## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page**

**Constitutions** **Page**



**Statutes** **Page**

**Secondary Authorities** **Page**

IN THE

Supreme Court of the United States

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No. 02-102

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JOHN GEDDES LAWRENCE and TYRON GARNER,
*Petitioners,*

v.

THE STATE OF TEXAS,
*Respondent.*

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**BRIEF *AMICUS CURIAE* OF THE CENTER FOR THE ORIGINAL INTENT OF THE CONSTITUTION IN SUPPORT OF RESPONDENT**

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**INTEREST OF AMICUS IN THIS CASE**

COIC exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect both the authority of the states and the liberties of the people.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. CONST. pmbl. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential, not only because of their place in our nation's history, but also because of their position as the elected representatives of the people. We preserve self-government by elevating the written will of those elected officials who wrote and ratified the Constitution over the opinions of unelected judges.

## SUMMARY OF ARGUMENT

The central purpose of this brief is to respond to various historical arguments raised in three *Amici Curiae* briefs filed on behalf of Petitioners by the American Civil Liberties Union ("ACLU Brief"), the Cato Institute ("Cato Brief"), and the Brief of Professors of History ("Historians Brief").

Contrary to the imaginative arguments contained in these briefs, the history of this country reflects a deep conviction that sodomy is criminally punishable conduct and not a constitutionally protected activity. The history of both state legislation and court decisions support the view adopted by this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), namely that neither the Bill of Rights nor the Fourteenth Amendment limit the authority of the states to punish homosexual sodomy.

Petitioners' *amici* inaccurately suggest that there was a de facto rule protecting consensual same-sex sodomy since the early days of the Republic. The proof of this argument is to be found, they contend, in a number of cases where sodomy convictions were reversed because they had been based on nothing more than the testim

of the Bill of Rights in 1791 and the Fourteenth Amendment in 1868 did not alter that state legislative authority.

This Court has frequently looked to the Constitution's "text, history and precedent" to determine its meaning. *Eldred v. Ashcroft*, ___ U.S. ___, 123 S.Ct. 769, 777 (2003). As this Court recently reiterated in *Eldred v. Ashcroft*, "a page of history is worth a volume of logic." *Id.*, quoting *New York Trust Company v. Eisner*, 256 U.S. 345, 349 (1921); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790 (1995) ("Against this historical background, we viewed the Convention debates as manifesting the Framers' intent that the qualifications in the Constitution be fixed and exclusive.").

It is a settled constitutional principle within our federal republic that states possess general police powers. Inherent within these powers lies the duty to regulate the "health, safety, and morals" of their members. *Barnes v. Glen Theater*, 501 U.S. 560, 569 (1991) (referencing public indecency statutes which were designed to protect m~~orals and public order). St~~ates have used this police power to promote m

### A. Proscriptions Against Sodomy Have Deep Religious, Political, and Legal Roots.

Sodomy was considered a heinous crime under common law. [5] Blackstone's writings are widely recognized as the best embodiment of English common law. His *Commentaries* were the standard legal textbook in the early days of our nation, and that work was frequently cited by early American courts. In this work, Blackstone discussed the "infamous crime against nature" and referenced the royal edicts prescribing its punishment.[6] Blackstone

[5] "Buggery is . . . committed by carnall knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with bruite beast." Edward Coke, *The Third Part of the Institutes of the Laws of England* 58-59 (1641). Thus, the term included anal intercourse between two men. *See also Stafford's Case*, 12 Co. Rep. 36, 37, 77 Eng. Rep. 1318 (1607).

[6] Blackstone referred to the "infamous crime against nature" as "a crime not fit to be named; '*peccatum illud horribile, inter christianos non nominandum.*'" 4 *C*

described the offense itself as one of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, *Commentaries* *215. The common law of England, including its prohibition of sodomy, provided the basis for the original state sodomy laws.

In early America, the Bible served as the source for many criminal laws. Early colonial statutes often quoted the Biblical passages of Leviticus 18:22 ("Thou shalt not lie with mankind as he lieth with womankind; it is an abomination.") and 20:13 when establishing prohibitions against sodomy.[7] States not using the Leviticus language referred to prohibited conduct as the "crime against nature." The phrase "crime against nature," which appears in Blackstone's *Commentaries* and numerous state statutes, harkens back to the Apostle Paul's condemnation in Romans 1:26-27 of those who "change the natural use into that which is against nature,"[8] as other *amici* have noted. Histor9801 379tdu13.4613 T 1 Tf -n65.6-0.8

> morning by all the drummers and fifers in the Army never to return.[13]

James Wilson, both a signer of the Declaration and the Constitution and one of the original Justices of this Court, wrote a commentary on American law. James Wilson, 2 *The Works of James Wilson* (1967) (from lectures given in 1790 and 1791).

the history of sodomy statutes does not lend credence to the contention by several briefs that sodomy statutes were rarely, if ever, enforced following the passage of the Bill of Rights. ACLU Brief at 11, 12; Historians Brief at 7.

At the time of the passage of the Bill of Rights in 1791, ten of the states clearly banned same-sex sodomy. At that time, twelve of the thirteen original states prohibited sodomy either by statute or by their adoption of the English common law.[14] Two of these prohibitions do not explicitly define the crime, but the other ten states specifically prohibited same-sex sodomy. Five of the states banned same-sex sodomy by statute, and the other five prohibited same-sex sodomy because of their adoption of English common law[15] In 1776, for example, Maryland had adopted its Declaration

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[14] Georgia is the only state not to have clearly adopted English common law or a sodomy statute by 1791. However, Georgia did adopt such a statute later, showing that its Legislature did not believe the new Bill of Rights limited its authority to criminalize sodomy. Georgia certainly *punished* sodomy – in 1734, a man received 300 lashes for engaging in sodomy. 3 *Detailed Reports on the Salzburger Emigrants Who Settled in America . . . Edited by Samuel Urlsperger* 314 (William H. Brown, trans., Athens, GA: Univ. of Georgia Press, 1972). In 1743, another man received the death penalty. 2 *The Journal of William Stephens* 1743-1745 3 (E. Merton Coulter, ed., Athens, GA: Univ. of Georgia Press, 1958-59).

[15] Five states had statutory provisions against same-sex sodomy: Connecticut, *Public Statute Laws of the State of Connecticut*, 1808 tit. LXVI (66), ch. 1 § 2, at 295 (enacted Dec. 1, 1642); Massachusetts, *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, at 187 (enacted

of Rights which incorporated the English common law along with its sodomy prohibition.[16] Six years prior to the passage of the Bill of Rights, Massachusetts enacted a law that prohibited sodomy. The application of that law continued after the ratification of the Bill of Rights.[17] Earlier in the same year the Bill of Rights was ratified, New Hampshire revised its 1679 sodomy law to a same-sex sodomy statute which was still on the books in 1805.[18] Importantly, none of the states viewed the ratification of the Bill of Rights as limiting or removing the power of the legislatures to ban sodomy, including same-sex sodomy.

At the time of the Fourteenth Amendment's ratification, eight states specifically prohibited same-sex sodomy, including five of the original states which retained their earlier sodomy laws.[19] At

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*General Assembly*, ch. DC (600) § 7, at 93 (enacted Mar. 18, 1796); South Carolina, 2 *Statutes of South Carolina* at 465, 493 (enacted Dec. 12, 1712); Virginia, 9 *Hennings Statutes of Virginia* 1775-1778, ch. V (5) § VI, at 127 (enacted May 1776). Two states had general sodomy statutes: Rhode Island, *Public Laws of the State of Rhode Island and Providence Plantations,* 1798, § 8, p. 586; and Pennsylvania, *Statutes at Large of Pennsylvaof*

least two more state courts explicitly applied the same-sex definition of common law sodomy.[20] For example, New Hampshire's 1812 same-sex sodomy law remained in effect after 1868, with only the penalty altered.[21] And New Jersey's prohibition of same-sex sodomy was in force both before and after the ratification of the Fourteenth Amendment.[22] At least twenty-two of the remaining states outlawed sodomy, although the definition of the crime also included acts committed by members of the opposite sex.[23] Although sodomy was not universally

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clarified its law, *see* note 9, *infra*. Two states admitted after 1791 prohibited same-sex sodomy by adopting Virginia's law: Kentucky, 1 *Digest of Kentucky Statute Law* 36 § 8 (Littell & Swigert, eds., Frankfort, KY: Kendall & Russell, 1822) (incorporating English common law through Virginia law); 2 *Digest of the Statute Laws of Kentucky of a Public and Permanent Nature* 1265 § 4 (Frankfort: Albert G. Hodgen, 1834) (lowering the penalty, but retaining the criminal statute); West Virginia, *West Virginia Const.*, art. XI § 8 (1863) (incorporating English common law through Virginia law).

[20] "Sodomy is a connection between two human beings of the same-sex – the male – named from the prevalence of the sin in Sodom." *Ausman v. Veal*, 10 Ind. 355 (May Term 1858) (defining the term "sodomy" as used in a slander case); *Coburn v. Harvey*, 18 Wis. 147 (Jan. Term 1864) (Wisconsin Supreme Court construed the history of Wisconsin as having adopted the common law of England, thus incorporating its same-sex sodomy law).

[21] *Public Laws of New Hampshire* June 1812 5-6 § 6 (enacted June 19, 1812).

[22] *A Digest of t*

proscribed, all thirty-one states that prohibited sodomy necessarily included same-sex sodomy in their definitions. No state viewed the Fourteenth Amendment as limiting their authority to enact statutes prohibiting same-sex sodomy.

### C. The Records of Appellate Courts Do Not Support the Claim That the States Avoided Prosecuting or Condemning Same-Sex Sodomy.

The historical briefs[24] contend that shadows indicating the right of consensual sodomy can be discovered in the fact that enforcement efforts appear to be sparse on the record found in appellate decisions. Several historical and logical fallacies underlie this argument.

First, appellate case law is not the best source for accurate social science research, concerning either current law or more distant history. Generally, many convictions are not appealed.

Second, and more importantly, the *amici* making this argument, particularly the ACLU, concede that a great majority of the reported cases contain factual situations that they deem

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*Code,* Art

"unclear."[25] Reasoning from silence is always dangerous. This is especially true when, as here, there is a documented revulsion which led to a disinclination to discuss the details of these sexual crimes.

The ACLU reads these allegedly "unclear" cases through the skewed vision of twenty-first century Americans who are accustomed to hearing explicit and graphic depictions of sexual activity. Such was not the case in the early days of America, especially if the subject was same-sex sodomy. Cultural values in those times made people, even judges, highly reluctant to record the particular facts of a case involving consensual sodomy.

The lack of explicit factual detail does not indicate any lack of definitional clarity. Sodomy prosecutions were not unknown. In *Smith v. State*, 150 Ark. 265, 234 S.W. 32, 33 (1921), the court said in one sodomy prosecution, "The evidence is revolting in detail, and it could therefore serve no good purpose to set forth." Moreover, a nineteenth century state court noted, "Every person of ordinary intelligence understands what the crime against nature with a human being is."[26]

Thus, given the reluctance of the courts to provide details, it cannot be said with any certainty that prosecutions for "private sodomy" were out of the ordinary. In fact, some courts expressly indicated that privacy was not a factor in sexual crimes.[27] Others

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[25] Using the ACLU Brief's calculations, approximately 73 Texas cases and 79 cases from other states were "unclear." ACLU Brief at 14 ns. 17 & 18.

[26] *People v. Williams*, 59 Cal. 397, 398 (1881).

[27] *See State v. Gage*, 116 N.W. 596 (Iowa 1908) (ruling that sodomy could be established by witnesses or circumstantial evidence); *Sweenie v. Nebraska*, 80 N.W. 815 (Neb. 1899) (holding that

equated "sodomy," or the "crime against nature," with crimes where consent or privacy were irrelevant.[28]

Third, *amici's* assertion that societal approbation for consensual acts of same-sex sodomy can be found in the silence of the appellate records is simply not true. Insofar as appellate courts are the correct measure of societal acceptance of consensual sodomy, it is beyond reasonable dispute that such acts were severely condemned.

In the period immediately following the adoption of the Fourteenth Amendment, appellate court decisions continued to echo the historical revulsion for the act of sodomy and the understanding that consent was no defense. *See, e.g.*, *Commonwealth v. Poindexter*, 118 S.W. 943, 943 (Ky.App. 1909) ("The acts charged against the appellees are so disgusting that we refrain from copying the indictment in the opinion."); *Herring v. State*, 46 S.E. 876, 881-82 (Ga. 1904.) ("After much reflection, we are satisfied that, if the baser form of the abominable and disgusting crime against nature—*i.e.*, by the mouth—had prevailed are sa

Several appellate court decisions have established that consensual activity was clearly prosecutable, and that the existence of consent served only to differentiate evidence requirements. In the context of a case involving incest, the Texas Court of Appeals quotes an authority which is applied to consensual sodomy:

> But alike in adultery and, it is believed, in fornication and in incest, where the crime consists in one's unlawful carnal knowledge of another, it is immaterial whether the other participated under circumstances to incur guilt or not, --just as sodomy may be committed either with a responsible human being, or an irresponsible one, or a beast. [I]t must be considered that in sodomy cases, the question of consent of the party with whom the act is committed, is not a material one. The crime is complete in either case if the act be committed.

*Mercer v. State*, 17 Tex. Ct. App. 452, 464 (1885) (internal quotation marks omitted).

In *Medis v. State*, 11 S.W. 112 (Tex.Ct.App. 1889), the Texas appellate court discussed the issue of consent, clarifying that the testimony of a third party would be required if both parties consented to the act. In *People v. Hickey*, 41 P. 1027 (Cal. 1897) the California appellate court ruled that "it was not an element in the offense where the act is done or attempted with the consent of the other party." 41 P. at 1028. Consent provided no immunity in a sodomy prosecution.

In *Honselman v. People*, 48 N.E. 304 (Ill. 1897) the Illinois court ruled that uncorroborated evidence alone, given by a consenting partner, was sufficient to convict both parties of sodomy. Citing *Gray v. People*, 26 Ill. 344 (1861), concerning the difficulty of proof, the Illinois court stated, "The offense should be clearly proved, but it is one committed in secrecy and ordinarily

not capable of being otherwise proved than by the testimony of a participant, and the law is, that the uncorroborated testimony of an accomplice is legally sufficient to sustain a conviction." *Honselman*, 48 N.E. at 305. Unlike several other state courts, the Illinois court ruled that corroborating evidence submitted by a third party was not required for the conviction of private, consensual sodomy.

Finally, in *State v. Gage*, 116 N.W. 596 (Iowa 1908), the Iowa court ruled that either third-party testimony or circumstantial evidence of penetration would be sufficient for conviction in a sodomy case. Once again, we see an example of state courts applying sodomy statutes to private, consensual activity. Although some states had higher evidence requirements for conviction, all states cited above clearly held c

might arguably play some role.[30] From this rule, the Cato Brief illogically derives the principle that any action between consenting adults within the home was immune from prosecution merely because the testimony of one partner was insufficient evidence.

Even if this were an accurate statement, it would be improper to infer a quasi-constitutional rule of privacy from a mere rule of evidence that was intended to en

presumed to be pre-existing." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting). "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." T. Cooley, *Constitutional Limitations*, ch. X (4th ed. 1878), quoted in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring).

However, the Fourteenth Amendment, like the Thirteenth and Fifteenth, was intended to change the law. The core purpose of the Fourteenth Amendment was to overturn those state laws that failed to guarantee equal protection and due process to black Americans. This Court's "suspect classification" doctrine closely approximat12 0 12 a5

This Court has been reluctant to expand the "suspect classification" to include every group seeking the protection of this constitutional status. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (wealth is not a suspect class); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mental retardation is not a "quasi-suspect" classification). Lawyers lack no diligence in mining the phrases employed by this Court over the decades when endeavoring to argue that their clients should be included in this or another "protected" category. It is the words and phrases of the Framers of the Fourteenth Amendment that must be dispositive if the principle of republicanism—*we elect the rulers who make the law*—is to retain any meaning.

The essence of the Equal Protection Clause prohibits arbitrary treatment of people. *See, e.g., Central State University v. American Ass'n of University Professors*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring). Racial discrimination is presumptively arbitrary. But any arbitrary, irrational treatment of people is prohibited. The debate about classifications and levels of scrutiny at times obscures reality; it is only arbitrariness that can possibly explain the outcomes of this Court's Equal Protection jurisprudence. Distinctions based on time-honored standards of law should be accorded some deference, but in the end arbitrary classifications cannot stand.

Texas outlawed same-sex sodomy because it views the practice as immoral. Petitioners' Opening Brief at 37. As this brief fully documents, this position is absolutely consistent with the time-honored traditions of this nation. Unless this Court is prepared to say that the moral traditions of this nation and western civilization are categorically arbitrary, it must affirm the decision below.

## II.

## THIS COURT SHOULD FOLLOW THE ORIGINAL INTENT OF THE FRAMERS AND DECLINE PETITIONERS' INVITATION TO LEGISLATE FROM THE BENCH

### A. In a Republic, Laws Are Created Only by Legislatures.

Petitioners and their *amici* have urged this Court to radically rewrite the criminal laws of this nation. Sodomy once was considered a crime so unspeakable that courts declined to describe the behavior in any detail.[33] Now this very reluctance caused by moral revulsion is asserted as a basis for the anti-historical contention that the Framers of the Constitution intended to protect consensual sodomy.

The briefs filed by those who support the legalization of same-sex sodomy demonstrate that they have made significant progress toward their political goals. Far fewer states punish sodomy now than at earlier times in our nation's history.[34] However, unsatisfied with the pace of change, these political advocates ask this Court to finish the process in one swift judicial act. Their argument is cloaked in supposed historical analysis and constitutional

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[33] *See, e.g., Honselman v. Illinois*, 48 N.E. 304, 305 (Ill. 1897) ("The existence of such an offense is a disgrace to human nature. The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it."); *Cross v. State*, 17 Tex. Ct. App. 476, 1885 WL 6739 at *2 (1885) ("the crime of sodomy is too well known to be misunderstood, and too disgusting to be defined further than by merely naming it. I think it unnecessary, therefore, to lay the *carnaliter cognovit* in the indictment.").

[34] Cato Brief at 17, 26, Historians Brief at 29; ACLU Brief at 21-24.

reasoning. In reality, these submissions contain wishful thinking presented as accurate history, and political rhetoric thinly disguised as constitutional analysis.

Elected officials in Congress proposed the Fourteenth Amendment. Elected officials in the states ratified the Fourteenth Amendment. If the meaning of the language of the Fourteenth Amendment is twisted from that intended by those who drafted and ratified it, we will witness not an act of social progress but one of judicial tyranny.

John Locke wrote:

> Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority received from them; and therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts.[35]

Locke quotes Richard Hooker, *Of the Laws of Ecclesiastical Polity* (1593), to demonstrate the tyrannical nature of laws created by any other process.

> The lawful power of making laws to command whole politic societies of men, belonging so properly unto the same entire societies, that for any prince or potentate, of what kind soever

[35] John Locke, *Second Treatise on Civil Government* 74 (Prometheus Books 1986) (1690).

upon earth, to exercise the same of himself, and not by express commission immediately and personally received from God, or else by authority derived at the first from their consent, upon whose

states enshrines sodomy as a fundamental right guaranteed by the Bill of Rights and the Fourteenth Amendment. The fact that some states have changed or repealed their sodomy laws provides no support for the thinly veiled request for this Court to act as a "super-legislature."[37] Defining the criminality of certain forms of sexual conduct, such as same-sex sodomy, is a policy issue that has historically and properly been left to the state legislatures.

Prior to her appointment to this Court, Justice Ginsburg criticized the Supreme Court for imposing the broad holding of *Roe v. Wade*, 410 U.S. 113 (1973), on the states. She noted "in my judgment, *Roe* ventured too far in the change it ordered." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985). She further observed that the national trend "toward liberalization of abortion statutes" (also noted by this Court in *Roe*) quickly ended when the Court greatly restricted the states' authority to regulate abortion. *Id.* at 379-80; *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992) ("*Roe v. Wade* . . . invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators' court.
In 1973, when *Roe* was issued, abortion law was in a state of change across the nation.").

*Hardwick*, 478 U.S. 186 (1986), with that to *Roe*. Those disappointed with the *Bowers* decision have successfully petitioned many legislative bodies for change. Opponents of *Roe* march on this Court since there is no other realistic venue for relief.
This Court should stay out of this public policy dispute and leave it to the state legislatures to decide. [38]

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[38] Additionally, this Court should dismiss the cert petition as improvidently granted due to the deficient record. This case does not provide the facts for this Court to address the significant issues raised in the Questions Presented involving the constitutionality of private sex acts engaged in by consenting adults. The record in this case only shows that the Petitioners were adult males who engaged in "anal sodomy." Pet. App. 129a. & 141a.

Under the record of this case, the factual possibilities exist that one of Petitioners lacked capacity to consent, that the sodomy was forced, or that Petitioners engaged in commercial prostitution, or performed their act in public view or before an audience. Petitioners have not presented evidence refuting those factual alternatives. It is Petitioners' burden to prove that these facts do not exist in a case, in order to give this Court a clean vehicle to rule on the substantive legal questions. At best, all Petitioners can do is make a facial challenge to the Texas law,

## CONCLUSION

The Texas law prohibits conduct – sodomy between individuals of the same gender – as many other states and their courts have historically done. There is no fundamental right "deeply rooted in this Nation's history and traditions" to engage in same-sex sodomy. *Bowers*, 478 U.S. at 192-193. The Texas Court of Appeals decision should be affirmed.

Respectfully submitted,

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# APPENDIX 1

**Maryland**

Maryland had no sodomy statute in 1791, but the Declaration of Rights of Maryland, section 3, a portion of the Maryland State Constitution passed in 1776 said "that the inhabitants of Maryland are entitled to the common law of England. . . ." Sodomy was a crime under the common law (see section on North Carolina).

> Every person duly convicted of the crime of sodomy, shall be sentenced to undergo a similar confinement for a period not less than one year nor more than ten years, under the same conditions as are herein after directed.

*Maryland Laws*, ch.. CXXXVIII (138), art. IV, § 8.

**Massachusetts**

> That if any man shall lay with mankind as he layeth with a woman, or any man or woman shall have carnal copulation with any beast or brute creature, and be thereof duly convicted, the offender, in either of those cases, shall be adjudged guilty of felony, shall be sentenced to suffer the pains of death, and the beast shall be slain, and every part thereof burned. And be it further enacted by the authority aforesaid, that such order and form of process shall be had and used, in trial of such offenders, and such judgment given, and execution done, upon the offender, as in cases of murder.

*Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, p. 187, Act of March 3, 1785.

**New Hampshire**

**North Carolina**

When the Bill of Rights was ratified in 1791, North Carolina had adopted the English common law statute of Henry VIII which was the basis for the common law's crime of buggery (see section on South Carolina):

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm, for the detestable and abominable vice of Buggery committed with mankind or beast: It may therefore please the King's Highness, with the assent of his Lords spiritual and temporal, and the Commons of this present Parliament assembled . . . That the same offense be from henceforth adjudged Felony . . . And that the offenders being hereof convict . . . shall suffer such pains of death and losses and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as Felons be accustomed to doe [sic] according to the order of the Common-laws of this Realm. And that no person offending in any such offense, shall be admitted to his Clergy, And that Justices of Peace shall have power and authority, within the limits of their Commissions and Jurisdictions, to hear and determine the said offense, as they do use to doe [sic] in cases of other Felonies . . .

25 Henry VIII, ch. 6.

**Pennsylvania**

> That the pains and penalties hereinafter mentioned shall be inflicted upon the several offenders who shall from and after the passing of this act commit and be legally c

Laws of this Realm, for the detestable and abominable Vice of Buggery committed with the Mankind or Beast: (2) It may

> and made divers evil disposed Persons have been the more bold to commit the said most horrible and detestable Vice of Buggery aforesaid, to the high Displeasure of Almighty God.
>
> II. Be it enacted, That the said Statute before mentioned, made in the 25th Year of the said late King Henry the 8th, for the Punishment of the said detestable Vice of Buggery, and every Branch, Clause, Article and Sentence therein contained, shall from and after the 1st Day of June next coming be revived, and from thenceforce shall stand, remain, and be in full Force, Strength and Effect for every, in such Manner, Form and Condition, as the same Statue was at the Day of the Death of the said late King Henry the Eighth, the said Statute of Repeal made in the said 1st Year of the said late Queen Mary or any Words general or special therein contained, or any other Act or Acts, Thing or Things, to the contrary notwithstanding.

*Public Laws of the State of South Carolina,* 1790, p. 65.

**Virginia**

Before 1792, Virginia relied on the English common law which made sodomy a punishable crime (see *Hennings Statutes of Virginia,* vol. 9, 1775-1778, ch. V, § VI, p. 127). Virginia passed a specific sodomy ban in 1792:

> That if any do commit the detestable and abominable vice of buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without the benefit of clergy.

*Virginia Statutes at Large,* 1835, p. 113.

**State Sodomy Laws in 1868**

**Alabama**

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than two or more than ten years.

*Alabama Code,* 1852, § 3235, p. 583.

**Arkansas**

> Every person convicted of sodomy, or buggery, shall be imprisoned in said jail and penitentiary house, for a period not less than five, nor more than 21 years.

*Statutes of Arkansas,* 1858, ch. 51, Art. IV, § 5, p. 335 (passed in 1838).

**California**

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the State Prison for a term not less than five years, and which may extend to life.

*Statutes 1850*, ch. 99, § 48, p. 99.

**Florida**

> Whoever commits the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State penitentiary not

exceeding twenty years.

*Florida Laws 1868,* ch. 1637, Subchap. 8, § 17, p. 98.

**Georgia**

Sodomy and bestiality shall be punished by hard labour in the penitentiary, during the natural life or lives of person or persons convicted of these detestable crimes.

*Lamar's of Georgia,* 1810-1819, § 35, p. 571.

**Illinois**

The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and may extend to life.

*Revised Statutes of* 1844-45, ch. 30, Div. 5, § 50, p. 158.

**Kansas**

Every person who shall be convicted of the detestable and

**Kentucky**

> Whoever shall be convicted of the crime of sodomy or buggery with man or beast, he shall be confined in the penitentiary not less than two nor more than five years.

*Revised Statutes of 1852*, ch. 28, Art. IV, § 11, p. 381.

**Louisiana**

> Whoever shall be convicted of the detestable and abominable crime against nature, committed with mankind or beast, shall suffer imprisonment at hard labor for life.

*Revised Statutes of Louisi*

**Minnesota**

> Every person who shall commit sodomy, or the crime against nature, either with mankind or any beast, shall be punished by imprisonment in the territorial [sic] prison, not more than five years, nor less than one year.

*Minnesota Statutes* 1858, ch. 96, § 13, p. 729.

**Mississippi**

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term not more than ten years.

*Laws of 1857,* ch. 64, Art. 238, § 52, p. 611.

**Missouri**

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by imprisonment in the penitentiary not less than ten years.

*Revised Statutes 1855,* ch. 50, § 7, p. 624.

**Nevada**

*The Compiled Laws of Nevada in Force from 1861-1900*, § 4699, sec. 45, p. 915 (approved November 26, 1861).

**Oregon**

> If any person shall commit sodomy or the crime against nature either with mankind or beast, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year, nor more than five years.

*Oregon Organic and General Laws, 1845-64*, ch. 48, § 639, p. 560 (passed October 19, 1864).

**Tennessee**

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five nor more than fifteen years.

*Code of Tennessee,* 1858, § 4843, p. 868.

**Texas**

> If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.

*Penal Code of the State of Texas,* 1879, art. 342, p. 46 (passed on February 11, 1860).

**Vermont**

Vermont had no criminal sodomy statute until 1937, although Vermont courts recognized sodomy as a crime at common law, which could be punished. See *State* v. *La Forrest*, 71 Vt. 311, 45 A. 225 (1899). This is the text of the Vermont criminal sodomy statute passed in 1937:

> A person participating in the act of copulating the mouth of one person with the sexual organ of another shall be imprisoned in the state prison not less than one year nor more than five years.

*Vermont Statutes of 1947,* ch. 370, § 8480, p. 1593.

**West Virginia**

> If any person shall commit the crime of buggery, either with mankind or with any brute animal, he shall be confined in the penitentiary not less than one nor more than five years.

*Code of West Virginia*—1870, ch. 149, § 12, p. 694 (passed in 1868).

**Wisconsin**

> Every person who shall commit sodomy, or the crime against nature, either with mankind or beast, shall be punished by imprisonment in the state prison, not more than five years nor less than one year.

*Revised Statutes of Wisconsin,* 1858, ch. 170, § 15, p. 975.

**After 1868**

**Indiana**

Indiana did not have a criminal sodomy law at the time of the passage of the 14th Amendment, but passed the following law in 1881:

> Whoever commits the abominable and detestable crime against nature, by having carnal knowledge of a man or beast, or who, being a male, carnally knows any man or any woman through the anus, and whoever entices, allures, instigates, or aids any person under the age of twenty-one years to commit masturbation or self-pollution--is guilty of sodomy, and, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen years nor less than two years.

*Revised Statutes of Indiana*—1897, ch. 5, art. 5, § 2118, p. 338.

**Iowa**

Iowa did not have a criminal sodomy law at the time of passage of the 14th Amendment, but later passed the following law in 1892:

> Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years nor less than one year.

*Annotated Code of Iowa*, 1897, § 4937, p. 1941, passed 24 General Assembly, ch. 39.

**Ohio**