No.____
In the
Texas Court of Criminal Appeals
At Austin

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No. 14-99-00109-CR
No. 14-99-00111-CR
In the Court of Appeals for the
Fourteenth District of Texas
At Houston

———— ♦ ————

JOHN GEDDES LAWRENCE and TYRON GARNER
Appellants

v.

THE STATE OF TEXAS
Appellee

——— ♦ ———

PETITION FOR DISCRETIONARY REVIEW OF APPELLANTS JOHN GEDDES LAWRENCE AND TYRON GARNER

——— ♦ ———

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TABLE OF CONTENTS

To The Honorable Court of Criminal Appeals of Texas:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist to resolve whether Texas Penal Code Ann. § 21.06 (Vernon 1994) ("§ 21.06"), which criminalizes oral and anal sex between same-sex couples only, violates the rights to equal protection and privacy guaranteed under the federal and Texas Constitutions. These questions of first impression in this Court, disagreed upon by appellate courts and justices and of great importance to gay and lesbian Texans, would be illuminated by oral argument.

STATEMENT OF THE CASE

Appellants John Geddes Lawrence and Tyron Garner were charged with violating § 21.06, a Class C misdemeanor, in the privacy of Lawrence's home.[1] They filed motions to quash the charges in Harris County Criminal Court on equal protection and privacy grounds under the federal and state constitutions. The court denied those motions on December 22, 1998. Appellants then pled no contest, and were found guilty and fined $200.

[1] The Probable Cause Affidavits in the record reflect that appellants were arrested and charged for intimate conduct occurring in Lawrence's home. *See* Clerk's Record for Lawrence v. State at 000005; *see also* Clerk's Record for Garner v. State at 000005.

Both appealed to the Fourteenth Court of Appeals, a panel of which, on June 8, 2000, ruled that § 21.06 violates the Equal Rights Amendment to the Texas Constitution (Tex. Const. art. I, § 3a) ("ERA"), and rendered judgments of acquittal as to both appellants. The panel did not reach appellants' parallel sex discrimination claim under the federal equal protection guarantee, or their claims that § 21.06 violates federal and state constitutional rights to equal protection because it discriminates on the basis of sexual orientation. Nor did the panel address appellants' claims under the state and federal rights to privacy. Appendix A, June 8, 2000 Majority Opinion ("Panel Op."). On June 23, 2000, the state filed a motion for rehearing en banc, which was granted by the Fourteenth Court of Appeals. By judgment and opinion rendered March 15, 2001, a majority of the Court of Appeals affirmed the judgment of the trial court, holding that § 21.06 does not discriminate on the basis of sexual orientation or sex in violation of federal or state constitutional equal protection guarantees and does not violate the right to privacy guaranteed under the federal or state constitutions. Appendix B, March 15, 2001 Majority Opinion ("Maj. Op.") at 7. Justice Anderson and Senior Chief Justice Murphy dissented on the grounds that § 21.06 violates the ERA and federal equal protection by discriminating on the basis of sex and violates state and federal equal protection by discriminating on the basis of sexual orientation, without sufficient government justification.[2] Appendix B, March 15, 2001 Dissenting Opinion ("Dis. Op.").

[2] Justices Yates and Fowler each filed concurring opinions as well, included in Appendix B.

STATEMENT OF PROCEDURAL HISTORY

A panel of the Fourteenth Court of Appeals reversed the judgment of the trial court in a decision rendered June 8, 2000. The state's motion for rehearing en banc, filed June 23, 2000, was granted. On rehearing, a majority of the Court of Appeals, sitting en banc, affirmed appellants' conviction by judgment and opinion rendered March 15, 2001. Appellants did not file a motion for another rehearing. Appellants now file their petition for discretionary review pursuant to Rule 68 of the Texas Rules of Appellate Procedure.

QUESTIONS PRESENTED FOR REVIEW

1.

Whether § 21.06, which criminalizes oral and anal sex between same-sex but not heterosexual couples, violates the right to equal protection guaranteed by the United States Constitution by discriminating on the basis of sexual orientation and sex without legitimate and sufficient government justification.

2.

Whether § 21.06 violates the right to equal protection guaranteed by the Texas Constitution by discriminating on the basis of sexual orientation and sex without legitimate and sufficient government justification.

3.

Whether § 21.06, which criminalizes intimate adult behavior, violates the appellants' right to privacy guaranteed by the Texas Constitution.

4.

Whether § 21.06 violates the appellants' right to privacy guaranteed by the United States Constitution.

REASONS FOR REVIEW

A. The Court of Appeals' decision conflicts with other Court of Appeals' decisions on the same issues. Tex. R. App. P. 66.3(a).

B. The Court of Appeals has erroneously decided important questions of state and federal law that have not been, but should be, settled by this Court. Tex. R. App. P. 66.3(b).

C. The Court of Appeals has decided important questions of state and federal law in conflict with applicable decisions of the Supreme Court of the United States. Tex. R. App. P. 66.3(c).

D. Justices of the Court of Appeals have disagreed on material questions of law necessary to the court's decision. Tex. R. App. P. 66.3(e).

ARGUMENT IN SUPPORT OF REASONS FOR REVIEW

Appellants, two adult men, were arrested and convicted under § 21.06 for engaging, in the privacy of one of their homes, in consensual sexual conduct. If appellants had been a man and a woman instead of two men, their conduct would not be a crime in this state. The majority of the Fourteenth Court of Appeals, in denying appellants' claims that § 21.06 violates federal and state constitutional guarantees of equal protection and privacy, has misinterpreted vital constitutional principles in conflict with controlling U.S. Supreme Court authorities (Tex. R. App. P. 66.3(c)) and with other Courts of Appeals and justices (Tex. R. App. P. 66.3(a) & (e)). These constitutional errors by the Court of Appeals, of broad significance, warrant review by this Court as "caretaker of Texas Law." Arcila v. State, 834 S.W.2d 357, 360 (Tex. Crim. App. 1992); Tex. R. App. P. 66.3(b).

It is particularly imperative this Court exercise its discretion to hear this appeal given the Court's unique jurisdiction to relieve not only appellants but all gay and lesbian Texans from the discriminatory effects of § 21.06 reaching far beyond this criminal prosecution. As the state stipulated and the Austin Court of Appeals found in an earlier civil declaratory judgment action challenging § 21.06, the statute "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." State v. Morales, 826 S.W.2d 201, 202-03 (Tex. App. –

Austin 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994).[3] There are thus "over a quarter of a million Texas citizens who identify themselves as harmed by the existence of this statute." Morales, 869 S.W.2d at 954 (Gammage, J., dissenting).[4]

In Morales, the Austin Court of Appeals held that § 21.06 violates the Texas Constitution's privacy guarantee.[5] On appeal, without addressing the merits of the case, the Texas Supreme Court reversed because the civil courts nonetheless lack "jurisdiction to render a declaratory judgment regarding the constitutionality of 21.06." 869 S.W.2d at 947. Although "sympathetic" to the lack of a forum, absent a criminal prosecution, the Supreme Court held that "*[t]he personal rights of the citizens of this state are protected from infringement by criminal statutes by the criminal courts of Texas*." *Id.* at 947-48 (emphasis added). In short, the Supreme Court held that Texas' lesbian and gay citizens

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[3] For example, City of Dallas v. England, 846 S.W.2d 957 (Tex. App. – Austin 1993), challenged the Dallas police department's policy banning gay men and women from employment because they violate § 21.06's criminal prohibition. Very recently, § 21.06 has been invoked as a justification to prohibit lesbians and gay men from providing foster and adoptive services. *See* Third Amended Complaint filed June 20, 2000, in Bledsoe v. Texas Dep't of Protective and Regulatory Services, No. 98-06892-1 (Dallas County Dist. Ct.). As the state stipulated in Morales, the legislated stigma of § 21.06 also "implicitly condones hate crimes against lesbians and gay men." 826 S.W.2d at 202-03. *See generally* Christopher R. Leslie, Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws, 35 Harv. C.R.-C.L. L. Rev. 103 (2000).

[4] Underscoring the significance of this case to lesbian and gay Texans and its place on the national stage, the American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers – the leading national associations of mental health care professionals – have all adopted policies urging the elimination of criminal laws discriminating against gay men and lesbians. *See, e.g.,* Brief of Amicus Curiae American Psychological Association, American Psychiatric Association, National Association of Social Workers, Inc., and Colorado Psychological Association, Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996) (No. 94-1039), *available at* http://www.psyclaw.org/romerbrief.html. Since 1960, when every state had sodomy prohibitions in force, all but fifteen have decriminalized consensual, private, adult sodomy, and Texas remains one of only three to criminalize sodomy between same-sex couples only. *See* Bowers v. Hardwick, 478 U.S. 186, 193-94, 106 S. Ct. 2841, 2845-46 (1986); http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275 (last modified 3/26/2001).

[5] The Court of Appeals reached the same conclusion in England, *supra* note 3.

would have to await a criminal enforcement to seek relief from this unconstitutional law. *See id.* at 947.

That day has come. Section 21.06 has been used to prosecute these two gay appellants for private, adult intimacy that is legal for heterosexual couples. The constitutionality of § 21.06 is now squarely before this Court of last resort in Texas. If ever there was a case involving "an important question of state [and] federal law that has not been, but should be, settled by the Court of Criminal Appeals," it is this one. Tex. R. App. P. 66.3(b). Appellants respectfully urge the Court to accept jurisdiction of this appeal and provide them and other gay and lesbian Texans a just remedy from this unconstitutional law.

I. The Holding Of The Court Of Appeals Majority That § 21.06 Does Not Violate State And Federal Equal Protection Guarantees By Unlawfully Discriminating On The Basis Of Sexual Orientation And Sex Was Erroneous And Warrants Review

Section 21.06, titled the "Homosexual Conduct" law, provides that a "person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[6] In the 1970s, the Texas legislature repealed its long-standing, evenhanded prohibition on oral and anal sex for all couples, and instead enacted § 21.06, singling out for criminal sanction sexual intimacy between same-sex couples only. Maj. Op. at 7. Thus § 21.06 for the first time set up two different rules for this intimate

[6] Section 21.01 of the Penal Code defines "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

behavior: male-female couples could freely engage in the acts, but same-sex couples were uniquely targeted for criminal condemnation for the identical conduct. This different treatment of different groups of people is the core constitutional problem with § 21.06, a problem incorrectly treated by the Court of Appeals majority. The two principal errors in the majority's denial of appellants' equal protection claims lie in its flawed conclusions: (A) that the state's purported interest in "preserving public morality" could form a legitimate and rational justification for discrimination on the basis of sexual orientation,[7] and (B) that the statute does not classify according to the gender of the sexual partners, and hence does not trigger the heightened scrutiny under the ERA and federal equal protection principles for sex-based legislative classifications.

A. The Majority Erred In Holding That The State's Purported Interest In "Preserving Public Morality" Justifies Discriminating On The Basis Of Sexual Orientation

The equal protection guarantees of Article I, § 3, of the Texas Constitution and of the Fourteenth Amendment of the U.S. Constitution prohibit, at their most basic level, any legislative classification that treats people unequally unless that different treatment advances a legitimate and rational government interest. *See, e.g.,* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 3254-55 (1985); Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425, 437 (Tex. 1998). Here

[7] According to the majority, that § 21.06 "evidences a hostility toward homosexuals, not shared by heterosexuals . . . may be sufficient to support an equal protection claim." Maj. Op. at 7. Appellants assert that not only is this sufficient to support their claims, but that § 21.06 – the so-called "Homosexual Conduct" law – by its very terms draws a sexual orientation-based classification and triggers equal protection review on that basis.

the majority held that discriminating on the basis of sexual orientation, as does § 21.06, squares with federal and state equal protection guarantees because the purported statutory purpose advanced by the state – "preserving public morals"(Maj. Op. at 7) – is a "legitimate state interest" to which § 21.06 is rationally related (*id.* at 12).[8]

The majority's reliance on public moral disapproval to justify this unequal rule of law conflicts with well-established equal protection principles. The U.S. Supreme Court has repeatedly rejected bare disapproval, no matter how deeply rooted in or consistent with social, moral, or religious norms, as a basis for the disadvantageous government treatment of one group. *See, e.g.,* Romer v. Evans, 517 U.S. 620, 632, 116 S. Ct. 1620, 1628 (1996); Cleburne, 473 U.S. at 448, 105 S. Ct. at 3259. Equal protection's limits mean that, while moral judgments or majoritarian sentiment can support *evenhanded* laws that uniformly condemn certain behavior, such views cannot support a law that makes a disfavored group unequal to everyone else. *See* Romer, 517 U.S. at 635, 116 S. Ct. at 1629. The Supreme Court most recently applied this core constitutional principle to strike a gay-targeted state constitutional amendment, in Romer v. Evans.

The dissent below correctly asserted that Romer "controls" appellants' sexual orientation discrimination claim and compels the conclusion that the state's public morality justifications are "nothing more than politically-charged, thinly-veiled, animus-

[8] Should this Court disagree with appellants that § 21.06 cannot satisfy even rational basis review, appellants would then respectfully urge, as they did below, that at least intermediate scrutiny of this classification would be appropriate given the long and ongoing history of discrimination against gay men and lesbians for a characteristic that bears no relation to their ability to contribute to society.

driven cliches" that fail the rational basis test. Dis. Op. at 19-21. The majority, however, simply wrote off Romer as irrelevant because the present case challenges a gay-targeted criminal prohibition while Romer challenged a gay-targeted restriction on legislative protection from discrimination. Maj. Op. at 9. The majority's overly fine distinction ignores what the dissent below aptly recognized, that "[t]he statute at issue here, much like Amendment 2 [in Romer], draws a classification for the purpose of disadvantaging the group burdened by the law." Dis. Op. at 19.

Significantly, in his dissent in Romer, Justice Scalia urged the same justification for § 21.06 relied on by the majority in this case, that "traditional sexual mores," in particular "moral disapproval of homosexual conduct," provide a legitimate justification for the government's different treatment of gay and non-gay people. 517 U.S. at 636, 644, 116 S. Ct. at 1629, 1633 (Scalia, J., dissenting). But the Supreme Court rejected this argument, because — regardless of the source or characterization of the disapproval — the discriminatory law in Romer reflected only the illegitimate purpose of "animosity toward the class of persons affected." *Id.* at 634, 116 S. Ct. at 1628. As with § 21.06, the legislative object was to make gay men and lesbians "unequal to everyone else. This [a state] cannot do." *Id.* at 635, 116 S. Ct. at 1629. *See also* Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997) (Romer simply reinforced the "venerable rule under the Equal Protection Clause" that the state may not base different treatment on the desire to condemn one group).

Romer is only the most recent Supreme Court case to apply this "venerable rule." The Supreme Court has repeatedly rejected disapproval, dislike, or discomfort, whether stemming from moral or religious norms or other sources, as a basis for the disadvantageous treatment of one group by the law.[9] Yet the majority below failed even to mention, much less apply, these precedents.

Rather than follow this central tenet of equal protection, the majority instead relied on inapposite doctrine and cases, including Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (1986), outside the equal protection context involving challenges on the basis of due process. Those cases hold that advancing public morals might be a legitimate basis for government regulations that, unlike § 21.06, *apply evenhandedly to all* and do not infringe fundamental rights.[10] In the words of the dissent below, the majority decision

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[9] *See* U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 529, 534, 93 S. Ct. 2821, 2823, 2826 (1973) ("[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group," in this case "hippies," by treating them less advantageously under the law "cannot constitute a legitimate governmental interest"); Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 1882 (1984) (despite deep-rooted, long-standing social mores against interracial marriage, "the law cannot, directly or indirectly, give . . . effect" to "private biases"); Loving v. Virginia, 388 U.S. 1, 3, 11, 87 S. Ct. 1817, 1819, 1823 (1967) (notwithstanding "moral" and traditional origins, the belief that "[God] separated the races [on different continents] shows that he did not intend for the races to mix," is an illegitimate basis for legislative action); Cleburne, 473 U.S. at 448-49, 105 S. Ct. at 3258-59 (fear of and discomfort around the mentally retarded, though undoubtedly common, rejected as illegitimate concern of government).

[10] Bowers upheld an evenhanded Georgia law that criminalized oral and anal sex for everyone in the state based on the presumed moral belief of Georgians, and the Court did so in the context of due process, not equal protection. 478 U.S. at 188 n.1, 196 & n.8, 106 S. Ct. at 2842 n.1, 2846-47 & n.8. It thus has no application to appellants' claim that § 21.06, singling out only same-sex sodomy for criminal condemnation, violates equal protection. *See* Stemler, 126 F.3d at 873 ("It is inconceivable that Bowers stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation").

Likewise, not a single case cited in the string of footnotes on page eight of the majority's opinion involved an equal protection challenge. None addressed a law singling out only one group for disadvantage. For example, Yorko v. State, 690 S.W.2d 260, 265-66 (Tex. Crim. App. 1985) (cited in note ten of the majority decision), involved a privacy and due process challenge to a general prohibition on the sale of sexual devices applicable to everyone in the state, not just to a particular disfavored group.

"ignores the important distinction between the functions of the two clauses and how that distinction shapes review under each clause using the rational basis standard." Dis. Op. at 19 n. 12.

The two constitutional inquiries have "an entirely different set of purposes," and a decision in a due process case cannot be imported into an equal protection analysis. Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1174 (1988); *see also* Dis. Op. at 18 n.12. The due process clause "restrict[s] short-term or shortsighted deviations from widely held social norms," *id.,* and "protects a range of basic rights; it does not speak to the constitutionality of classifications." Sunstein, at 1170. In contrast, the equal protection clause "protect[s] disadvantaged groups against the effects of past and present discrimination by political majorities" and against "traditions, however long standing and deeply rooted." Dis. Op. at 19 n. 12. *See also* Sunstein, at 1163, 1174. Equal protection's requirement that laws burden people generally, rather than solely burdening those who are unpopular, "operates as a political safeguard, ensuring that if the heterosexual majority is to burden gays and lesbians, it must burden itself as well." *Id.* at 1178.

Viewed through the proper constitutional lens, the justification for § 21.06 relied on by the majority below, that the legislature considers "'homosexual sodomy'" to be "more reprehensible" than "'heterosexual sodomy'"(Maj. Op. at 10), is premised on

precisely the type of bias toward a disfavored group against which the equal protection guarantee guards. This law shamelessly discriminates against people, not behavior, for the *identical* behavior that is criminal for gay people is perfectly legal for their non-gay neighbors. "Sexual preference, and not the act committed, determines criminality, and is being punished."

Commonwealth v. Wasson, 842 S.W.2d 487, 488 (Ky. 1992) (declaring Kentucky's same-sex sodomy prohibition unconstitutional).

The Court of Appeals' decision thus guts a core constitutional limit on government discrimination and ignores controlling equal protection principles in holding that the legislature can target gay men and women for criminal condemnation based on public moral disapproval. Tex. R. App. P. 66.3(b) & (c). Its error is further demonstrated by the fact that the courts of other states have found it necessary to strike down laws similar to § 21.06 when confronted with an equal protection challenge. For example, in Wasson, the Kentucky Supreme Court noted, "Certainly the practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized." 842 S.W.2d at 499. The Kentucky Court underscored, "homosexuals do not become 'fair game' for discrimination simply because their sexual practices are not considered part of our mainstream traditions." *Id.* (citation omitted). *See also* Picado v. Jegley, No. CV99-7048 (Ark. Cir. Ct., Pulaski Cty. March 23, 2001); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980); People v. Onofre, 415 N.E.2d 936, 942-43 (N.Y. 1980). As the U.S. Supreme Court has repeatedly held, government "may not avoid the strictures of [the equal protection clause] by deferring to the wishes or objections of some fraction of the body politic." Cleburne, 473 U.S. at 448, 105 S. Ct. at 3259; *see also* Palmore, 466 U.S. at 433, 104 S. Ct. at 1882.

B. The Majority Erred In Holding That § 21.06 Does Not Classify According To Sex And So Is Not Subject To Heightened Scrutiny Under The Texas ERA And The Federal Equal Protection Guarantee

On its face, § 21.06 criminalizes conduct based on the sex of the actors. If one of the appellants had been female instead of male, no crime would have occurred. Thus § 21.06 punishes sexual pairings that defy traditional gender roles, in which women are considered appropriate sexual partners only for men, and men are considered appropriate sexual partners only for women. Section 21.06's sex classification triggers the heightened protection of the Texas ERA and passes muster only if the state demonstrates that the discriminatory treatment is necessary to protect a "compelling" government interest – a burden the state conceded at oral argument it cannot meet. Dis. Op. at 27. *See* In Re McLean, 725 S.W.2d 696, 698 (Tex. 1987). Moreover, the bare moral disapproval that cannot form even a *legitimate* basis for this discriminatory rule certainly cannot amount to a *compelling* government objective.

For the same reasons § 21.06 violates the ERA, it also violates federal equal protection's prohibition on sex discrimination that, as here, does not achieve an "exceedingly persuasive" justification. United States v. Virginia, 518 U.S. 515, 533, 116 S. Ct. 2264, 2275 (1996).

Rather than acknowledge that § 21.06 classifies by sex and hence must fall under the ERA and the federal equal protection guarantee, the majority below relied on the same "equal application" argument expressly rejected by the U.S. Supreme Court in Loving v. Virginia, 388 U.S. 1 (1967), declaring unconstitutional an analogous criminal prohibition

on interracial marriage. Tex. R. App. P. 66.3(c). The majority below contends that because men and women are equally penalized for engaging in same-sex intimacy, § 21.06 does not discriminate on the basis of sex. But in Loving the identical argument was made to justify an anti-miscegenation law that equally penalized whites and blacks for inter-marrying. The Supreme Court held that by using race as the determinant of the criminality of conduct, the state perpetuated an invidious racial classification in violation of equal protection. *Id.* at 11; *see also* Dis. Op. at 7.

The same principle is true here: using the sex of an individual as the determinant of criminality perpetuates the very sex stereotypes against which the ERA and equal protection clause were intended to guard. The majority asserts without analysis that § 21.06 was not intended to "perpetuate any societal or cultural bias with regard to gender" and so cannot be compared to the Loving miscegenation statute's implicit enforcement of a hierarchy between the races. Maj. Op. at 13. This unreasoned assertion does not bear examination. Just as miscegenation laws kept races in separate and unequal spheres, § 21.06's requirement that women play one sex role and men play another perpetuates the view that the proper roles of women and men are distinct and limited by tradition. The majority's unthinking dismissal of § 21.06's roots in rigid sex stereotypes ignores the fundamental purpose of the ERA:

> to break formally with the separate spheres doctrine, which assigned men and women different roles in public and private realms of social life. Ratification of the ERA was intended to supplant antiquated stereotypes and

ideas about the appropriate place of men and women with the principle of equality and individual choice.[11]

These principles require heightened scrutiny of sex classifications imposed by the state in the bedroom as much as anywhere else. This scrutiny § 21.06 cannot survive. *See supra* at 14. *See also* Dis. Op. at 3-16; Panel Op.; Picado at 9-10 (Arkansas same-sex sodomy prohibition discriminates on the basis of sex).

In the words of the dissent, "by its decision . . . the majority renders meaningless the action of the people of Texas in placing the ERA in the state constitution." Dis. Op. at 25 n. 15. This "gratuitous nullification of an act of the people of Texas," *id.*, warrants review by this Court. Tex. R. App. P. 66.3(b).

II. The Court Of Appeals Erred In Holding That § 21.06 Does Not Violate The Right To Privacy Guaranteed By The Texas And U.S. Constitutions

The Court of Appeals also erred in failing to recognize a fundamental constitutional right of adults to engage in consensual sexual intimacy with their chosen partner without interference by the state. As the Georgia Supreme Court opined, "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998).[12]

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[11] Wolfgang P. Hirczy de Mino, Does An Equal Rights Amendment Make a Difference?, 60 Albany L. Rev. 1581, 1581-82 (1997). *See also* Susan Crump, Comment, An Overview of the Equal Rights Amendment in Texas, 11 Hous. L. Rev. 136, 138 (1973); Rodric B. Schoen, The Texas Equal Rights Amendment in the Courts—1972-1977: A Review and Proposed Principles of Interpretation, 15 Hous. L. Rev. 537, 630 (1978).

[12] The decision below leaves Texas out of step not only with Georgia but also with the "moving stream" of states finding protection in their state constitutions for private, consensual adult intimacy. Wasson, 842 S.W.2d at 498 (Ky. 1992); *see also* Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250

The Austin Court of Appeals agreed: "[W]e can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." Morales, 826 S.W.2d at 204; *see also* England, 846 S.W.2d at 958. In direct conflict with the decision of the Court of Appeals below, both Morales and England correctly concluded that § 21.06 violates a fundamental right to privacy secured under the Texas Constitution.[13] Tex. R. App. P. 66.3(a) & (b).

The Court of Appeals in the present case, without even acknowledging Morales and England, denies a constitutional zone of privacy for this intimate adult conduct. Instead, the Court relies on the distinguishable Texas Supreme Court decision in City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996), and on an overly narrow view of constitutional limits on the power of the legislature to interfere in the most private spheres.

In City of Sherman, a police officer, denied a promotion because he had a long-term adulterous relationship with a fellow officer's wife, was held not to have had a protected right to privacy infringed by the police department's decision. That decision was premised on the harm to department morale and to the erosion of his fellow officers'

(Tenn. Ct. App. 1996); Picado, at 4-9. Moreover, in Powell Georgia declared unconstitutional under its state constitution the same sodomy prohibition upheld in Bowers under the federal due process clause.

[13] Although the Texas Supreme Court overturned Morales on jurisdictional grounds to await this day when the criminal courts could address the merits of § 21.06, the England ruling remains undisturbed. *See* Morales, 869 S.W.2d at 942 n.5 (Texas Supreme Court dismissed the City of Dallas's application for writ of error in England because no motion for rehearing had been filed with the court of appeals, as required at that time).

trust caused by the relationship. *Id.* at 466. Also, the Court observed that "[r]ather than suffering an

invasion of privacy, Henry invaded the 'privacy surrounding the marriage relationship.'" *Id.* at 470 (citation omitted).

In contrast to City of Sherman, the state's interest in protecting marital relationships is not at issue here. Neither appellant is married; no issues of adultery, its affront to the civil law, and its destabilizing effect on married couples are present. Furthermore, unlike City of Sherman, where Henry's conduct harmed the functioning of a police department, the case at bar involves two private citizens, both adults, who are being punished criminally not because their conduct affected anyone else but simply because they engaged in the intimate conduct at all. City of Sherman, a civil action before the Texas Supreme Court, not this Court, did not address whether adultery can constitutionally be criminalized in Texas – it is already legal in the state, *id.* at 473 – while here appellants' private, intimate conduct is criminal and resulted in their arrest and prosecution after police officers barged into one of their homes.

In denying a right to privacy in the present case, the Court below ignores that as modern conceptions of liberty and limits on government have evolved, it is "an essential component of liberty," to be free from criminal prosecution for private, consensual, adult sexual activity that affects no one but the couple. *Id.* at 473; *see also* Morales, 826 S.W.2d at 204.

Likewise, the U.S. Supreme Court wrongly decided in Bowers that the federal constitution does not afford a right to privacy from government intrusion into this most

intimate sphere. Appellants preserve their claim that § 21.06 violates the federal right to privacy should Bowers be revisited by the Supreme Court in this or another case.

Finally, once appellants' right to privacy is properly recognized, § 21.06 must fall because the state cannot bear its burden of demonstrating that the law advances "a compelling governmental objective that can be achieved by no less intrusive, more reasonable means." Texas State Emps. Union v. Texas Dep't of Mental Health and Mental Retard'n, 746 S.W.2d 203, 205 (Tex. 1987).

Appellants respectfully submit that this Court should settle these weighty constitutional questions, of grave concern to Texas' citizens and of great importance to Texas jurisprudence. Tex. R. App. P. 66.3(b).

PRAYER FOR RELIEF

Appellants respectfully pray that this Honorable Court grant their Petition for Discretionary Review, set this case for oral argument, and reverse the decision of the Court of Appeals, declare § 21.06 unconstitutional, and quash the charges against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 13th day of April, 2001, a true and correct copy of this Petition for Discretionary Review of Appellants' John Geddes Lawrence and Tyron Garner, was forwarded by first class U.S. mail to:

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APPENDIX

Index

A. June 8, 2000, Judgment and Majority and Dissenting Opinions of a Panel of the Fourteenth Court of Appeals, Lawrence and Garner v. The State of Texas, No. 14-99-00109-CR and No. 14-99-00111-CR

B. March 15, 2001, Judgment and Majority, Concurring, and Dissenting Opinions of the Fourteenth Court of Appeals En Banc, Lawrence and Garner v. The State of Texas, No. 14-99-00109-CR and No. 14-99-00111-CR