No. 02-102

In The
Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL AND FOCUS ON THE FAMILY IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICUS CURIAE[1]

Family Research Council [hereinafter "FRC"] is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts, and state courts.

FRC represents thousands of constituents in its efforts to protect the institutions of marriage and family in federal and state law. Toward that end, FRC has worked to strengthen the legal definition of marriage as being a union of one man and one woman, as it always has been in the United States. FRC has conducted extensive research and produced numerous publications regarding the traditions of legal, cultural, moral, and religious support for marriage, as well as regarding the tangible benefits of traditional marriage for individuals and for society.

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[1] 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 Amicus Curiae, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

Focus on the Family [hereinafter "FOF"] is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting and the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: family.org.

Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF ARGUMENT

This argument for affirming the judgment below contains two main premises. The premises are supported by abundant authority in this Court, by the positive law (constitutions, statutes, judicial decisions) of the States, and by the convictions and habits of the American people.

These premises are, first, the sexual intimacies of married couples are constitutionally protected; non- and extra-marital sexual acts are not.[2] Second, marriage is a relation between a man and a woman.

In addition to the main premises some other premises are implied or are needed to hold up the judgment against the argument that discrimination between acts of same-sex and opposite-sex couples is impermissible. These other

[2] References in the text throughout to "sexual acts" are, unless otherwise indicated, to the acts of consenting adults in private.

premises are mostly uncontroversial facts, which reasonable legislators could surely accept as true. They concern the number and range of sexually active male-female relationships – within and outside marriage – in Texas, and the hazards of investigating and prosecuting those sexual acts. Another premise is this: States may discourage the "evils" – as this Court said in *Eisenstadt* – of sexual acts outside of marriage by means up to and including criminal prohibition.

The argument concludes that Texas may constitutionally choose to protect marital intimacy by prohibiting same-sex "deviate"[3] acts, while tolerating similar behavior by unmarried opposite-sex persons. The critical difference upon which the legal distinction rests is not the raw physical behavior but the relationships: same-sex deviate acts can never occur within marriage, during an engagement to marry, during a courtship prior to engagement, or within any relationship that could ever lead to marriage. Physically similar sexual acts between married persons are constitutionally protected.[4] Physically similar acts between unmarried persons of different sexes occur within relationships which Texas may wish to encourage, either as valuable in themselves, or because they could mature into marriages, or both.

Some legally permitted/tolerated acts occur within relationships having a very distant – if any – relation to

[3] "Deviate" indicates those specific sexual acts described in the Texas statute though, unless otherwise indicated in the text, the reference is *not* limited (as it is in the statute) to acts between persons of the same sex.

[4] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

marriage. But Texas could reasonably conclude that criminal prosecution is too blunt a tool with which to distinguish along the spectrum of opposite-sex relationships, all potentially marital and many verging on or preparing for the strictly marital. Not wishing to intrude upon, damage, and perhaps destroy valued and incipiently marital relationships, Texas could reasonably decide to leave all these opposite-sex relationships undisturbed by the criminal law.

Endeavoring to prudently protect and promote marriage by such reasonable means, Texas legislators are scarcely liable to charges of acting on mere prejudice against a class of persons, unreasoned moral hostility to certain acts, or in servile reliance upon mere popular disapproval of either.

The argument does not mean that a State is forbidden to prohibit all non- and extra-marital sexual acts. The argument does not mean that a State is forbidden to tolerate all non- and extra-marital sexual acts. The argument is consistent with both very restrictive and very permissive legal treatments of sex outside of marriage – and of regimes, including that of Texas, which fall somewhere in between.

To defeat the argument one or both of the main premises would have to, at least implicitly, be denied. Denial of either by this Court would contradict an unbroken line of holdings as old as the Constitution. Denial of either would be presumptuous and, from a social and cultural point of view, bitterly divisive.

ARGUMENT

I. THE RECORD IN THIS CASE REQUIRES EITHER THAT THE WRIT BE DISMISSED AS IMPROVIDENTLY GRANTED, OR THAT THE STATUTE BE UPHELD ON A FACIAL CHALLENGE.

This Brief argues that the Texas statute is a reasonable means of promoting and protecting marriage – the union of a man and a woman – and that no stricter standard of scrutiny is constitutionally justified. Before this Court reaches those substantive questions, however, a threshold matter must be addressed, for the Record contains insufficient evidence to permit this Court to rule on the questions presented by the Cert. Petition.

The sparse Record shows that each of the Petitioners pleaded *nolo contendre* to charges that he performed "deviate sexual intercourse with another individual of the same sex," contrary to the prohibition found in Tex. Pen. Code Ann. § 21.06 (Vernon 1994). The Record shows further that the Petitioners are adult males, and that they engaged in anal intercourse.[5]

This Court is invited by Petitioners' counsel to suppose that each Petitioner consented to a sexual act which involved no money or anything else of value, and which occurred entirely out of public view.[6] Petitioners' arguments depend upon these further suppositions. But the Record contains no evidence to support the invitation.

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[5] Pet. App. 129a.

[6] *See* Cert. Pet. 2-3.

This Court is also invited to suppose that Petitioners are homosexuals.[7] Whatever the truth of the matter, the Record provides insufficient evidence to conclude either Petitioner is, in a strong and persistent way, sexually attracted to persons of the same sex.

Petitioners' arguments call for the Court to rule on important Due Process and Equal Protection questions, including the momentous matter of overruling a recent precedent of this Court (*Bowers v. Hardwick*). Because the Record does not present a clear opportunity to adequately weigh these matters, this Court should decline to decide them.

At most the Petitioners can mount a facial challenge to the Texas law. The Court held in *U.S. v. Salerno,* 481 U.S. 739, 745 (1987), that a party making a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." Petitioners evidently concede, however, that the Texas statute *could* validly be enforced in some circumstances, including cases of deviate sex in public.

This Court should either uphold the challenged law under *Salerno* or dismiss the Petition as improvidently granted.

[7] *See* Cert. Pet., *passim.*

II. SEXUAL INTIMACIES WITHIN MARRIAGE ARE CONSTITUTIONALLY PROTECTED; NON- AND EXTRA-MARITAL SEXUAL ACTS ARE NOT AND MAY BE DISCOURAGED.

A. *Griswold v. Connecticut*

In G*riswold v. Connecticut*, 381 U.S. 479, 486 (1965), this Court described "a right of privacy older than the Bill of Rights" – that surrounding husband and wife:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. . . . [I]t is an association for as noble a purpose as any involved in our prior decisions.[8]

Griswold involved a statute that criminalized a married couple's use of contraceptives. But the *Griswold* Court articulated a broader, encompassing immunity. *Griswold*'s "marital privacy" was (as Justice White said in his concurrence) the "right to be free of regulation of the intimacies of the marriage relationship."[9] Justice Douglas asked in his opinion for the Court, "[w]ould we allow the police to search the *sacred precincts of marital bedrooms* for telltale signs of the use of contraceptives?"[10] Of course, neither the location nor the dimensions of a couple's bedroom makes it "sacred." No judge would hesitate, for example, to authorize a search of a whole home for bomb residue, stolen goods, drugs or weapons. The force of Justice Douglas's question is carried by the implicit

[8] 381 U.S. at 486.

[9] 381 U.S. at 502-03.

[10] 381 U.S. at 485 (emphasis added).

reference to what a married couple, as such, characteristically *does* in their bedroom.

The *Griswold* opinions steadily refer to the marital "relationship," to marital "privacy," and to marital "intimacy" (and "intimacies"). The Court's explicit focus was not a particular sex act, or contraceptives as such. The majority opinions even abstain from express judgments – favorable or unfavorable – about the moral worth of contraception.

Griswold is best understood as standing for the married couple's right of non-interference, or immunity, for all their consensual, private sexual acts. This understanding of *Griswold,* if not the only possible one, is surely one that reasonable Texas legislators could hold.

The *Griswold* holding has been affirmed many times by this Court.[11]

Thus, not only *may* state legislators distinguish sharply the sexual acts of millions of opposite gender couples – those who are married – from all same-sex couples, they are constitutionally obliged to do so. Whatever else they *may* do, constitutionally speaking, state legislators *must* stay out of the marital bedroom. *Griswold* squarely contradicts, therefore, the Petitioners argument that Texas may not discriminate between same-sex and opposite-sex deviate acts.

[11] *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

B. *Poe v. Ullman*

Griswold recognized the unique – "sacred" – place of marital sexual intimacies in our constitutional order. Being "sacred" means that they are beyond state interference or regulation. This elevated station implies that non- and extra-marital sexual acts stand on a different, more prosaic footing. They are open to state regulation.

In his 1961 *Poe v. Ullman* dissent (which on the merits anticipated the Court's holding in *Griswold*), Justice Harlan agreed that marriage is the distinguishing principle of sexual morality, and elaborated its implications:

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, *as well as laws forbidding adultery, fornication and homosexual practices, which express the negative of the proposition, confining sexuality to lawful marriage,* a pattern[ ] deeply pressed into the substance of our social life. . . . [12]

The State is authorized by the Constitution – and required by the common good – to *promote* marriage by respecting the privacy of the marital bedroom. The State is also within its constitutional authority – and required by the common good – to discourage sexual acts outside of marriage. The State's discouragement of fornication, homosexual acts, and other non-marital sexual activity

[12] Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (emphasis added).

may and commonly has (as Justice Harlan said) included making crimes of some, or all, of those acts.

Justice Harlan indicated why treating the deviate acts of unmarried persons as crimes does not impose an arbitrary, majoritarian morality upon an oppressed minority. The discouragement arises not from a paternalistic desire to correct and punish persons for their sexual misbehavior, for the sake of their moral improvement. Much less does it arise from a dislike for the persons who would engage in deviate acts, same-sex or otherwise. The State's discouragement of non- and extra-marital sexual acts is a requirement of the great common (and thus objective) good of marriage.

To say, as Petitioners do, that Texas is imposing an arbitrary morality upon same-sex partners is necessarily, in light of *Griswold, Poe,* and other cases, to say that the difference between marital sexual acts and unmarried persons' casual deviate sex is arbitrary. But that assertion is false. That assertion is falsified by every legal authority available to this Court.

Petitioners' suggestion might rather be that, in a diverse society such as our own, the civil institution of marriage should swing free from all moral conceptions of it, even if those conceptions are accepted (for sake of argument) as objective, and even true. The idea might be to expand, or flatten out, the legal contours of marriage, so as to make it available to everyone on their own terms. The idea might be, in other words, to privatize marriage.

This revised suggestion must be rejected. In the first place, one might well wonder about the intelligibility of "privatized" civil marriage. Part III of this Argument aims to show, moreover, the utter incompatibility of this aspiration with our whole constitutional, legal and cultural tradition.

Finally, the aspiration to a value-free marital regime is impossible. If the opposite-sex character of marriage depends upon an illicit moral view, why not monogamy, too? Upon what proper basis is marriage limited to two persons, or three, or four? Upon what proper basis could any presumption of sexual fidelity and permanence be grounded? "Value-free" marriage would turn out to be nothing at all.

C. *Eisenstadt v. Baird*

In *Eisenstadt v. Baird*, a four-Justice majority of this Court stated that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[13] The *Eisenstadt* Court supported this conclusion by disaggregating the married couple. The *Eisenstadt* Court said:

> [T]he marital couple . . . is an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to *bear* or *beget* a child.[14]

Eisenstadt could be said to warrant reversal of the judgment in this case. The reasoning might be stated as follows: "if the right of privacy means anything, it is the right of individuals to be free of governmental regulation of sexual acts between, or among, consenting adults, at

[13] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[14] 405 U.S. at 453.

least when the acts occur in private." This seems to be the principle of constitutional law contended for by some *amici* and, implicitly, by Petitioners.

First. *Eisenstadt* is without doubt the strongest support available in the U.S. Reports for this extraordinary principle of personal autonomy. But the reasoning of *Eisenstadt* offers no support for extending the disaggregation of marriage into the whole realm of sexual conduct, and the opinion expressly contradicts such an extension.

Eisenstadt focused on the reproductive consequences of sexual intercourse between unmarried men and women. The Justices aimed to prevent State from "punishing" fornicators with maternity or paternity. The Court referred throughout not to singles' deviate sexual acts, but to "sexual intercourse" and procreative "sexual relations." *Eisenstadt* stands, after all, for an individual's privacy regarding the "bear[ing] or beget[ting of] a child."[15] Though "bear" amounted to *dictum* (no question of an already pregnant woman's options was presented to the *Eisenstadt* Court), the *dictum* became law within a year.[16] It is *Roe* to which *Eisenstadt* pointed. *Eisenstadt* is not a preview or fount of the dissenters' views in *Bowers v. Hardwick,* or of the Petitioners' claims here.

Second. *Eisenstadt* expressly said that non- and extramarital sexual acts were "evils" (the Court's word), against which States possess a "full measure of discretion in fashioning means to prevent."[17] *Eisenstadt* did not simply

[15] 405 U.S. at 453.

[16] *See* Roe v. Wade, 410 U.S. 153 (1973).

[17] 405 U.S. at 448-49 (referring in this sentence to fornication).

grant this discretion, nor did it label fornication "evil" for argument's sake. *Eisenstadt* instead explicitly

> conced[ed] that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "evils . . . of different dimensions and proportions, requiring difficult remedies."[18]

The *Eisenstadt* Court recognized, too, that reasonable and constitutionally permissible attempts to deter fornication and adultery could include making those acts criminal.[19]

Eisenstadt does not stand for a broad right of individual sexual freedom. It affirms instead the States' traditional authority to promote marriage by deterring – even by criminal sanctions – all sexual acts outside of marriage.[20]

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[18] 405 U.S. at 448 (citation omitted).

[19] *Id*. The *Eisenstadt* Court decided, however, that one could not reasonably regard deterrence of fornication, for example, as the purpose of the Massachusetts law, and therefore decided the case on other grounds.

[20] In addition to the unique moral and cultural status of marriage in our society, there is a growing body of empirical evidence regarding the tangible benefits of marriage for individuals who marry, for their children, and for society as a whole. Put simply, married people and their children are happier, healthier, safer, and more prosperous.

For example, a five-year study released in 1998 found that continuously married people experience better emotional health and less depression than people of any other marital status. *See* Nadine F. Marks and James David Lambert, *Marital Status Continuity and Change Among Young and Midlife Adults*, 19 JOURNAL OF FAMILY ISSUES 652-86 (November 1998). A 1990 review of research found that married people also have better physical health, while the unmarried have significantly higher rates of mortality – about 50 percent higher for women and 250 percent higher for men. Catherine E. Ross et al., *The Impact of the Family on Health: The Decade in Review*, 52 JOURNAL

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OF MARRIAGE AND THE FAMILY 1059-78 (November 1990). Rates of violent abuse by intimate partners are four times higher among never-married women, and twelve times higher among divorced and separated women than they are among married women (Bureau of Justice Statistics, *Intimate Partner Violence*, National Crime Victimization Survey, U.S. Department of Justice, Washington, D.C., May 2000, pp. 4-5, 10). In fact, married people are less likely to be the victims of any type of violent crime than are those who have divorced, separated, or never married (Bureau of Justice Statistics, *Criminal Victimization 1999: Changes 1998-1999 with Trends 1993-99*, National Crime Victimization Survey, U.S. Department of Justice, Washington, D.C., August 2000, p. 7).

Families headed by married couples also have much higher incomes and greater financial assets. LINDA J. WAITE, ED., THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 385-86 (2000). In addition, married couples who are sexually faithful even experience more physical pleasure and emotional satisfaction in their sexual relations than do any other sexually active people. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 364 (1994).

Children raised by married parents, meanwhile, experience lower rates of many social pathologies, including: premarital childbearing (Kristin A. Moore, *Nonmarital School-Age Motherhood: Family, Individual, and School Characteristics*, 13 JOURNAL OF ADOLESCENT RESEARCH 433-57 (October 1998)), illicit drug use (John P. Hoffman and Robert A. Johnson, *A National Portrait of Family Structure and Adolescent Drug Use*, 60 JOURNAL OF MARRIAGE AND THE FAMILY 633-45 (August 1998)), arrest (Chris Coughlin and Samuel Vucinich, *Family Experience in Preadolescence and the Development of Male Delinquency*, 58 JOURNAL OF MARRIAGE AND THE FAMILY 491-501 (May 1996)), health, emotional, or behavioral problems (Deborah A. Dawson, *Family Structure and Children's Health and Well-Being: Data from the 1988 National Health Interview Survey on Child Health*, 53 JOURNAL OF MARRIAGE AND THE FAMILY 573-84 (August 1991)), poverty (Federal Interagency Forum on Child and Family Statistics, *America's Children: Key Indicators of Well-Being 2001*, Washington, D.C., p. 14); or school failure or expulsion (Dawson, op.cit.). These benefits are then passed on to future generations as well, because children raised by married parents are themselves less likely to cohabit or to divorce as adults

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III. MARRIAGE IS THE UNION OF A MAN AND A WOMAN.

All fifty states[21] and the federal jurisdiction limit marriage to the union of one man and one woman. Congress amended the United States Code in 1996 to state:

> In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[22]

Griswold is one of this Court's many judicial affirmations of this definition of marriage. Those affirmations include, perhaps most notably, several nineteenth-century decisions by which this Court helped to preserve monogamy as the only morally valuable form of marriage.[23]

That the married couple is comprised of man and woman is so massively, and so unequivocally settled that

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(PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 111-15 (1997)).

[21] In Baker v. State, 744 A. 2d 864 (1999), the Vermont Supreme Court said that the 1777 state constitution required the legislature to extend all the legal benefits of marriage to same-sex couples. The court did not require that same-sex partnerships be assimilated to the legal category – marriage – inhabited by opposite-sex couples. And they have not been. Pursuant to state legislation, same-sex couples may now enter into "civil unions" in Vermont. Everyone who is married in Vermont is still party to a union of man and woman.

[22] 1 U.S.C. § 7 (2000).

[23] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885).

the Hawaii Supreme Court, when it was determined to legalize same-sex marriage, relied solely upon its *state* constitution. The Hawaii court recognized that the federal constitutional right of marital privacy pertained only to "unions between men and women."[24]

This Court is probably aware of political movements which seek to reform marriage law, precisely to require recognition of same-sex relationships as marriages. This Court is also probably aware of political movements which seek to re-affirm, and thereby to preserve marriage as the union of a man and a woman. The global Congressional definition quoted above is one fruit of the latter effort. FRC and FOF are proud to be associated with that effort and have made common cause with many allies in the democratic marketplace.

This Court's task in the present appeal is hardly, of course, to join one side or the other. The Constitution calls this Court instead to respect the judgments of democratic decisionmakers – past and present – and to respect this Court's own judgments, all of which limit marriage to men and women. If the composition of the legally married couple is to be changed, it is change which our Constitution leaves to the considered judgment of the people, acting through their elected representatives.

Though it is settled the definitional question calls for further comment. It is not that either the FRC or FOF supposes this Court to be so incautious as to reach out and explicitly redefine marriage to include same-sex couples. Petitioners do not overtly ask this Court to do that. But

[24] Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993).

reversal of the judgment below would *imply* that marriage is not limited to the union of man and woman, or that marriage is not the principle of sexual morality, as Justice Harlan recognized it to be. The second implication would devastate State efforts to promote and protect marriage. The first implication would abolish marriage. A reversing opinion could, of course, contain both implications.

But how could expanding the class of persons able to marry work its abolition?

The burgeoning democratic debate is only ostensibly about expanding marriage. In truth and at root it is a question of what marriage is. For depending on what marriage is, or is thought to be, marriage is either possible or impossible for same-sex couples.

The law of marriage commonly exhibits this type of dependence. It is impossible for most adults to marry at any given moment. That is because they are already married. Given that marriage is monogamous, a second marriage cannot occur so long as the first persists. Anyone who is under a certain age or who is mentally incompetent is legally incapable of marrying, too. That is because marriage is a free and voluntary commitment of incomparable magnitude.

Marriage is, and has always been understood by our law to be, a bodily, two-in-one flesh union of persons. That is why it is impossible for two men or two women to marry: it is impossible for them to enter into bodily communion. Apart from this understanding of marriage, the legal requirement of consummation (which is only fulfilled by vaginal intercourse) is unintelligible. Apart from this

understanding of marriage, there cannot be any sense in which marriage is characteristically procreative, or intrinsically ordered to having and raising children.[25]

If marriage is understood, however, as an association of individuals who seek from each other and from their relationship certain emotional, sexual, psychological satisfactions, and who set up a household with pooled finances, the ineligibility of same-sex couples to wed surely appears unreasoned, and arbitrary. Where marriage is stripped of its meaning as an integral, bodily union oriented in some sense towards procreation, there indeed

[25] The intrinsic link between marriage as the union of man and woman to procreation and child rearing is scarcely a national or continental phenomenon. It is universal, as anthropologists including Margaret Mead attest:

> When we survey all known human societies, we find everywhere some form of the family, some set of permanent arrangements by which males assist females in caring for children while they are young. . . . [I]n most societies there is the assumption of permanent mating, the idea that the marriage should last as long as both live. . . . " MARGARET MEAD, MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD 188, 195 (1949).

Concerning married adults having generally improved health, see Robert H. Coombs, *Marital Status and Personal Well-Being: A Literature Review*, 40 FAMILY RELATIONS 97-102 (1991). This was a metanalysis of 130 empirical published studies on marital status and levels of personal health and well-being.

On the importance of married parents, see SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994). This is the book from the world's leading researcher on single parent families. Interestingly, they find single parenting helps nothing. Kids from single parent families do generally half as well in the most important measures of well-being than kids with a mom and a dad.

appears to be no reason why same-sex couples may not marry.

Legal recognition of same-sex relationships as marriages would, therefore, imply the law's redefinition of "marriage," not a subtle expansion of eligibility. This redefinition – that marriage is *not* a bodily or two-in-one communion between persons of the opposite sex – would be so extraordinary and unprecedented that it would mean the end of marriage as the law, and the overwhelming majority of Americans, have always understood it. The new relationship might take the place of "marriage" in the law books. But in truth, and to almost all Americans, it would not be marriage at all. It would instead be more the sexually involved relationship of householders.

And there would, then, be no non-arbitrary basis whatsoever upon which monogamy could be legally maintained. This Court recognized keenly near the end of the last century that marriage, being a two-in-one communion, simply could not be polygamous. Notwithstanding the sincere beliefs of many people in Mormon communities in plural marriage, the fact was – and is – that marriage is for *one* man and *one* woman. One need not agree with all the measures that Congress took, and that this Court approved, to preserve marriage in Utah to see that *fundamentally* the effort was sound, and right.

We do agree with Oxford legal philosopher Joseph Raz that "monogamy, assuming that it is the only valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal

institutions."[26] The same univocal cultural and legal commitment is necessary to sustain marriage as the monogamous union of man and woman. Once marriage is no longer a bodily communion oriented towards procreation – which is to say, no longer the union of a man and a woman – then three or more persons could as readily constitute a marriage as could two.

We are in early stages of an increasingly intense political debate about the central cultural institution of our society, of which the aspiration to same-sex marriage is more symptom than cause. It is not a debate about modestly increasing the number of people able to marry, or of incrementally adjusting our understanding of it. At stake is the *intelligibility* of marriage as we have, from time immemorial, understood it. It would be greatly inopportune, and bitterly divisive, for this Court to implicitly decide this great question by overturning the judgment below.

IV. THE TEXAS LAW HERE CHALLENGED IS A RATIONAL MEANS BY WHICH TO PROTECT AND PROMOTE MARRIAGE AS THE UNION OF A MAN AND A WOMAN.

The sharpest challenge to the Texas statute is that it is *wholly* arbitrary, even nonsense. The statute is said to evaluate the exact same "behavior" in contradictory ways. The objection so far stated fails, for it overlooks the obvious truth that the same physical movements may be entirely different human acts. Precisely the same behavior

[26] JOSEPH RAZ, THE MORALITY OF FREEDOM, 162 (1986).

may be performed by a married couple and the parties to a motel tryst. It scarcely follows that they all perform the same human act. And they do not: one is the marital act and the other is fornication. The same behavior – vaginal intercourse – may be the very different acts of fornication, adultery, statutory rape, incest, or the marital act.

The criticism, then, can only be that the same "behavior" between unmarried persons must, from a constitutional point of view, be treated as identical acts. But this begs the question. Some Texas legislators might regard deviate sexual acts between persons on the verge of marriage as morally acceptable, or at least not nearly as distant from marriage as the deviate acts of persons whose relationship is not, and could never be marital.

We turn to the manner in which similar behavior within different relationships gives rise to reasonable legislative classifications.

Marriage is not the mere creature of the state, as are stipulated institutions such as courts, legislatures, prisons, banks. Marriage existed before there was a state; its existence is not dependent upon the law. The vast majority of Americans understand marriage as an integral communion of man and woman which comes into being when the spouses say "I do." Spouses marry *themselves,* in front of a public deputy, who is usually someone quite apart from the state: a priest, minister, rabbi or other religious official.

Americans recognize that marriage is a pre-legal moral reality. This Court's recognition of the same reality is found in its many grateful references to marriage as the

pre-condition of our political institutions.[27] This universal recognition is manifest in this Court's many declarations in favor of the choice, or opportunity, to marry as a natural right which the state must respect, and which it may never abridge.[28]

Marriage is a pre-political moral and cultural institution upon which the law supervenes. The law recognizes marriage, regulates it, promotes it, protects it. *Griswold* establishes one measure of protection: marital intimacies are immune from state interference.

In order to protect and promote marriage, Texas legislators could prohibit all non- and extra-marital sexual relations. But Texas lawmakers could conclude that many potentially or incipiently marital relationships would be impaired, if not destroyed, by prosecuting the couples for private, consensual sexual acts. These legally permitted/tolerated acts include relations between engaged couples; couples who are not engaged but who nevertheless firmly intend to marry; couples seriously courting and discussing marriage; couples "going steady" and who are open to marriage and to the other as a suitable spouse, but who are not yet openly discussing marriage; couples who are just beginning to date and who, if all goes well, will soon be considering marriage. Texas legislators could reasonably conclude that, though these couples' deviate sex might be immoral, criminal prosecution would disrupt these potentially or incipiently marital relationships.

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[27] *See, e.g.*, Maynard v. Hill, 125 U.S. 190 (1888).

[28] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Zablocki v. Redhail, 434 U.S. 374 (1978).

Texas lawmakers evidently have concluded that the common good, including the good of marriage, is better served by allowing *all* these relationships to proceed unmolested.

Besides the foregoing couples, Texas lawmakers could reasonably wish to leave undisturbed those many Texans in common-law marriages, persons who are really married but who, for one reason or another, have not a marriage license. To this group lawmakers could add those many Texas men and women, sexually intimate and functioning as mother and father, but who cannot marry because one (or both) is estranged from a spouse. Without indicating or implying any moral approval, Texas legislators could reasonably view such melded family-type groupings as better left intact, than broken by the prospect – or the reality – of criminal prosecution. (Of course, given the availability of civil divorce, these couples are potential spouses, too.) Reasonable legislators, including those who believe that all sex outside of marriage is immoral, could decide not to intrude upon all these relationships, too.

Texas legislators could hardly be unaware of the casual character of many sexual encounters between unmarried men and women. But a reasonable legislator, desiring to leave alone all married, engaged, courting, and otherwise open-to-marriage couples, would have to ask: should the "casual" or "purely physical" or "meaningless" quality of these encounters be an element of the criminal offense? Should the potential or incipiently marital quality of the relationship instead be an affirmative defense? What would satisfactory proof of either look like? How would investigating officers be able to distinguish the two types of cases? Would probable cause be present whenever an unmarried couple was reasonably believed to have

committed a prohibited act? If so, would not the dangers of intrusion upon potentially and incipiently marital relationships be already too great? How many prosecutions would succeed? Would not the temptation to perjury, or to exaggerate affections and intentions, undermine proof in almost every instance? Could a jury unanimous in their willingness to convict such couples be empaneled?

Faced with these difficulties and problems reasonable legislators who wished to promote marriage, and who believed sex outside marriage to be wrong, could reasonably conclude that the common good was better served – or less ill-served – by permitting/tolerating deviate acts between men and women.

A reasonable legislator could surely decide to leave *all* deviate sex acts alone. But a reasonable legislator could instead decide that, where marriage is not and cannot be present, incipient, or remotely in view, the common good is better served by prohibiting deviate sex acts. These legislators would recognize that police officers would be faced with nearly-impossible judgments about "casual" as opposed to "meaningful" non-marital sex.[29]

[29] Someone might naively object that promoting marriage must not be the purpose of the Texas statute. The objector might say that legislators have not *consistently,* or *seriously* or *effectively* acted on that view: many non- and extra-marital acts are left alone. This uncomprehending objection is refuted by showing, as does Section III above, the contingent and prudential nature of the judgments beneath the Texas law, a law which is not a *logical* entailment of the aim to protect marriage. No such logic is required by the Constitution. None is possible. The Texas statute is guided, though not compelled, by reason, and that is what the Constitution requires. Judging Texas lawmakers by the proffered standard would not only deny them that "full discretion" which *Eisenstadt*

(Continued on following page)

Further evidence that the Texas legislature was concerned with *marriage,* and not with *animus* towards homosexuals and lesbians, is found in other statutory prohibitions which sweep inclusively. Texas makes "deviate sexual intercourse" a crime for *everyone* – married or not, same-sex or not – when it occurs in public.[30] Everyone – married or not, same-sex or not – is liable to prosecution where sexual conduct takes place without consent, for money, or with a minor.[31]

No discrimination is made by these criminal prohibitions precisely because the end sought to be achieved bears no relation to marriage. Public decency – a concern for the sensibilities of those, especially but not only children, upon whom sexual acts may offensively intrude – *is* undermined by public sex, regardless of marriage and sexual preference. Forcible and commercialized sexual acts, as well as taking sexual advantage of minors, are all wrongs which do not depend upon or vary according to the marital status or sexual orientation of those culpable. Selling one's body for money is just as wrong, for example, when the customer is the same sex as the seller as it is when the customer is not.

If Texas legislators entertained, and wanted to act upon, some hostility to homosexuals and lesbians, they could be expected to show it in laws such as these. They might be expected to show by making homosexual child abuse an aggravated form of sexual abuse, with higher

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recognized to be within their constitutional competence. It would deny them discretion altogether.

[30] TEX. PEN. CODE § 21.07(a)(2).

[31] *Id.* § 22.011(a)(1); § 43.02; § 22.011(a)(2), § 21.11.

penalties. Or, they might decriminalize prostitution between men and women, figuring it to be an almost normal expression of sexual energy, but retain criminal penalties for same-sex prostitution.

No such distinction is made, because protecting marriage, and potentially or incipiently marital relationships is not relevant to the purposes of these laws.

V. STRICT SCRUTINY IS NOT REQUIRED BECAUSE THE LAW NEITHER DISCRIMINATES AGAINST A SUSPECT CLASS NOR BURDENS A FUNDAMENTAL RIGHT.

Is constitutional scrutiny more rigorous than the "rational basis" test required in this case? It is, if the legislation discriminates against a suspect class, or if the law burdens a fundamental right.

No suspect class is involved. Neither homosexuality nor the inclination (whatever exactly it might be called) which leads one to violate the Texas statute is constitutionally suspect. The challenged law, in fact, disturbs no one for possessing any particular affection or sexual orientation: neither homosexuality nor any other affection or taste is the line drawn by the law. Those who commit acts forbidden by the law constitute the class of persons who are not married and can never be married – but who nevertheless seek sexual satisfaction with another by the proscribed means. A plausible argument for special – indeed, the highest – constitutional protection of this class of persons is hard to imagine. *Poe*, *Griswold* and many other cases falsify any such argument.

Is there some fundamental right burdened by the Texas law?[32] It surely cannot be a right to sexual satisfaction from or with another person outside of marriage. Though many persons in our society may engage in non- and extra-marital acts, they do so without the benefit of constitutional entitlement. The whole tradition of public morality described by Justice Harlan in *Poe* belies such a contention.

Perhaps in light of these obvious impediments, some *amici* argue for what amounts to a libertarian, or Millian, principle of personal autonomy: *all* private, consensual sexual acts involving persons over a certain age are

[32] This case may appear to involve one fundamental right squarely favoring Petitioners: the Fourth Amendment right to be free from unreasonable search and seizure. Petitioners were seized not only upon private premises, but in the home of one of them (Lawrence). Perhaps Justice Douglas's query in *Griswold* could be adapted to Petitioners' situation: should we search his bedroom for telltale evidence of their deviate acts?

Perhaps not. But that question – whether probable cause to believe that deviate sex acts may be occurring at home should *by itself* justify for non-consensual entry, search, and arrest – has nothing to do with deciding this case. No resolution of the question *could* justify, even in part, reversing the court below.

Why? One reason is that Petitioners seek a judgment that the Texas sodomy statute is unconstitutional. But the statue is not limited to acts occurring in persons' homes, to acts occurring in non-residential private places, or to any place at all. It prohibits certain conduct, wherever it occurs. Any resolution of the home-search question could, therefore, only *limit* application of the statute.

The second reason is that the police entered Lawrence's dwelling lawfully, based upon reasonable cause to believe that *another* crime – a "weapons disturbance" – was underway. Because the entry was lawful, evidence of Petitioners criminal acts were in plain view. Observations made by police officers from a vantage point they lawfully occupy are not Fourth Amendment activity at all.

"private" – none of the State's business.[33] These arguments depend upon broad philosophical concepts of self-sovereignty, self-definition, and non-interference by the State. They are best supported, if they are supported by anything in this Court's precedents, by the so-called Mystery Passage in *Planned Parenthood v. Casey*:[34]

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.[35]

No question of belief is controverted here. Texas has taken no steps to deny anyone's beliefs in the value or desirability of the deviate *acts* proscribed by the statute. Treating the *Casey* passage, then, as support for a liberty to perform certain (allegedly harmless) sexual acts, we see clearly that it is the *Eisenstadt*-extension argument stated and refuted in Part II of this Brief.

But *Casey* came after *Eisenstadt*. Did *Casey* implicitly undermine *Eisenstadt*'s controlling statements that fornication and adultery were "evils", and that the States had a "full measure of discretion" in choosing the means of combating them?

No. This Court's post-*Casey* decisions make it clear that philosophical abstractions, including the Mystery Passage, are not sources or founts of fundamental rights.

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[33] So described, the principle would constitutionally immunize prostitution.

[34] 505 U.S. 833 (1992).

[35] 505 U.S. at 851.

Abstractions such as personal autonomy are, at most, useful descriptions of some of the Court's holdings:

> That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are protected . . . and *Casey* did not suggest otherwise. . . . By choosing th[e] language [of the Mystery Passage] the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.[36]

Glucksberg is this Court's standing order on Due Process methodology. That case also established beyond doubt that fundamental rights do not arise from the urgency or intensity with which proponents advance their claims on behalf of them, from the asserted importance of the matter to them, or from any *subjective* basis at all. Rather, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[37] A glance at that history and tradition conclusively shows that there is no fundamental right to fornication, adultery, homosexual sexual acts, or to any other sexual acts apart from marriage.

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[36] Washington v. Glucksberg, 521 U.S. 702, 727, 728 (1997) (citations omitted).

[37] 521 U.S. at 720-21 (citation omitted).

These same traditions and practices illumine the initial matter of "careful description" of the asserted fundamental interest.[38] The level of generality (or specificity) with which the right or interest is properly stated depends upon the categories and distinctions deemed relevant by history and tradition. The whole tradition establishes that, outside of marriage, no one has a constitutional right to the undisturbed pursuit of sexual intimacies with another. To borrow the *Glucksberg* Court's application of these criteria to the question of assisted suicide, it would "reverse centuries of legal doctrine and practice, and strike down the considered policy choices of almost every State" to hold otherwise.

CONCLUSION

The judgment of the Texas court should be affirmed.

Respectfully submitted,

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[38] *Id.*