-sex couples. 1973 Tex. Gen. Laws ch. 399, § 1.

As things currently stand, therefore, the State of Texas has abandoned its traditional moral objection to particular sex acts – so long as they are performed on a member of the opposite

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[6] For many years, however, the Texas Supreme Court held that the statute was too vague to state an offense. *See, e.g., Frazier* v. *Stat*e, 39 Tex. 390 (1873) ("there is no such offense known to our law as the one charged in the indictment"). It was not until 1883 that the law was held sufficiently clear in light of the common law to be enforceable. *Ex parte Berge*n, 14 Tex. App. 52 (Tex. Ct. App. 1883).

sex or on animals. In its place Texas offers up the recently fashioned "moral" objection to homosexual conduct alone and draws no distinction between such conduct and the identical conduct by heterosexual couples other than the raw assertion that one is immoral while the other is not.

A. Moral Claims Standing Alone Are Insufficient State Interests When There Exist Substantial Indicia of Animus Against a Class of Persons.

It is rare to find moral claims offered as the sole justification for public laws. While morals undoubtedly inform many of our laws, they also routinely coincide with harm-based public policy concerns such as health, safety, and protecting the rights of third parties. Even where laws might be considered solely a reflection or promotion of morals – indecent exposure prohibitions, for example – they typically involve some element of offensive *public* conduct that triggers a proper interest by public authorities. The routine coincidence of moral proscriptions with public policy concerns helps explain why this Court generally recognizes in the same breath the government's presumptive authority to regulate and promote the "public health, safety, and morals." *See, e.g.*, *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

In those few instances, however, where moral claims in support of legislation are completely divorced from harm-based justifications, somewhat greater caution is warranted in determining whether such claims form a legitimate and sufficient basis for legislative classifications. While even bare moral claims are presumptively sufficient under rational-basis scrutiny, that presumption can and should be overcome if there are substantial indicia of invidious animus against a class as a significant driving force behind the classification under review.

Faced with such indicia of animus arising from the history, context, and structure of the law at issue, this Court should require more from the State than a non-falsifiable and

often circular assertion that morality alone is the basis of the classification. Such moral assertions, even though presumptively valid in themselves, generally escape judicial review as to their substance. If the constitutional guarantee of equal protection is to be more than a hollow promise, cancelable upon the mere assertion of a moral interest, it must provide judicial review where substantial indicia of animus are present. Coupled with impermissible group animus, and unsupported by judicially reviewable policy claims, even valid moral considerations are offset or negated by the simultaneous presence of unconstitutional animus underlying the law.

B. The History, Context, and Structure of the Homosexual Conduct Law Indicate Animus Against Gays as a Class.

In this case, Texas law on its face raises the grave suspicion that animus toward gays as a class, rather than the asserted moral concerns alone, animates the discriminatory classification. Unlike the prohibition at issue in *Bowers*, which at least facially applied with equal force to sodomy performed by straight and gay couples alike, Texas law applies only to gay couples. The State thus asserts no official interest in the actual sexual *conduct* involved in this case. Texas does not seek to protect any consenting adults from participating in the defined sexual acts, but rather seeks to control – and thus classifies based upon – the *identities* of the persons involved.[7] The objection here is to gay couples *per*

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[7] To say that it is conduct *by particular persons* that is objectionable – thus conflating the issues of conduct and identity – is no answer because it would effectively insulate the law from equal protection analysis and leave only substantive due process analysis in its place. A law forbidding red-heads from driving cars would thus be aimed at the narrowly defined conduct of "red-headed driving" rather than discriminate against red-heads with regard to the general conduct of driving. The only check would then be whether the goal of banning red-headed driving is permissible under the Due Process Clause. That simply drains all meaning from equal protection.

se given that the identical conduct is permissible for straight couples. *That* objection indicates animus toward gays as a class of persons rather than a mere moral objection to particular acts of homosexual intimacy.[8]

Texas argues that it is entitled to treat gays differently because homosexual conduct is immoral even where the identical heterosexual conduct is permissible. Texas offers nothing more than its own assertion that the relative sex of consenting adult couples is morally significant in the context of identical sex acts. That non-falsifiable assertion, however, flies in the face of history and tradition – which made no such distinction – and thus ought to be weighed with skepticism. Here both the history and the structure of the Texas law, as well as the context and practical consequences of that law, provide substantial indicia that animus against a class is at work. Texas's bare assertion of narrow and ahistorical moral concerns, while perhaps sufficient in isolation to support legislative classifications, is necessarily insufficient when coupled with such offsetting and invidious animus.

Same-Sex-Only Prohibitions Flout History. One indication of group animus in relation to moral claims is the ahistorical imposition of a traditionally uniform moral precept on only a narrow group. The decision to enforce the traditional morality against only a single class, when unrelated to harm-based policy justifications, suggests that the now-partial application of the rule inevitably has more to do with the class

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[8] There is no need to join any debate over what constitutes homosexuality versus bisexuality versus anything else. What matters for the purposes of Texas law is not how a person would self-identify or how some researcher would categorize the person, but rather the irreducible fact that the persons overwhelmingly disadvantaged by the law are those who are sexually attracted to members of the same sex. Whether such attraction is consistent and exclusive, opportunistic, or extremely limited and experimental is irrelevant. The law burdens those with homosexual inclinations of whatever frequency and leaves untouched persons with exclusively heterosexual inclinations.

singled out for continued restriction than it does with the traditional moral position itself. The history of sodomy laws in Texas and elsewhere demonstrates that same-sex-only restrictions are novel innovations contrary to the long-established tradition of sodomy prohibitions making no distinction based on the relative sex of the participants.

When the Fourteenth Amendment was ratified in 1868, of the 37 states with laws against sodomy, all but three forbade the conduct for *all* couples, regardless of their relative sex. Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 YALE L.J. 1073, 1082-84 (1998). The three outliers targeted only male-male couples, and had no restrictions on female-female couples. None of the states, therefore, had any objection to homosexual conduct as a category unto itself. It was not until 1969 that Kansas became the first state to adopt a law targeted at homosexuals as a class. William N. Eskridge, Jr., GAYLAW 330 (1999); *see also* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 103, 111 (2000) ("The interpretation of sodomy laws has evolved over time from strictures that applied to all people to edicts that apply exclusively to gay men and lesbians. As of the mid-1960s, all sodomy laws in the United States facially applied equally to both heterosexual and homosexual sodomy. No state had yet passed any law applicable only to same-sex conduct.") (footnotes omitted). The asserted moral objection to homosexual sodomy *alone* was thus unknown to the Framers of the Constitution and of the Fourteenth Amendment.

In contrast to the material relied upon in *Bowers* suggesting that proscriptions against *sodomy in general* have "ancient roots," 478 U.S. at 192, proscriptions limited to homosexual conduct are novel and largely rootless developments of the modern era. Even today, only four states have laws targeted at same-sex conduct. Pet. 4 (identifying same-sex-only laws or judicial constructions of laws in Texas, Kansas, Missouri,

and Oklahoma). Traditional morality drew no such fine distinctions and condemned sodomy for all persons regardless of the sex of their partners. Whether or not such traditional morality was sensible, it was at least fairly equal and consistent as implemented historically by law. Texas law is instead a novelty, abandoning both the relative equality and consistency of traditional sexual morality.

Texas thus offers a novel moral regime whereby conduct once condemned is now acceptable, but only for the political majority, while the identical conduct is prohibited for the political minority.[9] That change in position indicates the use of raw and self-serving political power to impose restrictions on a disfavored group that the majority is unwilling to impose upon itself. It is thus the very sort of class-based legislation that exemplifies the danger of majority factions, that undermines our confidence in the political processes that produced it and sustains it, and that raises concern under the Equal Protection Clause regardless whether suspect classes or fundamental rights are involved. Even where moral concerns might also be asserted, the use of such majority-faction power in the service of animus toward a narrow class fails the rational-basis test and violates the Constitution.

Abandoned Policy Justifications Caution Against Animus Hiding Behind Lingering Moral Claims. One of the more telling suggestions of animus by those seeking to selectively burden gays is the shift to non-falsifiable arguments after previous justifications have been debunked or delegitimized over time. With the advance of positive knowledge

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[9] The demise of generally applicable sodomy laws is a useful example of how the majority protects the liberty of the minority when the two groups' rights are tied together by an equally applicable law. Restrictions that the majority will not tolerate for itself are repealed for all. Same-sex-only prohibitions, by contrast, are harder to dislodge because the majority has no interest in repealing them, having obtained for itself the freedom to engage in the formerly proscribed sexual conduct. The minority is left to fend for itself, and predictably has a harder time doing so.

about homosexuality, the claims of direct public harm have fallen by the wayside. Nothing now remains but a self-contained "moral" claim against homosexuality selectively edited from the broader historical condemnation of sodomy in general.

In the recent past, objections to homosexuality have been based on a variety of harm-based claims thought to justify regulation. For example, those seeking to restrict or punish homosexuals have variously asserted that it is a sickness, that it is chosen or changeable, and that its incidence varies with the degree of tolerance or repression in a legal regime. Richard A. Posner, SEX AND REASON 224 (1992); Ernest van den Haag, *Notes on Homosexuality and Its Cultural Setting*, *in* THE PROBLEM OF HOMOSEXUALITY IN MODERN SOCIETY 296-300 (Hendrik M. Ruitenback ed., 1963). Homosexuals also were tarred with being generally lacking in morals and more likely to force themselves on unwilling partners and children. van den Haag, *Notes on Homosexuality* at 295; Joseph S. Jackson, *Persons of Equal Worth:* Romer *v.* Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 459-60 (1997). These claims were then used to justify measures to deter homosexuality, to get existing homosexuals to change their orientation, and to protect straight persons and children from being lured into homosexuality the way they might be lured into some vice.

As positive knowledge about homosexuality improved, such myths were debunked and fact has replaced fiction and prejudice regarding gays. *See, e.g.*, Posner, SEX AND REASON at 297-307 (rehearsing evidence and lack thereof regarding promotion, encouragement, and suppression of homosexuality); van den Haag, *Notes on Homosexuality* at 291-300 (homosexuality not a sickness or disease, not related to theft, swindle, or rape, and not suppressed by legal restriction). Indeed, even Texas no longer pretends that there is any material harm to homosexual conduct or that its law can alter the inci-

dence of homosexuality, but instead asserts only a moral interest conveniently immune from empirical falsification.

Regardless whether such a moral claim could stand in isolation to support legislation, it is certainly *not* in isolation here. Rather, the collapse of excuse after excuse for discriminating against gays and the late-coming manufacture of a novel, selective, and non-falsifiable moral claim serves as the backdrop for equal protection analysis. That backdrop strongly indicates a lingering animus likely born of the falsified substantive libels against gays. Such animus stands as a foil and an offset to *ad hoc* "moral" justifications.

Underinclusion as to Greater Offenses to Traditional Sexual Morality Indicates Animus. At the time Texas abandoned its general prohibition on private consensual sodomy and adopted its Homosexual Conduct law it also eliminated penalties for private bestiality. *Donoho*, 643 S.W.2d at 699 ("Deviate sexual intercourse, though a more modern term, describes conduct that was formerly denounced by statute in this State as sodomy – omitting now, however, bestiality."). As Texas law now stands, a person can legally have sex with an animal but not with a committed partner of the same sex.

But crossing the species line is at least as great an offense to traditional sexual morality as reflected in the law as is remaining on the same side of the gender line. One need not take issue with traditional sexual morality to recognize that the decision to selectively enforce such morality in such a backwards manner reflects a deep animus against gays as a class. Indeed, the selectivity of Texas law fairly screams animus. A Texan may have sex in private with an animal or an opposite-sex partner he met ten minutes ago, and the law will take no heed. But let a Texan have sex with even a committed same-sex human partner, and the criminal law cries foul. Whatever morality Texas purports to protect with that regime, it is not *traditional* sexual morality.

The message sent by the patchwork of Texas sex laws is that gay citizens are less worthy of a life of physical intimacy than are animals and those who molest them. If that is not an expression of animus against a class of persons, nothing is.

Infrequent Prosecution and Secondary Discrimination Suggest Animus and a Lack of Significant Moral Concern. In Texas, as under sodomy laws elsewhere, prosecutions for violation of the Homosexual Conduct law are rare. *Baker* v. *Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982) (sodomy law "not enforced by criminal prosecutions"), *rev'd*, 769 F.2d 289 (CA5 1985) (*en banc*), *cert. denied*, 478 U.S. 1022 (1986); *see also Bowers*, 478 U.S. at 198 n. 2 (Powell, J., concurring) ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.").

While the absence of substantial enforcement does not eliminate the law's adverse impact on gays, it does cast considerable doubt on the significance of any moral assertions in support of it.[10] Were Texas materially concerned with the morality of private consensual behavior among same-sex couples, presumably it would make an actual effort to stop or deter such conduct. That it makes no affirmative effort to enforce its law thus demonstrates that, at best, its moral concerns with the conduct itself are *de minimis*. Instead, the pri-

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[10] Justice Scalia has suggested that non-enforcement or repeal of sodomy laws reflects only a practical concern with the costs of enforcement but does not negate the genuineness of the claimed moral concern. *See Romer*, 517 U.S. at 645 (Scalia, J., dissenting). But the resources needed to actually enforce a law against homosexuality are nowhere near as burdensome as Justice Scalia implies – it would not be hard to identify gay couples in cities with gay bars and neighborhoods, or to obtain probable cause to believe they had engaged in sexual relations. And insofar as enforcement of the asserted morality might be "unseemly," "offensive," "wasteful," or "demeaning" to police and law enforcement as an institution, *id*., that speaks volumes about the strength of the government's interest and such thin claims ought not be sufficient to differentiate between identical conduct for gay and straight couples when animus is present.

mary impact of laws targeting homosexual conduct is to act as an excuse for discrimination against gays in other contexts having nothing to do with their private intimate behavior. That is, the real-world function of the law is to target gays as a class, not to proscribe what the State asserts is morally objectionable behavior.

The existence of sodomy laws is often used to justify denials of equality to gays in a host of other areas, such as public and private employment, child custody, adoption, foster care, and other areas. Leslie, 35 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. at 104 ("Public agencies, private actors, and courts all rely on the criminality of sodomy to justify discrimination against gay and lesbian Americans. Sodomy laws are used to facilitate employment discrimination, bias against gay and lesbian parents in custody disputes, discrimination against gay organizations, discriminatory enforcement of solicitation statutes, and immigration discrimination."). Such secondary uses of those laws in ways designed to disadvantage gays and discriminate against them in their non-sexual lives suggests that the laws are largely masks or tools for more general anti-gay animus. Animus against gays as a class, rather than the apparently *de minimis* moral concern with their actual sexual conduct, is at the root of the Homosexual Conduct law.

Broad Burdens on a Narrow Class Suggest Animus. As this Court held in *Romer*, animus can be inferred from the narrow targeting and sweeping consequences of the law under review. In this case, the law singles out gays as a narrow class against whom to selectively enforce previously uniform notions of sexual morality.[11]

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[11] Indeed, gays as a class are particularly small, accounting for only 2-3 percent of the population. Posner, SEX AND REASON at 294-95. That small size heightens the danger of political breakdown and majority faction discussed in Part I, *supra*.

That the Texas law might be claimed to burden gay and straight persons alike by forbidding them equally from engaging in homosexual conduct is, at best, a facetious dodge. It is only gays who seek same-sex partners as a matter of course, not as a matter of extraordinary exception. To thus argue that gays and straights alike are denied same-sex relations and therefore are granted the equal protection of the law "is a wonderful replication (except for its lack of sarcasm) of Anatole France's observation that '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges * * * *.'" *Hill* v. *Colorado*, 530 U.S. at 744 (Scalia, J., dissenting) (quoting J. Bartlett, Familiar Quotations 550 (16th ed.1992)). The Homosexual Conduct law is no more targeted at straight persons having some incidental same-sex contact "than French vagrancy law was targeted at the rich." *Id*. To suggest otherwise is to honor the form of equality while mocking its substance.

Upon this narrow group is heaped the primary disability of being forbidden to engage in private sexual conduct allowed to the majority of consenting adults and the further prospective disabilities that come from any criminal conviction of having done nothing more or less than the majority of their fellow Texans.

The immediate impact of the law upon the personal lives of gay persons is obvious, deep, and sweeping. The gay citizen, and the gay citizen alone, is put to an awful choice. On the one hand, if he obeys the Homosexual Conduct law, he must forever forego a life of intimacy. He can never satisfy the desire common to all of humanity for the physical expression of love for another person to whom one is emotionally and sexually attracted. As this Court has recognized, sex is "a great and mysterious motive force in human life." *Roth* v. *United States*, 354 U.S. 476, 487 (1957). Gay persons who remain faithful to the law are uniquely denied access to this most basic aspect of human existence.

On the other hand, if he disobeys the Homosexual Conduct law, the gay citizen flouts the criminal code which all conscientious citizens strive to obey. In addition to violating this civic obligation, he must live with the knowledge and fear that, in the eyes of the state, he is but an as-yet-undiscovered criminal.

And, if convicted of disobeying the law, he then faces a daunting series of obstacles throughout his life that no opposite-sex couple would face for engaging in the same physical act. He must, for example, reveal his conviction for violation of the Homosexual Conduct law on applications for public and private employment, for housing, for credit, and for numerous other purposes. That fact may be used to discriminate against him in all of the pursuits that constitute ordinary civic life. As a consequence of conviction under the Homosexual Conduct law, he may be barred altogether from some types of employment. Evidence of his criminal conviction may be used against him in a child custody dispute or other litigation. In some jurisdictions he may be required to register as a sex offender, exposing to all of neighbors his criminal conviction. *See generally* Pet. 12-14 (describing numerous secondary legal consequences of conviction for petitioners in this case).

Thus, the Homosexual Conduct law potentially reaches into every conceivable aspect of a person's life: personal intimacy, employment, housing, and family law. Sweeping and fundamental are the consequences of this law to gay persons. If it is not a tool to deny them a life of physical affection with another human being, it is a sword hanging over their heads threatening them with discrimination in obtaining life's necessities.

The combination of targeting a narrow class and imposing broad burdens upon that class demonstrates both animus and unconstitutionality. It shows the Texas law to be

> a status-based enactment divorced from any factual context from which we could discern a relationship to le-

> gitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation * * * [is] obnoxious to the prohibitions of the Fourteenth Amendment * * * *"

Romer, 517 U.S. at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

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Perhaps no single one of the above indicia of animus is sufficient by itself to overcome a presumptively valid public-morality justification. But together, they are powerful indicators that Texas has singled out a class of citizens not to advance a moral view about their conduct, but to make that class of citizens unequal. Whatever moral interest Texas may assert, that interest, when coupled with the substantial indicia of animus present in this case, is simply insufficient to constitute a legitimate basis for the classification of gays as criminals.

In the end, it does neither morality nor law any favor to allow them to be used in the service of animus. To use public morality as a cover for animus, as Texas has done, is to cheapen morality and to cause it to be brought into disrepute. It is to conflate morality and hatred, undermining the pluralistic moral values of Liberty and Equality enshrined in our Constitution. This Court should recognize and reject the Homosexual Conduct law as the discriminatory product of animus against a politically small and unpopular class of citizens, affirm the more enduring morality of equality reflected in our Constitution, and thereby fulfill this Nation's historical tradition of bringing the outcast in from the cold.

CONCLUSION

For the foregoing reasons, the decision of Court of Appeals of Texas, Fourteenth District, should be reversed.

Respectfully Submitted,

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