

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 Court of Appeals of Texas
Fourteenth District

**BRIEF IN SUPPORT OF RESPONDENT ON BEHALF OF *AMICI*
CURIAE TEXAS PHYSICIANS RESOURCE COUNCIL,
CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS AND
CATHOLIC MEDICAL ASSOCIATION**

Glen Lavy
(Counsel of Record)
ALLIANCE DEFENSE FUND
15333 North Pima Road, Suite 165
Scottsdale, Arizona 85260
(480) 444-0020

Attorneys for Amici Curiae

C. Same-sex Sodomy Is More Harmful to the
Public He

TABLE OF AUTHORITIES

Cases

<i>Baker v. Wade</i> , 774 F.2d 1285 (5 th Cir. 1985)	5
<i>Barbier v. Connolly</i> , 113 U.S. 27 (1884)	6
<i>Barnes v. Glen Theatre, Inc.</i> , 501 U.S. 560 (1991)	6-7
<i>Board of Trustees of the University of Alabama v. Garret</i> , 531 U.S. 356 (2001)	3
<i>Campbell v. Sundquist</i> , 926 S.W.2d 250 (Tenn. Ct. App. 1996)	28
<i>Central Bank of Denver, N.A. v. First Interstate Bk. of Denver, N.A.</i> , 511 U.S. 164 (1994)	4
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985)	6
<i>City of Erie v. Pap’s A.M.</i> , 529 U.S. 277 (2000)	6
<i>Federal Communications Comm’n v. Beach Communications, Inc.</i> , 508 U.S. 307, 315 (1993)	3, 5, 29
<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	29
<i>Icicle Seafoods, Inc. v. Worthington</i> , 475 U.S. 709 (1986)	5
<i>Lens Express, Inc. v. Ewald</i> , 907 S.W.2d 64 (1995)	5
<i>L’Hote v. City of New Orleans</i> , 177 U.S. 587 (1900)	6

<i>McLaughlin v. Florida</i> , 379 U.S. 184 (1964)	4
<i>Railroad Co. v. Husen</i> , 95 U.S. 465 (1877)	6
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)	4
<i>Williamson v. Lee Optical of Okla., Inc.</i> , 348 U.S. 483 (1955)	29

Statutes

Texas Penal Code § 21.01(3)	8
-----------------------------------	---

Other Authorities

Aetna, 4 Physician News (December 2002)	20
Jeremy Agnew, <i>Some Anatomical and Physiological Aspects of Anal Sexual Practices</i> , 12 Journal of Homosexuality No. 1, 75 (Fall 1985)	8, 9
Associated Press Newswires, <i>Cases of Syphilis among Gay and Bisexual Men Increases</i> , 10/1/02 APWIRES 04:27:00	15
Associated Press Newswires, <i>Syphilis Outbreak in Los Angeles County Leads to Calls for More Testing</i> , 12/27/02 APWIRES 02:40:00	14
Richard R. Babb, M.D., <i>Sexually Transmitted Infections in Homosexual Men</i> , 65 Postgraduate Medicine No. 3, 215 (1979)	19

Janice I. Baldwin, Ph.D., & John D. Baldwin, Ph.D.,
*Heterosexual Anal Intercourse: An Understudied,
High-Risk Sexual Behavior*, 29 *Archives of Sexual
Behavior* No. 4, 357 (2000) 20, 22

- 2002), www.cdc.gov/hiv/stats/hasr1302.pdf . . . 25-26, 27
- CDC, *HIV Incidence Among Young Men Who Have Sex With Men—Seven U.S. Cities, 1994-2000*, 50 MMWR No. 21, 440 (2001) 27
- CDC, *Increases in Unsafe Sex and Rectal Gonorrhea Among Men Who Have Sex With Men—San Francisco, California, 1994-1997*, 48 MMWR No. 3, 45 (1999) 28
- CDC Press Release, *New CDC Studies Shed Light on Factors Underlying High HIV Infection Rates Among Gay and Bisexual Men*, CDC Office of Communication (July 10, 2002), www.cdc.gov/od/oc/media/pressrel/r020710.htm . 17, 27
- CDC Press Release, *Overall Syphilis Rate Rises for First Time Since 1990*, Office of Communication (Nov. 1, 2002), www.cdc.gov/od/oc/media/pressrel/r021101b.htm 14, 16
- CDC Press Release, *U.S. Syphilis Rate Declines to All-Time Low in 2000*, Office of Communication (Nov. 28, 2001), www.cdc.gov/od/oc/media/pressrel/r011128.htm 14
- CDC, *Preventing the Sexual Transmission of HIV, the Virus that Causes AIDS: What You Should Know about Oral Sex*, HIV/AIDS Update (December 2000), [ftp://ftp.cdcnpin.org/Updates/oralsex.pdf](http://ftp.cdcnpin.org/Updates/oralsex.pdf) 18
- CDC, *Primary and Secondary Syphilis—United States, 2000-2001*, 51 MMWR No. 43, 971 (Nov. 1, 2002) . . 14

- CDC, *Sexually Transmitted Disease Surveillance 2001*,
www.cdc.gov/std/stats/TOC2001.htm 7, 8, 16
- CDC, *Tracking the Hidden Epidemics: Trends in
 STDs in the United States 2000*, [www.cdc.gov/
 nchstp/dstd/Stats_Trends/Trends2000.pdf](http://www.cdc.gov/nchstp/dstd/Stats_Trends/Trends2000.pdf) 7, 13, 16
- CDC, *U.S. HIV and AIDS cases reported through
 December 2001*, Year-end edition Vol. 13, No. 2,
www.cdc.gov/hiv/stats/hasr1302.htm 17
- William W. Darrow, Ph.D., et al., *The Gay Report on
 Sexually Transmitted Diseases*, 71 *American J. of
 Pub. Health* No. 9, 1004 (1981) 19
- Scott Dunbar & Susan Rehm, *On Visibility: AIDS,
 Deception by Patients, and the Responsibility of
 the Doctor*, 18 *Journal Med. Ethics* 180 (1992) 28
- William G. Eckert, M.D., & Steven Katchis,
Anorectal Trauma, 10 *The American J. of
 Forensic Medicine and Pathology* 3 (1989) 9
- Editorial & Comment, *Fighting Syphilis*, *The Columbus
 Dispatch*, 2002 WL 100598949 (Sept. 23, 2002) 15
- Pamela I. Erickson, Dr.P.H., et al., *Prevalence of
 Anal Sex Among Heterosexuals in California and
 Its Relationship to Other AIDS Risk Behaviors*,
 7 *AIDS Education and Prevention* No. 6, 477
 (1995) 20, 22
- J.L. Fluker, *A 10-year Study of Homosexually
 Transmitted Infection*, 52 *British J. of Venereal
 Disease* No. 3, 155 (1976) 30

- Gregory A. Freeman, *Bug Chasers: The men who long to be HIV+*, *Rolling Stone* 915 (February 6, 2003) . . . 28
- Gary D. Friedman, M.D., S.M., *Medical Usage and Abuse: "Prevalence" and "Incidence,"* 84 *Annals of Internal Medicine* 502 (1976) 7
- Morten Frisch, M.D., et al., *Sexually Transmitted Infection as a Cause of Anal Cancer*, 337 *New England Med. J.* No. 19, 1350 (1997) 15
- William M. Geisler, M.D., et al., *Epidemiology of Anorectal Chlamydial and Gonococcal Infections Among Men Having Sex With Men in Seattle: Utilizing Serovar and Auxotype Strain Typing*, 29 *Sexually Transmitted Diseases* No. 4, 189 (April 2002) 13
- James J. Goedert, et al., *Spectrum of AIDS-associated Malignant Disorders*, 351 *The Lancet* 1833 (June 20, 1998) 15
- Stephen E. Goldstone, M.D., *THE INNS AND OUTS OF GAY SEX: A MEDICAL HANDBOOK FOR MEN* (1999) 9, 10, 16
- Jimmy Greenfield, *Syphilis outbreak raises HIV fears*, *Chicago Tribune*, 2002 WL 102895528 (Nov. 19, 2002) 15, 16
- Daniel T. Halperin, Ph.D., *Heterosexual Anal Intercourse: Prevalence, Cultural Factors, and HIV Infection and Other Health Risks, Part I*, 13 *AIDS Patient Care and STDs* No. 12, 717 (1999) 20, 21

Christine Haughney, *Syphilis Rises Among N.Y. Gay Men; Experts Fear Data Point to Increase in Risky Sexual Activity*, *The Washington Post*, 2002 WL 101064118 (Sept. 27, 2002)

- (1981) 12, 13-14, 19
- Neil E. Reiner, M.D., et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men with Persistent Hepatitis B Virus Infection: Evidence for de facto Parenteral Transmission*, 96 *Annals of Internal Medicine* 170 (1984) . . . 12, 18, 19
- Gary Remafedi, et al., *Demography of Sexual Orientation in Adolescents*, 89 *Pediatrics* No.4, 714 (1992) 13
- Anne M. Rompalo, M.D., *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 *Clinical Infectious Diseases Suppl.* 1, S84 (1999) 10, 14, 16, 19, 21
- Anne M. Rompalo, M.D., *Sexually Transmitted Causes of Gastrointestinal Symptoms in Homosexual Men*, 74 *Medical Clinics of North Am.* No. 6, 1633 (November 1990) 10, 19, 21
- Gabriel Rotello, *SEXUAL ECOLOGY: AIDS AND THE DESTINY O*

Under rational-basis review, the Texas legislature's motivation for enacting the same-sex sodomy law is irrelevant. Petitioners have

⁵Public Health *Amici*'s reliance upon *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975), to argue that a public health concern cannot support a statute unless the interest was expressed in legislative

ally suspect,” and “in most circumstances irrelevant” to any constitutionally acceptable legislative purpose.

McLaughlin, 379 U.S. at 191-92 (citations omitted). In view of the Fourteenth Amendment, there was no reason to weigh evidence about whether racial minorities should be treated differently—the United States Congress and a majority of the states had already made that determination. There is no similar constitutional determination for same-sex behavior.

Petitioners made no effort in the trial court to prove a lack of rational relationship between the sodomy law and legitimate public interests. Furthermore, they have created no record from which this Court could conclude that the Texas same-sex sodomy law is without a rational basis.

C. Petitioners Are Asking the Court to Find Facts *de novo*

Absent record evidence to negate every conceivable basis to support the statute, Petitioners are, in effect, asking this Court to engage in *de novo* fact finding. They are asking the Court to weigh medical

nature, it is a political question committed to the legislature because it calls for pure public-policy decisions beyond a court's competence'" (citation omitted); *see also Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985) (reversing holding that Texas sodomy statute violated equal protection clause: "The finding of the district court, to the effect that no rational basis exists for prohibiting this manner of sexual conduct, is a legislative finding and not an adjudica

⁶This brief will address only the public health interest, since the State and other *amici* are addressing the public morality interest.

⁷It is important to distinguish between incidence and prevalence of diseases. Incidence refers to “the development of new cases of a disease in a population free of the disease,” while prevalence refers to “the number of persons who have a disease in a population at one point in time.” Gary D.

lifelong infections.” *Tracking the Hidden Epidemics: Trends in STDs in the United States 2000* at 1 (citation omitted).⁸ As the CDC noted in its most recent STD surveillance report, “[a]ll Americans have an interest in STD prevention because all communities are impacted by STDs and all individuals directly or indirectly pay for the costs of these diseases. *STDs are public health problems . . .*” CDC, *Sexually Transmitted Disease Surveillance 2001* at v, Division of STD Prevention (September 2002) (citation omitted; emphasis added).⁹

The CDC has identified men who have sex with men as among the groups that “are most vulnerable to STDs and their consequences . . .” *Id*

⁸Available at www.cdc.gov/nchstp/dstd/Stats_Trends/Trends2000.pdf.

⁹Available at www.cdc.gov/std/stats/TOC2001.htm.

¹⁰Texas Penal Code § 21.01(3) defines “sexual intercourse” in a medically correct sense as “any penetration of the female sex organ by the male sex organ.” Anal sex does not qualify as sexual intercourse under Texas law or medical definitions. *See* STEDMAN’S POCKET MEDICAL DICTIONARY 151 (coitus), 381 (sexual intercourse) (1987).

ENTED ANATOMY 385 (2nd ed. 1985). Accordingly, receptive anal sex may cause physical trauma to the anus and the rectum:

the lining of the rectum consists of a single layer of [membranous cellular tissue] with numerous goblet [mucous secreting] cells. The function of this thin layer is to promote the absorption of water and electrolytes. In spite of the limited protective capacity of secreted mucus from the goblet cells, the mucosa is incapable of much mechanical protection against abrasion. . . .

. . . One of the commonest problems associated with anal sexual activity is tearing of the anal canal. The external anal sphincter is biologically intended to have

insertion of objects into the rectum, may cause irritation of the rectal mucosa and produce a variety of anorectal problems. Symptoms may include anorectal pain, diarrhea, overproduction of mucus, flatus, purulent discharge, intestinal cramps, painful defecation, fecal leakage, hemorrhoids, anal or rectal ulceration and fissures, pruritus ani, or varying degrees of rectal prolapse.

Agnew, 12 *Journal of Homosexuality* at 90-91. A study of incontinence among men who practice receptive anal sex “revealed an excess of minor anal incontinence amongst anoreceptive homosexual men. Over a third of AR subjects reported some degree of anal incontinence or urgency of defaecation [sic].” A.J.G. Miles, et al., *Effect of Anoreceptive Intercourse on Anorectal Function*, 86 *Journal of the Royal Society of Medicine* 144, 146 (March 1993). The study also found a cumulative effect from repeated anal sex: “The correlation between maximum resting pressure and estimated number of partners suggests that the damage to the internal sphincter is a cumulative effect.” *Id.*; see also Goldstone, INNS AND OUTS at 19 (“Repeated injuries cause cumulative damage and, in later life, may lead to incontinence”).

The nature of the anus and rectum and the trauma that may

ereae

virus and enteric [intestinal] pathogens, including giardiasis, shigellosis, amebiasis and hepatitis B. *Id.* at 514; Anne Rompalo, M.D., *Sexually Transmitted Causes of Gastrointestinal Symptoms in Homosexual Men*, 74 *Medical Clinics of North Am.* No. 6, 1633, 1634-35 (November 1990); William F. Owen, Jr., M.D., *Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men*, 92 *Annals of Internal Medicine* 805 (1980). The enteric pathogens historically have not been transmitted sexually, but have become somewhat common among men who have sex with men: “These infections are [usually] associated with the ingestion of fecally contaminated food or water. Certain sexual practices, especially anilingus, may allow direct exposure to these pathogens

12.¹¹ However, the point of the concept of the “gay bowel syndrome” was that physicians were b

¹¹Scarce attacked the concept of “gay bowel syndrome” as “blatant medical homophobia.” *Id.* at 2.

“[i]n New York City, the prevalence of infection with giardiasis and/or amebiasis ranged from 30 percent to 40 percent in homosexual men.” *Id.* at 400 (citations omitted). Moreover, “[i]n San Francisco, Seattle and New York, from 30 percent to 70 percent of the patients with shigellosis were homosexual men.” *Id.* at 401 (citations omitted). Hepatitis B virus (“HBV”) was also more prevalent in men who have sex with men:

Serologic surveys of groups of homosexual men have shown that 50% to 75% have evidence of previous or current infection with HBV, and it has been estimated that in the United States alone more than 100,000 homosexual men are carriers of hepatitis B surface antigen (HbsAg). Only parenteral drug users have comparable rates of infection. *Prevalence rates for homosexual men exceed those for heterosexual partners of HbsAg-positive persons*, suggesting that the sexual activities of homosexual men lead to a greater frequency of exposure to infectious virus or provide more efficient routes of transmission.

Neil E. Reiner, M.D., et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men with Persistent Hepatitis B Virus Infection: Evidence for de facto Parenteral Transmission*, 96 *Annals of Internal Medicine* 170, 170 (1984) (citations omitted; emphasis added). Although rates of HBV have decreased, the CDC recently reported that men who had sex with men (1-2

percent)¹² accounted for nearly one-third of the sexually-trans-

¹²A 1993 report from the Alan Guttmacher Institute found that only 1.1% of 3,321 men surveyed were exclusively homosexual, and only 2.3% had engaged in sex with another man *in the prior ten years*. John O.G. Billy, et al., *The Sexual Behavior of Men in the United States*, Family Planning Perspectives, Alan Guttmacher Institute (March/April 1993). Another random survey found that about 2 percent of the men surveyed had sex with a man in the prior 12 months. Robert T. Michael, et al., *SEX IN AMERICA: A DEFINITIVE SURVEY* 175 (1994). A survey of 34,706 students in grades 7-12 found that 1 percent reported any homosexual experience. Gary Remafedi, et al., *Demography of Sexual Orientation in Adolescents*, 89 *Pediatrics* No.4, 714, 719 (1992). No random survey has found significantly higher percentages of men who have sex with men on a regular basis.

¹³Forty percent of acute HBV infections “were attributed to high-risk heterosexual practices—more than one partner in the prior six months, history of other STDs—and 18 percent were associated with homosexual activity.” *Id.* The rest of the HBV infections were not transmitted sexually.

Disorders, 351 *The Lancet* 1833, 1836 (June 20, 1998). A history of anal sex appears to increase the risk of

²¹Available at www.cdc.gov/od/oc/media/pressrel/r020710.htm.

²²Available at www.cdc.gov/hiv/stats.htm. Of the total of 141,048 cases of AIDS in females, 57,396 are from heterosexual contact.

²³African men are more likely than American men to acquire HIV from females because of the prevalence of un

Sexual Transmission of HIV, the Virus that Causes AIDS: What You Should Know about Oral Sex, HIV/AIDS Update (December 2000).²⁴ A number of the diseases associated with men who have sex with men, particularly the enteric pathogens, are most likely transmitted through an oral/anal or penile/anal/oral route. Marino & Mancini, 58 *Surgical Clinics of North America* at 514 (“Sexual transmission of [enteric pathogens] is a possible consequence of oro-anal, ano-genital, and genito-oral contact either separately or in sequence”). One study expressed surprise at finding that oral-anal sex “was the s

²⁴Available at <ftp://ftp.cdcnpin.org/Updates/oralsex.pdf>. The CDC defines “oral sex” as oral-penile, oral-vaginal or oral-anal contact. *Id.*

Rectal Surgeons, 1999 Core Subjects (1999);²⁵ Rompalo, *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 *Clinical Infectious Diseases* at S84; Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 *Archives of Sexual Behavior* at 264-65; Rompalo, *Sexually Tra*

²⁵Available at www.fascrs.org/coresubjects/1999/std/std.html.

²⁶Public Health *Amici*

health implications of female homosexual conduct are not as well documented as for men. Kathleen M. Morrow, Ph.D., Jenifer E. Allsworth, A.B., *Sexual Risk in Lesbians and Bisexual Women*, 4 *Journal of the Gay and Lesbian Med. Ass'n* No. 4, 159 (2000). Nevertheless, female same-sex conduct does impact public health. “Although the risk of transmission of certain STDs between women remains unclear, it has been reported

³²The STDs reported include “crabs,” gonorrhea, chlamydia, genital herpes, genital warts and syphilis. *Id.* at 161, Table I.

³⁹It may b

quoted by the Public Health *Amici* may have relevance for Saudi Arabia, but not for Texas. For example, Dallas County has made “a

(approximately 60 percent of cumulative AIDS cases in men are MSM) with San Francisco Dept. of Pub. Health, *HIV/AIDS Epidemiology Annual Report 2001* at 9, HIV/AIDS Statistics and Epidemiology Section (over 94 percent of cases in men and 90 percent of all AIDS cases are MSM).⁴¹ Furthermore, as

⁴¹Available at www.dph.sf.ca.us/Reports/STD/HIVAIDSAnnlRpt2001.pdf. The percentages include men who have sex with men and inject drugs (7.5% in Texas and 13% in San Francisco).