

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL M SMITH, ESQ	
4	On behalf of the Petitioners	3
5	CHARLES A. ROSENTHAL, JR.	
6	On behalf of Texas	26
7	REBUTTAL ARGUMENT OF	
8	PAUL M SMITH, ESQ	
9	On behalf of the Petitioners	49
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in No. 02-102, John Geddes Lawrence and Tyron Garner
v. Texas.

Mr. Smith.

ORAL ARGUMENT OF PAUL M. SMITH
ON BEHALF OF THE PETITIONERS

MR. SMITH: Mr. Chief Justice, and may it please
the Court.

The State of Texas in this case claims the right
to criminally punish any unmarried adult couple for
engaging in any form of consensual sexual intimacy that
the State happens to disapprove of.

It further claims that there's no constitutional
problem raised by a criminal statute that is directed not
just at conduct, but at a particular group of people, a
law that criminalizes forms of sexual intimacy only for
same-sex couples and not for anyone else in the State who
has -- has the right to make a free choice to engage in
the identical conduct.

Petitioners are two adults who were arrested in
a private home and criminally convicted simply because
they engaged in one of the forms of sexual intimacy that
is on the banned list in the State of Texas for same-sex

1 couples.

2 They bring two constitutional claims to the
3 Court today. First, among the fundamental rights that are
4 implicit in our concept of order of liberty, must be the
5 right of all adult couples, whether same-sex or not, to be
6 free from unwarranted State intrusion into their personal
7 decisions about their preferred forms of sexual
8 expression. Second, there's no legitimate and rational
9 justification under the Equal Protection Clause for a law
10 that regulates forms of sexual intimacy that are permitted
11 in the State only for same-sex couples, thereby creating a
12 kind of a second class citizenship to that group of
13 people.

14 QUESTION: On your substantive due process
15 submission, Mr. Smith, certainly, the kind of conduct
16 we're talking about here has been banned for a long time.
17 Now you point to a trend in the other direction, which
18 would be fine if you're talking about the Eighth
19 Amendment, but I think our case is like Glucksberg, say,
20 if you're talking about a right that is going to be
21 sustained, it has to have been recognized for a long time.
22 And that simply isn't so.

23 MR. SMITH: The Court's cases, Mr. Chief
24 Justice, say that history is a starting point, not the end
25 point of the analysis. And I think that it's important to

1 look at history as a whole and one of the errors that I
2 think that the Court made in Bowers v. Hardwick was only
3 looking at the issue in terms of homosexual sodomy and not
4 looking at the issue in general terms, which is the right
5 of everyone to decide for themselves about consensual
6 private sexual intimacy. If you look at the history as a
7 whole, you find a much more complicated picture. First of
8 all, you find that sodomy was regulated going back to the
9 founding for everyone and indeed the laws in the 19th
10 century didn't focus on same-sex couples, they focused on
11 particular --

12 QUESTION: Well, you're getting to your equal
13 protection argument now. Let's -- let's separate the two.
14 The first is, your -- your -- your fundamental right
15 argument, which has nothing to do with equal protection?

16 MR. SMITH: Well, Your Honor --

17 QUESTION: So the same-sex/other-sex aspect
18 doesn't come into it --

19 MR. SMITH: I think it does come into it,
20 because if you're going to suggest that the state of the
21 law on the books in the 19th century is the touchstone you
22 have to take into account that in the 19th century at
23 least on the face of the law married couples were
24 regulated in terms of their forms of sexual intimacy that
25 were created for them

1 QUESTION: It may well be, but so were same-sex
2 couples.

3 MR. SMITH: Indeed, they all were, Your Honor.

4 QUESTION: So all same-sex couples could not --
5 could not perform this act lawfully. What more do you
6 need than that? It was prohibited. When you go beyond
7 that and say, oh, but it was also prohibited for -- for
8 other sex couples, you're getting into an equal protection
9 argument, it seems to me, not a fundamental right
10 argument.

11 MR. SMITH: I guess I'm suggesting Mr. --
12 Justice Scalia, that it's been conceded here by this
13 State, it was conceded by the State of Georgia 17 years
14 ago, that married couples can't be regulated as a matter
15 of substantive due process in their personal sexual
16 expression in the home. That means that the state of the
17 law on the books in the 19th century can't be the deciding
18 factor.

19 QUESTION: They conceded it. I haven't conceded
20 it.

21 MR. SMITH: Your Honor. That may well be true.
22 I was -- I was working with the assumption that there may
23 be Justices who -- of the view that married couples do
24 have such a right and I am suggesting that the real issue
25 here is whether that fundamental right extends outside the

1 marital context into other unmarried couples who form
2 bonds and have -- and -- for whom sexual intimacy plays an
3 equally important role in their lives.

4 QUESTION: Were you talking specifically about
5 this Eisenstadt against Baird where there was an unmarried
6 couple -- while there was an unmarried person and the
7 conduct in question would have been perhaps in the 19th
8 century, early 19th century, criminal? Are you talking
9 about fornication?

10 MR. SMITH: Yes, Justice Ginsburg. I think the
11 Court in -- has moved from Griswold to Eisenstadt -- has
12 moved in the contraception area outside of the marital
13 context to the unmarried context, certainly the right --
14 the qualified right to abortion applies to unmarried
15 people, as well as married people. And I think that the
16 Court in -- in looking at this issue of the scope of the
17 fundamental right to make choices about sexual intimacy
18 ought to take into account not just the state of law on
19 the books in the 19th century but a couple of other
20 factors, one the change in enforcement in the last 50
21 years because the Court's fundamental rights cases all do
22 look at current laws, as well as 19th century law and also
23 even in the 19th century, the fact that there's no record
24 of active enforcement of these laws against conduct -- of
25 adults consensual occurring in the private setting and

1 that's true for married couples, it's true for different-
2 sex couples who weren't married, it's true for same-sex
3 couples. The enforcement of the sodomy laws of this
4 country going back to the founding involves coercion, it
5 involves children. It involves public activity. It
6 doesn't involve the kind of conduct that's at issue here.

7 So you really have a tradition of respect for
8 the privacy of couples in their -- in their home, going
9 back to the founding and I think then what began to happen
10 in 1960 was a recognition that we should take that
11 tradition and -- and turn it into positive law on the
12 books.

13 And so you now had three quarters of the States
14 who no longer regulate this conduct for anyone based on a
15 recognition that it's not consistent with our basic
16 American values about the relationship between the
17 individual and the State.

18 QUESTION: Well, it depends on what you mean by
19 our basic American values, to revert to what the Chief
20 Justice was suggesting earlier. Really what's at issue in
21 this case is whether we're going to adhere to -- in the
22 first part of the case, not the equal protection aspect.
23 It's whether we're going to adhere to what -- what we said
24 in -- in Glucksberg, mainly that before we find a
25 substantive due process right, a fundamental liberty, we

1 have to assure ourselves that that liberty was objectively
2 deeply rooted in this Nation's history and tradition.

3 That's what we said in Glucksberg and we've said
4 it in other cases. Or are we going to depart from that
5 and go to the approach that we've adopted with regard to
6 the Eighth Amendment, which is it evolves and changes in
7 -- in social values will justify a new perception of what
8 is called unusual punishment.

9 Now, why should we -- why should we slip into
10 the second mode? I'm -- I mean, suppose all the States
11 had laws against flagpole sitting at one time, you know,
12 there was a time when it was a popular thing and probably
13 annoyed a lot of communities, and then almost all of them
14 repealed those laws.

15 Does that make flagpole sitting a fundamental
16 right?

17 MR. SMITH: No, Your Honor, but the Court's
18 decisions don't look just at history, they look at the --
19 at the function that a particular claimed freedom plays in
20 the lives of real people. That's why contraception became
21 an issue. That's why abortion became an issue.

22 QUESTION: I don't know what you mean by the
23 function it plays in the lives of real people.

24 MR. SMITH: The Court has said that --

25 QUESTION: Any law stops people from doing what

1 they really want to do.

2 MR. SMITH: The Court has said that it's going
3 to use reasoned judgment to identify a realm of personal
4 liberty that involves matters of central and core to how a
5 person defines their own lives, and relates to key other
6 people.

7 It's about moral upbringing of children in the
8 home. It's about procreation or nonprocreation in your
9 sexual relations with your mate. It's about basic
10 questions of what kind of a family you're going to live
11 with and other intimate associations.

12 QUESTION: Well, you say it's about procreation
13 or nonprocreation, but none of the cases that you have
14 talked about involved nonprocreation, did they?

15 MR. SMITH: They certainly involved the right to
16 decide to engage in sexual relations with -- while
17 preventing procreation, that's what -- that's what
18 Griswold and Eisenstadt and Carey all say you have a right
19 to do. That there's a right to decide whether to bear and
20 beget children and then that right resides with unmarried
21 people as much as it resides with married people.

22 And I submit to you that it's illogical,
23 fundamentally illogical to say that an unmarried couple
24 has a right free of State intrusion to decide whether or
25 not to have procreative sex or nonprocreative sex, but

1 doesn't have the right to be free from State intrusion --
2 free from a law that says you can't have any sexual
3 intimacy at all. There's a -- there's a jagged piece
4 missing from the edifice of this Court's substantive
5 fundamental rights jurisprudence.

6 QUESTION: It doesn't say you can't have -- you
7 can't have any sexual intimacy. It says you cannot have
8 sexual intimacy with a person of the same sex.

9 MR. SMITH: This particular law does that, yes,
10 Your Honor, but certainly our -- our submission is that
11 fornication laws and -- and laws involving sodomy
12 regulation more broadly would be equally unconstitutional,
13 because they involve --

14 QUESTION: But your position, as I understand
15 it, is even if you take the narrowest view of Glucksberg
16 and even if you say there's got to be a positive
17 historical sanction, that in fact there is no historical
18 -- no substantial historical evidence to the contrary
19 because, A, the -- the sodomy laws were not enforced
20 against consensual activity historically and B, they were
21 not aimed at homosexual as opposed to sodomy in general?

22 MR. SMITH: Right.

23 QUESTION: Is that -- your historical point, you
24 say even if I accept your argument, I should win?

25 MR. SMITH: Yes, Your Honor. I think first of

1 all that the positive law, the law on the books proves too
2 much because it intruded right into the marital bedroom
3 and that the record of enforcement which may be more
4 informative actually supports us rather than supporting
5 the notion that this is something that can be regulated.

6 QUESTION: What do you mean by the record of
7 enforcement, that there were -- that what happened in this
8 case was an accidental intrusion of the police? They
9 didn't come into the bedroom looking for people conducting
10 illicit sexual relations? They were there for another
11 reason and happened to discover these -- these men in that
12 conduct.

13 What do you mean by lack of enforcement? The
14 police have not gone around knocking on bedroom doors to
15 see if anyone -- I mean -- this is not the kind of a crime
16 that the police go around looking for, but do you have any
17 evidence to show that when they -- when they found it
18 being committed, they turned a blind eye to it and did not
19 prosecute it?

20 MR. SMITH: The evidence we have is the -- is
21 the absence of reported cases discussing arrests for that
22 kind of conduct.

23 QUESTION: Well, that's because it's -- it's an
24 act committed in private, and -- and the police respect
25 the privacy of -- of one's home, of one's bedroom, and so

1 they don't investigate and find it.

2 But it seems to me what you would need is
3 evidence that when the police discovered this matter, they
4 said, oh, well, these are not laws that we enforce. I
5 don't see any evidence of that sort.

6 MR. SMITH: Certainly it seems to us there's a
7 significance to the fact that it has never been treated
8 as, for example, drug use in the home has been treated.
9 And people do -- the police obviously do actively seek to
10 infiltrate homes to find that kind of activity, it's been
11 treated in a categorically different way. But perhaps --

12 QUESTION: To what extent can you characterize
13 it? I mean, the ACLU brief has a lot of evidence along
14 this line. I -- and it seemed to me they want to
15 characterize it as saying that the history has gone
16 exactly the opposite direction than what's been suggested.
17 But if you go back to colonial times really, the laws not
18 only were different but look at the prosecutions. And
19 they did prosecute people for sex crimes. But they didn't
20 prosecute people for same-sex crimes. And then if you go
21 across the history, it's only recently that people have
22 been prosecuted for same-sex crimes. Is that a fair
23 characterization? What is the real record?

24 MR. SMITH: The argument about 19th century
25 enforcement is that they didn't prosecute anyone for

1 private and consensual crimes involving adults, that they
2 worried about children, they worried about public
3 activity, they worried about coercion, but that they
4 didn't worry about same-sex or different-sex sodomy. Now
5 as to the equal protection point which I think I should
6 get to in my remaining time. This is a statute which in
7 addition to intruding into that area of important
8 fundamental protections, limits its focus just to one
9 small minority of the people of the State of Texas. It
10 says that these specified forms of sexual intimacy called
11 deviate sexual intercourse are illegal only for same-sex
12 couples and not for anyone else in the State of Texas.

13 QUESTION: Well, what about a statute that
14 covered both?

15 MR. SMITH: Well, I think that would be
16 unconstitutional under my first point, Your Honor.

17 QUESTION: Right.

18 MR. SMITH: I think there is a multiple --
19 multiply unconstitutional statute, because it does the
20 second thing as well, it says that --

21 QUESTION: Well, if the statute covered both,
22 would there be an equal protection argument?

23 MR. SMITH: If there was a record of enforcement
24 almost exclusively as to same-sex couples, I think there
25 would be potential constitutional problems there, but the

1 statutory language itself would not involve an equal
2 protection problem of the same sort that we're dealing
3 with here.

4 QUESTION: Mr. Smith, aren't there a lot of
5 statutes like that? Aren't there statutes in many States
6 about adultery that don't cover sexual relations of one of
7 the married couple with someone else of the same sex? Are
8 they unconstitutional because of denial of equal
9 protection?

10 MR. SMITH: I don't know whether statutes
11 actually are written that way, Your Honor. The point I
12 would make is that when a statute --

13 QUESTION: What about rape laws? There are --
14 there are rape laws that -- that only apply to -- to
15 male/female rape.

16 MR. SMITH: That may be as well. I think --

17 QUESTION: You think that they're
18 unconstitutional?

19 MR. SMITH: I didn't suggest that they're
20 unconstitutional. My point is that when a statute is
21 limited to one particular group of people, particularly a
22 minority of people in the State, that that limitation
23 itself has to be justified under equal protection, that
24 that's a classification of people, not merely a definition
25 of conduct. And that if the -- if the justification of

1 the line that was drawn here is -- is insufficient as a
2 matter of mere rationale basis analysis. Because --

3 QUESTION: I don't understand that. Suppose the
4 State has a rape law that -- that, you know, that really
5 requires the penetration of the female sex organ by --
6 which is the classic common-law definition of rape, and it
7 has no -- no law of -- about homosexual rape. You think
8 that that law would be unconstitutional?

9 MR. SMITH: I think it would have to be
10 justified by the State. They may well come in with
11 evidence that this is not a problem that needs to be
12 addressed or that the victims are more able to protect
13 themselves, they may have -- they may have --

14 QUESTION: One step at a time? This is more
15 common? This is -- or this is something that we find
16 more -- more -- more -- more odious?

17 MR. SMITH: Well, the one thing that I submit,
18 the Court, the State should not be able to come in to say
19 is we are going to permit ourselves the majority of people
20 in our society full -- full and free rein to make these
21 decisions for ourselves but there's one minority of people
22 don't get that decision and the only reason we're going to
23 give you is we want it that way. We want them to be
24 unequal in their choices and their freedoms, because we
25 think we should have the right to commit adultery, to

1 commit fornication, to commit sodomy and the State should
2 have no basis for intruding into our lives but we don't
3 want those people over there to have the same right.

4 QUESTION: I mean you you can put it that way,
5 but society always -- in a lot of its laws makes these
6 moral judgments, you can make it sound very puritanical,
7 the -- you know, the laws -- the laws against bigamy, I
8 mean, who are you to tell me that I can't have more than
9 one wife? You blue-nose bigot. Sure. You can make it
10 sound that way, but these are laws dealing with public
11 morality. They've always been on the book, nobody has
12 ever told them they're unconstitutional simply because
13 there are moral perceptions behind them. Why is this
14 different from bigamy?

15 MR. SMITH: First of all, the first law that's
16 appeared on the books in the States of this country that
17 singles out only same sex sodomy appeared in the '60s and
18 the '70s and it did not -- and it does not go way back,
19 this kind of discrimination. Now, bigamy involves
20 protection of an institution that the State creates for
21 its own purposes and there are all sorts of potential
22 justifications about the need to protect the institution
23 of marriage that are different in kind from the
24 justifications that could be offered here involving merely
25 a criminal statute that says we're going to regulate these

1 peoples behaviors, we include a criminal law which is
2 where the most heightened form of -- of people protection
3 analysis ought to apply. This case is very much like
4 McLaughlin, Your Honor, where you had a statute that said
5 we're going to give an specially heightened penalty to
6 cohabitation, but only when it involves a white person
7 with a black person. That interracial cohabitation is
8 different, and the State there made the argument we're
9 merely regulating a particular form of conduct, and that's
10 a different form of conduct than -- than intro racial
11 cohabitation. And this Court very clearly said no.
12 You're classifying people. And that classification has to
13 be justified.

14 And this Court at many times said a mere
15 disapproval of one group of people, whether it be the
16 hippie communes in Moreno or the mentally retarded in
17 Cleburne, or indeed gay people.

18 QUESTION: But all -- almost all laws are based
19 on disapproval of either some people or some sort of
20 conduct. That's why people legislate.

21 MR. SMITH: And what this Court does under the
22 equal protection clause is -- is -- standard as a bull
23 work against arbitrary government when the -- when there
24 is no rational justification for the line that is drawn.

25 QUESTION: Well, do you -- do you -- in order to

1 win under an equal protection argument, do you have to
2 apply some sort of heightened scrutiny?

3 MR. SMITH: We certainly do not think we do,
4 Your Honor. We think this fails rational basis scrutiny,
5 just as the law did in Romer, in Cleburne, in Moreno, in
6 Eisenstadt, all of those laws were thrown out under
7 rational basis scrutiny, because the State basically
8 didn't come up with anything other than we want it that
9 way. We want these people to be excluded. We'd had
10 distaste for them. We disapprove of them. It's mere
11 disapproval, or hostility, however historically based, is
12 not sufficient. And certainly even applying the rational
13 basis --

14 QUESTION: We said the opposite in Bowers,
15 didn't we? Overrule bounds essentially on that point?

16 MR. SMITH: Well, certainly Bowers is not an
17 equal protection case and it didn't involve this kind of
18 discrimination.

19 QUESTION: The equal protection and on to the --

20 MR. SMITH: No I was still talking about the
21 level of scrutiny under equal protection, Your Honor.

22 QUESTION: Maybe you ought to hold up one hand
23 so I'll know which?

24 MR. SMITH: It's hard when you have these two
25 points to shift back and forth.

1 QUESTION: I understand. We had the same
2 problem in the last case --

3 MR. SMITH: Three weeks ago, yes, Your Honor.

4 The -- but the Court in applying even the
5 rational basis standard has not been insensitive to the
6 reality of what the world is like, and to the fact that
7 some groups of -- some classifications tend to be
8 involving minorities that have had histories of
9 discrimination against them and that the overall effect of
10 some line-drawing can be very harmful. In Romer itself,
11 the Court looked at the actual effects of the -- of the
12 amendment in the Constitution and all of the many ways in
13 which it caused harm. Here you have a statute that while
14 it -- while it purports to just to regulate sexual
15 behavior, has all sorts of collateral effects on people.
16 People in the States who still regulate sodomy everyday
17 they're denied visitation to their own children, they're
18 denied custody of children, they're denied public
19 employment. They're denied private employment, because
20 they're labeled as criminals merely because they've been
21 identified as homosexuals. And that we submit --

22 QUESTION: If you prevail, Mr. Smith, and this
23 law is struck down, do you think that would also mean that
24 a State could not prefer heterosexuals to homosexuals to
25 teach kindergarten?

1 MR. SMITH: I think the issue of -- of
2 preference in the educational context would involve very
3 different criteria, Your Honor, very different
4 considerations, the State would have to come in with some
5 sort of a justification.

6 QUESTION: A justification is the same that's
7 alluded to here, disapproval of homosexuality.

8 MR. SMITH: Well, I think it would be highly --
9 highly problematic, such a -- such a justification.

10 QUESTION: Yes, it would?

11 MR. SMITH: If that were the only justification
12 that could be offered, there was not some showing that
13 there would be any more concrete harm to the children in
14 the school.

15 QUESTION: Only that the children might -- might
16 be induced to -- to follow the path of homosexuality. And
17 that would not be -- that would the not be enough?

18 MR. SMITH: Well, I -- I think the State has to
19 have a greater justification for its discrimination than
20 we prefer pushing people towards heterosexuality. That
21 amounts to the same thing as disapproval of people's
22 choices in this area and there has to be a more -- more
23 reasons and justifiable distinction than simply we prefer
24 this group of people, the majority, instead of this group
25 of people, the minority.

1 Justice Jackson in the railway express case said
2 very eloquently that the equal protection clause is an
3 important bulwark against arbitrary government because
4 it's there to make sure that legislators don't avoid
5 political retribution by imposing onerous burdens only on
6 one minority, but that in fact the majority will live by
7 the same rules as purports to impose on everybody else.

8 QUESTION: Mr. Smith before you continue down to
9 the equal protection line. Your first argument was the
10 right of personal privacy in one's most intimate sexual
11 relations, you were asked and you didn't get a chance to
12 answer because you went back on your equal protection
13 track, you are asking the Court to overrule Bowers against
14 Hardwick. I thought that was very --

15 MR. SMITH: Yes, Your Honor.

16 We're asking you to overrule it and we think
17 that the right of -- of the fundamental right of unmarried
18 people to make these choices about private adult
19 consensual intimacy applies for different sex couples as
20 well as same sex couples and that Bowers was wrong for
21 essentially three reasons, first it posed the question too
22 narrowly by focusing just on homosexual sodomy, which is
23 just one of the moral choices that couples ought to
24 have -- that people ought to have available to them

25 And second in its analysis of history, which I

1 think I explained already and third, and perhaps most
2 importantly, in the assumptions that the Court made in
3 1986 about the realities of gay lives and gay
4 relationships, the Court simply asserted in the Bowers
5 case that there's no showing that has been demonstrated
6 between the opportunity to engage in this conduct and
7 family.

8 And certainly while it may not have been shown
9 in that case or even apparent to the Court in 1986, I
10 submit it has to be apparent to the Court now that there
11 are gay families that family relationships are
12 established, that there are hundreds of thousands of
13 people registered in the Census in the 2000 census who
14 have formed gay families, gay partnerships, many of them
15 raising children and that for those people, the
16 opportunity to engage in sexual expression as they will in
17 the privacy of their own homes performs much the same
18 function that it does in the marital context, that you
19 can't protect one without the other, that it doesn't make
20 sense to draw a line there and that you should protect it
21 for everyone. That this is a fundamental matter of
22 American values.

23 So those are the three reasons we ask you to
24 overrule Bowers v. Hardwick as to the fundamental rights
25 aspect of the case and that we think that that is an area

1 where the Court should go -- should go back and reconsider
2 itself.

3 The Court has now left open for nearly 30 years
4 the question of whether anybody outside has a right -- has
5 a privacy right to engage in consensual sexual intimacy in
6 the privacy of their home.

7 And I submit to you, you know, while the Court
8 has left that unanswered, the American people have moved
9 on to the point where that right is taken for granted for
10 everyone.

11 Most Americans would be shocked to find out that
12 their decision to engage in sexual intimacy with another
13 person in their own home might lead to a knock on the door
14 as occurred here and a criminal prosecution.

15 And that -- that reality is something that the
16 Court needs to take into account and certainly in so
17 doing, it shouldn't -- in constructing its fundamental
18 rights edifice draw distinctions between gay couples and
19 other couples.

20 QUESTION: You probably say the same about
21 adultery, you think adultery laws are unconstitutional?

22 MR. SMITH: I think that the state has --

23 QUESTION: I mean think people probably feel the
24 same way about that, you know. It may not be a nice thing
25 to do, but I certainly don't expect a knock on the door

1 and go to jail for it.

2 MR. SMITH: Your Honor, adultery is a very
3 different case. It involves the State interests in
4 protecting the marital contract which people voluntarily
5 take on. And -- and so in assessing.

6 QUESTION: Why is the marital contract important
7 to the State? Because it's the source of -- of the next
8 generation, right?

9 MR. SMITH: Sure, the State is --

10 QUESTION: And you think that there's not some
11 of the same thinking behind the conscious choice of the
12 State to favor heterosexual and marital sex over
13 homosexual sex?

14 MR. SMITH: Well, I can understand a law which
15 says we're going to attempt to channel heterosexuals
16 towards marriage by making them -- making it illegal for
17 them to have sex without marriage. I can't understand
18 that law under -- under that kind of rational which only
19 regulates same sex couples and says you can't have sex but
20 everyone else has a right to do that.

21 As for adultery and all of the other parade of
22 horrors which people have raised in their briefs, it
23 seems to me you've got to look at the individual interests
24 and the State interests and their dramatically different
25 in all of those cases incest, prostitution, all of

1 these -- bestiality, all of these things either there's
2 very little individual interests or there's very
3 heightened State interest or both, in all of those cases,
4 so the idea that by recognizing the right of all adult
5 couples to make choices like this in their own home the
6 Court is going to open up a whole can of worms, I submit,
7 is correct.

8 If I could reserve the balance of my time, Your
9 Honor.

10 CHIEF JUSTICE REHNQUIST: Very well, Mr. Smith.

11 Mr. Rosenthal, we'll hear from you.

12 ORAL ARGUMENT OF CHARLES A. ROSENTHAL, JR.

13 ON BEHALF OF TEXAS

14 MR. ROSENTHAL: Give me just a moment. Mr. Chief
15 Justice, and may it please the Court.

16 The State humbly submits that enforcement of
17 Texas Penal Code Statute 21.06 does not violate the 14th
18 Amendment of the Constitution because this Court has never
19 recognized a fundamental right to engage in extramarital
20 sexual conduct and because there is a rational basis for
21 the statute sufficient to withstand equal protection
22 scrutiny.

23 I'd like to begin with a brief discussion of
24 substantive due process. From a practitioner's
25 standpoint, it appears that the jurisprudence of this

1 Court appears to resolve the means by which the Court
2 entertains a claim of novel protected liberty interests.

3 Since the Constitution does not expressly
4 address the issue of privacy or of sexual conduct, we look
5 to the Court's precedents and to the history of our
6 people.

7 If a historical, traditional analysis applies,
8 it then serves as objective guideposts to guide this
9 Court, as long as those ideals and laws do not infringe on
10 fundamental rights.

11 The Court has maintained that designation of a
12 liberty interest is done -- not done with impunity. But
13 only those interests that appear to be carefully
14 identified asserted rights should be drawn and should be
15 considered as liberty interests. The record in this case
16 does not particularly show which rights the petitioners
17 are asking to uphold.

18 QUESTION: I -- I don't understand what you mean
19 by that. Aren't we clear what right they're seeking to
20 uphold?

21 MR. ROSENTHAL: No, sir, they're -- they're
22 asking for the right of homosexuals to engage in
23 homosexual conduct.

24 QUESTION: Right.

25 MR. ROSENTHAL: But there's nothing in the

1 record to indicate that these people are homosexuals.
2 They're not homosexuals by definition if they commit one
3 act. It's our position that a heterosexual person can
4 also violate this code if they commit an act of deviate
5 sexual intercourse with another of the same sex.

6 QUESTION: Why aren't -- why aren't they seeking
7 to vindicate the right of either homosexuals or
8 heterosexuals to commit homosexual act? What difference
9 does that make?

10 MR. ROSENTHAL: The difference it makes is as
11 the -- as the record is set out, it does not really define
12 the issues such that the Court can actually give the
13 petitioners a -- a specific form of relief.

14 QUESTION: But the -- the -- the statute, Texas
15 has already decided that for us. It has called this
16 homosexual conduct, so whether it's a heterosexual person
17 or a homosexual person, the crime is engaging in
18 homosexual conduct.

19 MR. ROSENTHAL: That's correct.

20 QUESTION: You don't even have to get to the --
21 as I understand it, you don't even have to get to the
22 characterization of homosexual. The statute clearly
23 defines certain acts committed by or together with
24 individuals of the same sex and that's your class, isn't
25 it?

1 MR. ROSENTHAL: Yes, it is.

2 QUESTION: What more do we need?

3 MR. ROSENTHAL: We're -- the class actually is

4 people who violate the act, not classes of individuals

5 based upon sexual orientation.

6 QUESTION: Well, I -- I can see that your point

7 may have some relevance on the equal protection side of

8 the equation, some relevance, I don't think it may be

9 controlling. It -- it doesn't seem to meet the arguments

10 that's made under the substantive liberty part of the

11 argument with reference to Bowers.

12 MR. ROSENTHAL: I beg your pardon?

13 QUESTION: It doesn't meet the petitioners'

14 argument with respect to Bowers versus Hardwick, which

15 they say should be overruled.

16 MR. ROSENTHAL: Well, of course we -- we believe

17 that Bowers versus Hardwick is -- is good law. It's

18 substantial law and that this Court should not overrule

19 Bowers --

20 QUESTION: But that question is certainly

21 clearly before us. I mean this is your statute. You

22 convicted the people for these acts and you have to be --

23 you have to defend it.

24 MR. ROSENTHAL: Yes, sir. And it's our position

25 that Bowers versus Hardwick is still good law, that

1 there's nothing that's changed about the fundamental
2 liberties or the -- or the history or traditions of our
3 country that should make the analysis in Bowers incorrect
4 any longer.

5 The petitioner also claims that the mores of our
6 nation have changed to the point where physical homosexual
7 intimacy is now part of the fabric of American values.
8 And it's our position this cannot be correct. Even if you
9 infer that various States acting through their legislative
10 process have repealed sodomy laws, there is no protected
11 right to engage in extrasexual -- extramarital sexual
12 relations, again, that can trace their roots to history or
13 the traditions of this nation.

14 QUESTION: Their basic argument, I think --

15 QUESTION: I -- I'm sorry. I didn't get that
16 argument. I thought you were going to say -- you were
17 responding to the argument that the morals haven't
18 changed, or that the morals have changed so that
19 homosexuality is now approved. And you respond to that by
20 saying that there's no tradition? I mean, that's --
21 that's a totally different argument from tradition. I
22 mean, the -- the argument is tradition doesn't matter.

23 MR. ROSENTHAL: Well, history -- tradition does
24 not matter in terms of whether or not it -- it can be a
25 protected liberty interest.

1 QUESTION: Why -- why do you think that the
2 public perception of -- of homosexual acts has -- has not
3 changed? Do you think it hasn't?

4 MR. ROSENTHAL: The public perception of it?

5 QUESTION: Yes, yes. Do you think there's
6 public approval of it?

7 MR. ROSENTHAL: Of homosexuals, but not of
8 homosexuality activity.

9 QUESTION: What do you base that on?

10 MR. ROSENTHAL: I beg your pardon?

11 QUESTION: What do you base that on?

12 MR. ROSENTHAL: Well, even --

13 QUESTION: I mean I think there ought to be some
14 evidence which -- which you can bring forward?

15 MR. ROSENTHAL: Sure.

16 QUESTION: Like perhaps the failure of the
17 Federal Congress to add the sexual preference to the list
18 of protected statuses against which private individuals
19 are not permitted to discriminate, that addition has been
20 sought several times and it's been rejected by the Federal
21 Congress, hasn't it?

22 MR. ROSENTHAL: Yes, sir, and -- and in
23 addition, what I was trying to say by the fact that
24 various States have changed their position on sodomy,
25 they've done it through the legislative process. And

1 that's where we believe this belongs, is in the State
2 House of Texas, not this Court.

3 QUESTION: Yes, but I thought you were
4 responding to the argument that the public perception
5 hasn't changed. That there still is -- is a public
6 disapproval of homosexual acts.

7 And you can't establish that by saying that the
8 States have repealed their homosexual laws.

9 MR. ROSENTHAL: Well, I think it goes back to
10 whether the -- where -- whether people in Texas and people
11 in the other States that had this law on their books
12 actually accepted through their representative government.
13 I think it comes down to the -- the actual people who --
14 who determine the consensus and mores of the State or
15 the -- or the elected legislators.

16 QUESTION: Might there be a difference between
17 the people's willingness to prosecute something criminally
18 and the people's embracing of that as a fundamental right?

19 MR. ROSENTHAL: Well, certainly. And just
20 because someone has decriminalized sodomy doesn't mean
21 that they embraced that practice as something that ought
22 to be taught in the schools as was mentioned before.

23 QUESTION: But the argument of -- of Bowers, to
24 overrule Bowers is not directly related to sodomy. It's
25 related, but not directly. It's that people in their own

1 bedrooms, which have their right to do basically what they
2 want, it's not hurting other people. And they -- the
3 other side -- says Bowers understated the importance of
4 that. It got the history wrong. It didn't understand the
5 relationship of the sodomy to families and in addition,
6 Bowers has proved to be harmful to thousands and thousands
7 and thousands of people, if not because they're going to
8 be prosecuted, because they fear it -- they might be,
9 which makes it a possible instrument of repression in the
10 hands of the prosecutors. Now, that's the kind of
11 argument that they're making. Harmful in consequence,
12 wrong in theory, understating the constitutional value.

13 MR. ROSENTHAL: All right --

14 QUESTION: All right, now how do you respond to
15 that?

16 MR. ROSENTHAL: Okay. First of all, let me --
17 let me correct something that -- that's very minor at this
18 point, but the allegation was made in petitioners'
19 argument that people can -- convicted of homosexual
20 conduct are banned from jobs and housing and all -- and
21 all that kind of thing. In Texas, homosexual conduct is a
22 class C misdemeanor. That is, it is the lowest
23 misdemeanor -- or the lowest prohibition that Texas has.

24 QUESTION: That I didn't bring in in my
25 question.

1 MR. ROSENTHAL: Yes, sir.

2 QUESTION: My question was, getting those sort
3 of three or four basic points, I would like to hear
4 your -- your straight answer to those points --

5 [Laughter.]

6 QUESTION: -- because on their face, they're --
7 I mean, I'm not -- not a criticism, I mean, directly
8 responding, directly responding to the -- to the -- to the
9 question.

10 MR. ROSENTHAL: Well, it's our position that the
11 line should be drawn at the marital bedroom, through which
12 we can -- through the law enforcement or anyone else
13 cannot pass unless something illegal happens inside that
14 bedroom.

15 QUESTION: Well, if this is drawing the line at
16 the bedroom door, this case is inside the bedroom, not
17 outside. That's the statute makes criminal, to my
18 understanding, of it what takes place within the bedroom
19 through consent. Am I right about that?

20 MR. ROSENTHAL: You're right about that, but --

21 QUESTION: And why isn't that something that the
22 State has no business getting involved in --

23 MR. ROSENTHAL: First of all, let me say --

24 QUESTION: -- as long as it doesn't hurt
25 anybody?

1 MR. ROSENTHAL: First of all, let me say that
2 consent may be alleged in this case, but consent is not
3 proven in the record in this case. There's -- there is
4 nothing in the record that shows that people are capable
5 of giving consent or that consent was, in fact, given, but
6 even given that, I -- I think that the -- that this Court
7 having determined that there are certain kinds of conduct
8 that it will accept and certain kinds of conduct it will
9 not accept may draw the line at the bedroom door of the
10 heterosexual married couple because of the interest that
11 this Court has that this Nation has and certainly that the
12 State of Texas has for the preservation of marriage,
13 families and the procreation of children.

14 QUESTION: Does Texas permit same-sex
15 adoptions -- two women or two men to adopt a child or to
16 be foster parents?

17 MR. ROSENTHAL: I don't know the answer to that,
18 Justice.

19 QUESTION: Well, in portraying what Texas sees
20 as a family and distinguishing both married and unmarried
21 heterosexual people from homosexual people, those things
22 wouldn't go together if the State at the same time said
23 same sex couples are qualified to raise a family. You can
24 adopt children, you can be foster parents.

25 You don't know what -- what the Texas law is on

1 that?

2 MR. ROSENTHAL: I do not know what that Texas
3 law -- what the Texas law says in that regard.

4 QUESTION: I think it would be relevant to your
5 argument that they're making -- that Texas is making the
6 distinction between kinds of people who have family
7 relationships and can be proper guardians of children and
8 those who can't.

9 MR. ROSENTHAL: Well, again, Your Honor, we're
10 not saying that they can't be proper guardians and we
11 can't say that they can't raise children. That -- that's
12 not the issue. The issue --

13 QUESTION: You're fairly certain that they can't
14 procreate children, aren't you?

15 [Laughter.]

16 MR. ROSENTHAL: We are sure that they -- that
17 they can't do that. But we're also not -- not penalizing
18 their -- their status. We're penalizing only the
19 particular activity that those unmarried couples may have
20 with respect to whether they have sexual intimacies.

21 QUESTION: Does Texas prohibit sexual
22 intercourse between unmarried heterosexuals?

23 MR. ROSENTHAL: Well, it used to. It does not
24 do that now, unless the sexual intimacy is in public or
25 where someone might view --

1 QUESTION: No, say in a -- a private situation
2 like this, it would not -- it would not be prohibited?

3 MR. ROSENTHAL: It does not criminalize it, it
4 does not condone it.

5 QUESTION: What about adultery?

6 MR. ROSENTHAL: I beg your pardon?

7 QUESTION: What about adultery?

8 MR. ROSENTHAL: Again, adultery is not penalized
9 in Texas, but it is certainly not condoned in Texas.

10 [Laughter.]

11 QUESTION: All right, so you said -- you said
12 procreation, marriage and children, those are your three
13 justifications. Now from what you recently said, I don't
14 see what it has to do with marriage, since, in fact,
15 marriage has nothing to do with the conduct that either
16 this or other statutes do or don't forbid. I don't see
17 what it has to do with children, since, in fact, the gay
18 people can certainly adopt children and they do. And I
19 don't see what it has to do with procreation, because
20 that's the same as the children.

21 All right. So -- so what is the justification
22 for this statute, other than, you know, it's not what they
23 say on the other side, is this is simply, I do not like
24 thee, Doctor Fell, the reason why I cannot tell.

25 [Laughter.]

1 QUESTION: Now, what is aside -- aside from
2 that?

3 MR. ROSENTHAL: I think what -- what I'm saying
4 is -- and I had not gotten into the equal protection
5 aspect of the -- of the argument yet, but under the equal
6 protection argument, Texas has the right to set moral
7 standards and can set bright line moral standards for its
8 people. And in the setting of those moral standards, I
9 believe that they can say that certain kinds of activity
10 can exist and certain kinds of activity cannot exist.

11 QUESTION: Could they say, for example, it is
12 against the law at the dinner table to tell really serious
13 lies to your family?

14 MR. ROSENTHAL: Yes, they can make that a law,
15 but there would be no rational basis for the law.

16 QUESTION: Oh, really. It's very immoral. I
17 mean, I know there's certainly -- it's certainly immoral
18 to tell very serious harmful lies to your own family under
19 certain circumstances and around the dinner table, some of
20 the worst things can happen.

21 [Laughter.]

22 But the -- the -- so Texas could go right in
23 there and any kind of morality that they think is just
24 immoral or bad, cheating, perhaps. What about rudeness,
25 serious rudeness, et cetera?

1 MR. ROSENTHAL: Well, again, if -- if Texas did
2 pass the law, it would have to -- have to show through
3 some rational basis test that it's rationally related to
4 some State interest.

5 QUESTION: Mr. Rosenthal, don't you think that
6 what laws a State may constitutionally pass has a lot to
7 do with what laws it has always been thought that a State
8 can constitutionally pass, so that if you have a 200-year
9 tradition of a certain type of law -- and I don't know of
10 a 200-year tradition of laws against lying at the dinner
11 table -- the presumption is that the State is within the
12 bounds of -- of the Constitution to pass that law in -- as
13 declaring what it has proscribed as contra bonos mores, a
14 term that's been in the common law from the beginning as
15 against good morals, bigamy, adultery, all sorts of things
16 like that, and isn't that determined pretty much on the
17 basis of what kind of laws the State has traditionally
18 been allowed to pass?

19 MR. ROSENTHAL: Certainly. And it goes -- it
20 goes to things as diverse as --

21 QUESTION: I don't suppose you're going to argue
22 that Loving against Virginia was incorrectly decided, are
23 you?

24 MR. ROSENTHAL: Oh, certainly not.

25 QUESTION: And that was certainly a long

1 tradition that supported that --

2 MR. ROSENTHAL: But it also violated a

3 fundamental right.

4 QUESTION: And that's the issue here.

5 [Laughter.]

6 MR. ROSENTHAL: Yes, sir. And the fundamental

7 right that was asserted there is -- is a long-established

8 fundamental right that we don't -- we don't treat races

9 differently because we think that one's inferior or we

10 stereotype someone --

11 QUESTION: There was a constitutional text

12 there, wasn't there, with Loving versus Virginia. I

13 thought there was something about a Civil War and no

14 discrimination on the basis of race.

15 MR. ROSENTHAL: Yes, and the same with -- with

16 the case that was cited from Florida.

17 QUESTION: When -- when did Texas select

18 homosexual sodomy as -- as a subject of specific criminal

19 prohibition?

20 MR. ROSENTHAL: Sodomy as a -- as a --

21 QUESTION: My question --

22 MR. ROSENTHAL: Yes, sir.

23 QUESTION: Go ahead, but my question is --

24 MR. ROSENTHAL: Yes, sir.

25 QUESTION: -- is about sodomy among two adults

1 of the same sex?

2 MR. ROSENTHAL: Yes, sir. And sodomy had -- has
3 a longstanding tradition of the history of Texas of sodomy
4 being against the law, however --

5 QUESTION: When -- when was -- was the first
6 statute passed? I think 200 years was mentioned. Was
7 there a law in the books in 1803?

8 MR. ROSENTHAL: No, I don't think Texas was a
9 State back then.

10 [Laughter.]

11 QUESTION: It doesn't have to be -- it doesn't
12 have to --

13 QUESTION: Territorial --

14 QUESTION: It's a trick question, Mr. Rosenthal.
15 Don't -- don't fall into that trap.

16 [Laughter.]

17 QUESTION: 1803 or the first date of the Texas
18 legislature's meeting, did they pass it at the -- at the
19 first meeting of the legislature?

20 MR. ROSENTHAL: Well, certainly in the -- in the
21 1854 Penal Code, the -- the kinds of activity that -- that
22 were classified now as sodomy were against the law.
23 However, I think to address your question --

24 QUESTION: When did -- when did they single out
25 homosexual sodomy?

1 MR. ROSENTHAL: In 1973, in the passage of the
2 1974 Penal Code.

3 QUESTION: So the issue here doesn't have much
4 of a longstanding tradition specific to this statute, does
5 it?

6 MR. ROSENTHAL: Well, not specific to -- not
7 specific to that statute, but it has a longstanding
8 tradition in Texas as being something that should be
9 proscribed and something that is regarded as immoral and
10 unwholesome.

11 QUESTION: Well, homosexual sodomy was unlawful
12 in Texas from when? There was not a statute addressed
13 just to that. It was addressed to sodomy in general, but
14 homosexual -- but homosexual sodomy included, and that law
15 goes back how long? To 1803?

16 MR. ROSENTHAL: To the -- to the time that Texas
17 was a republic, before it --

18 QUESTION: But what about the statute which this
19 Court I think once had to grapple with, people felt during
20 World War I that it was immoral to teach German in the
21 public schools. So then would you say that the State has
22 every right to do that, parents want their children to
23 learn German, but the schools forbid it? See, the hard
24 question here is can the State, in fact, pass anything
25 that it wants at all, because they believe it's immoral.

1 If you were going to draw the line somewhere, I guess you
2 might begin to draw it when the person is involved inside
3 his own bedroom and not hurting anybody else. Now that --
4 that now -- so you say it's morality. I -- I agree many
5 people do believe that that's a question of morality.
6 Many do not, but nonetheless, what can you add to what
7 you're saying, other than simply asserting its morality?
8 Because I don't think you think that the State could pass
9 anything in the name of morality?

10 MR. ROSENTHAL: Certainly not. But it would
11 have -- any law that would pass would have to have some
12 rational basis to the State interest.

13 QUESTION: You've not given a rational basis
14 except to repeat the word morality.

15 QUESTION: Is the rational basis is that the
16 State thinks it immoral just as the State thinks adultery
17 immoral or bigamy immoral.

18 QUESTION: Or teaching German.

19 QUESTION: Well, that --

20 [Laughter.]

21 QUESTION: Maybe we should go through counsel,
22 yes.

23 QUESTION: Isn't the -- Mr. Rosenthal, isn't the
24 thrust of Justice Breyer's question that when -- when the
25 State criminalizes behavior as immoral, customarily what

1 it points to is not simply an isolated moral judgment or
2 the moral judgment alone, but it points to a moral
3 judgment which is backed up by some demonstration of harm
4 to other people.

5 We -- we've heard questions for example about
6 harm to a -- a marital institution. It makes sense to say
7 whether you think the law is enforceable or not. It makes
8 sense to say that adultery threatens the -- the durability
9 of a particular instance of marriage.

10 What kind of harm to others can you point to in
11 this case to take it out of the category of simple moral
12 disapproval, per se?

13 MR. ROSENTHAL: Well, part of the -- part of the
14 rationale for the law is to discourage similar conduct,
15 that is, to discourage people who may be in jail together
16 or want to experiment from doing the same kind of thing
17 and I think -- and I think that the State can do that.
18 People can harm themselves and still be -- and still have
19 it be against the law. But they can take drugs and do
20 that.

21 QUESTION: Well, do you point to a kind of harm
22 here to an individual or to the individual's partner,
23 which is comparable to the harm that results from the --
24 the harm to the deterioration of the body and the mind
25 from drug-taking? I mean, I don't see the parallel

1 between the two situations.

2 MR. ROSENTHAL: Well, not -- not only do we say
3 that morality is a basis for this, but of course the
4 antecedents have raised that there may also be health
5 considerations. I don't know whether there are or not.

6 QUESTION: That is not the State's claim in any
7 case?

8 MR. ROSENTHAL: That's not the State's claim,
9 but I can't say that it's not true. Obviously this --
10 this has --

11 QUESTION: Did you read -- I don't know -- I
12 can't remember now who filed it, but there was one medical
13 brief filed on that subject and the argument there was
14 that, in fact, these laws are -- are directly antithetical
15 to health claim. Do you -- do you have any comment to
16 make on that brief?

17 MR. ROSENTHAL: Yes, sir. There was a law filed
18 on behalf of the respondents that took exactly the
19 opposite position.

20 QUESTION: So the issue was open, so far as --
21 as we're concerned that that would be your position, I
22 take it?

23 MR. ROSENTHAL: Yes, sir, for each expert
24 there's an equal and opposite expert.

25 QUESTION: But you're not saying the State of

1 Texas is doing this for -- to protect the actors who are
2 involved in this? One can say the State is taking action
3 to see that people don't harm others or themselves.
4 You're not suggesting that that's the reason for -- for
5 this particular law?

6 MR. ROSENTHAL: Well, I think Texas has the
7 right to prohibit certain conduct.

8 QUESTION: But if that's the reason for it, why
9 doesn't Texas prohibit the conduct in a heterosexual
10 relationship? I mean, it doesn't seem to be any harm
11 because if there were a harm, beyond moral disapproval,
12 the law would not be restricted to homosexuals.

13 MR. ROSENTHAL: Well, because heterosexual
14 conduct is -- the same kinds of conduct -- and by the way
15 it's not distinguished, it's still called deviate sexual
16 intercourse with heterosexuals.

17 QUESTION: But it's not prohibited?

18 MR. ROSENTHAL: But it's not prohibited.

19 QUESTION: Yeah.

20 MR. ROSENTHAL: But it also can lead to marriage
21 and to procreation. And that's -- and that's a legitimate
22 State interest.

23 QUESTION: But -- but procreation -- many people
24 with the blessings of Texas can have sexual relations who
25 are unable to procreate, so I don't see how -- whatever

1 the line might have meant in times gone, it certainly
2 isn't true that sexual relations are for the purpose of
3 procreation and anything that is not for that purpose is
4 beyond the pale.

5 You can't make that distinction.

6 MR. ROSENTHAL: No, but I think as a matter of
7 public policy, the State can make -- have -- can have
8 preferences -- and again it doesn't say that simply
9 because heterosexual people can -- can have deviate sexual
10 intercourse, the State approves it. There are just simply
11 other sanctions that the -- that the State may imply.

12 I did want to briefly distinguish this case from
13 your decision in Romer v. Evans. And obviously the
14 distinction there was -- was that the Colorado amendment
15 sought to classify people based on their orientation and
16 not their conduct. And by so doing, they excluded a
17 certain class of people from the political debate. Now,
18 on the contrary, Texas welcomes all into the political
19 debate and -- in the last Texas legislature, fortunately
20 our legislature meets only every other year, but in the
21 last Texas legislature, there was a hate crime statute
22 passed which made it a more heinous crime to make someone
23 a victim of crime based upon their sexual orientation and
24 it included all sexual orientations. It included
25 homosexuals, bisexuals and heterosexuals, all, so I don't

1 think we can say across the board that there's some sort
2 of Texas policy that we're trying to overall discriminate
3 against -- against homosexuals as a group.

4 QUESTION: Somebody wants to participate in the
5 political process, run for political office who is
6 homosexual and the charge is made on the other side don't
7 -- don't vote for this person, this person is a law
8 breaker, there is a closer connection to Romer in that
9 regard, isn't there?

10 MR. ROSENTHAL: Well, that would be true, if it
11 weren't that the historical fact that that's not in fact
12 true. That there have been people who have campaigned in
13 Texas and have admitted their homosexuality and have been
14 elected to office.

15 QUESTION: But the charge -- they could be
16 charged as law-breakers.

17 MR. ROSENTHAL: No, ma'am, they can't be charged
18 as law-breakers for having that orientation. They can
19 only be charged as law-breakers if they commit that
20 particular act. And then, again, the State does not allow
21 any disabilities to come from class C misdemeanor acts.

22 I'm sure it's obvious to this Court that the
23 issues of homosexual rights are highly emotional for the
24 petitioner in these quarters but equally anxious in this
25 Court's -- for this Court's decision are those who are,

1 number one, concerned with the rights of States to
2 determine their own destiny, and, two, and possibly more
3 important, those persons who are concerned that the
4 invalidation of this little Texas statute would make --
5 would make marriage law subject to constitutional
6 challenge.

7 Then again, how far behind that can there be
8 other acts of sexual gratification brought for
9 constitutional challenge also. There's already movements
10 to lower the age limit of consent for children engaged in
11 sexual practices. And there are secondary effects,
12 particularly in Texas law, where we are a common law state
13 and the common law is based upon community property shared
14 by both spouses. The State of Texas is asking this Court
15 to be mindful of the far-reaching aspects of your decision
16 in this case, so as not to disenfranchise 23 million
17 Texans who ought to have the right to participate in
18 questions having to do with moral issues. We ask you to
19 affirm the Texas Court of Appeals.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Rosenthal.

22 Mr. Smith, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF PAUL M. SMITH
24 ON BEHALF OF THE PETITIONERS

25 MR. SMITH: Thank you, Mr. Chief Justice. I

1 just have a couple of points to make. I thought I might
2 address this question of what it was that we proved in the
3 record below and whether or not we have, as a result,
4 adequately teed up the issues before the Court without
5 having put into evidence directly that this was a
6 noncoercive act or a noncommercial act or a nonpublic act
7 or things of that kind.

8 Our position is that this is a criminal statute
9 that has only two elements, it has a list of particular
10 kinds of sexual intimacy that you're not allowed to engage
11 in and it they have to prove as well that the two people
12 involved were of the same sex.

13 There was a complaint that was filed that listed
14 those two elements. My clients pleaded no contest to
15 those two elements but said that there is an insufficient
16 basis for imposing criminal liability on them, because,
17 first of all, they invade fundamental rights and second of
18 all, because the law is discriminatory, while it's
19 supposedly got a moral basis, it's a discriminatory
20 morality, a morality imposed only on one category of
21 couples in a State which does not penalize in any way
22 adultery, fornication or sodomy for people of -- of
23 couples that are different sex.

24 Those are the arguments that were made and -- so
25 our position is that that the statute is unconstitutional

1 both facially and as applied here, because the State
2 purports to impose liability based on those two elements
3 alone and that they are constitutionally insufficient
4 bases both for fundamental rights reasons and because it's
5 a discriminatory state.

6 The other point I thought I might just address
7 for the moment is the public health rationale which didn't
8 come up before. Essentially, what the facts are -- and I
9 think this comes out to a large extent, it's undisputed in
10 the amicus briefing -- the issue is not briefed in here
11 because the Texas brief doesn't even attempt to make this
12 argument, but it is -- the facts are that if this was the
13 line between safe and unsafe forms of sexual intimacy it's
14 as if the law cuts right across it. Regulating some of
15 the most safe forms of sexual activity possible,
16 including, for example, lots of safe sex -- same-sex
17 activity involving women and leaving completely
18 unregulated all sorts of forms of unsafe sexual activity
19 involving different sex couples.

20 So if there was ever a case of a law where the
21 fit is egregiously improper and insufficient to justify
22 the law under the rational basis test, this would be such
23 a case.

24 Unless the Court has further questions, thank
25 you very much.

1 CHIEF JUSTICE REHNQUIST: Thank you Mr. Smith.
2 The case is submitted.
3 (Whereupon, at 12:06 p.m., the case in the
4 above-entitled matter was submitted.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25