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I. Section 21.06 Violates Constitutional Rights to Liberty and Privacy Possessed by All Americans
   A. American Adults Have Fundamental Liberty and Privacy Interests in Making Their Own Choices About Private, Consensual Sexual Relations
      1. Well-Established Protections for Intimate Relationships, Bodily Integrity, and the Privacy of the Home Converge in This Vital Freedom
      2. There Is No Constitutional Exception to Liberty for Gay and Lesbian Citizens
      3. Objective Considerations Support Recognition of Fundamental Interests Here
   B. Texas Cannot Justify Section 21.06's Criminal Prohibition of Petitioners' and Other Adults' Private Sexual Intimacy
      C. Bowers Should Not Block Recognition and Enforcement of These Fundamental Interests Here

II. Section 21.06 Discriminates Without Any Legitimate and Rational Basis, Contrary to the Guarantee of Equal Protection
   A. Section 21.06's Classification Is Not Rationally Related to Any Legitimate Purpose and Serves Only the Illegitimate Purpose of Disadvantaging One Group
   B. The Broader Realities Reinforce This Law's Affront to Core Principles of Equal Protection
      1. The Homosexual Conduct Law Brands Gay Persons As Second-Class Citizens and Licenses Wide-Ranging Discrimination Against Them
      2. The Homosexual Conduct Law Reflects and Helps Fuel a Continuing History of Discrimination Against Gay Americans
   C. Equal Protection Concerns Are Particularly Strong Here Because of the Personal Burdens Imposed by This Criminal Law
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ARGUMENT

THE TEXAS HOMOSEXUAL CONDUCT LAW IS UNCONSTITUTIONAL AND CONTRARY TO THE RULE OF LAW BECAUSE IT INFRINGES INDIVIDUAL LIBERTY AND IRRATIONALLY SINGLES OUT A DISCRETE GROUP FOR SECOND-CLASS TREATMENT

A. Laws That Criminalize Private, Noncommercial Sexual Conduct Between Consenting Adults Contravene The Rule Of Law
1. The ABA's policies urging the repeal of sodomy laws and prohibiting sexual orientation discrimination reflect a growing consensus that the rule of law does not tolerate intrusions into private, noncommercial sexual conduct between consenting adults or invidious distinctions based on sexual orientation
2. Despite the improved treatment of many gay men and lesbians in society, and within the legal profession in particular, the retention of criminal laws that single out same-sex conduct continues to encourage irrational discrimination

B. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate Liberty and Privacy Interests Protected By The Due Process Clause And Bowers v. Hardwick Therefore Should Be Overruled
1. Bowers should be overruled because the weight of this Court's modern precedents supports the conclusion that the right of consenting adults to engage in intimate human conduct implicates a fundamental liberty interest protected by the Due Process Clause and a more complete account of the history of sodomy laws supports that view
2. Bowers should be overruled because it relied upon an improper narrowing of the Constitution's special protections for family and the home
3. Bowers should be overruled because it is inconsistent with Romer v. Evans

C. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate The Equal Protection Clause
1. The Texas Homosexual Conduct Law discriminates against gay men and lesbians by criminalizing conduct by same-sex couples that is not criminal when engaged in by different-sex couples
2. Under the Equal Protection Clause, the desire to harm and stigmatize members of a group, such as gay men and lesbians, is not a legitimate governmental interest
ARGUMENT

I. FIRST PRINCIPLES: THE FOURTEENTH AMENDMENT REQUIRES THAT STATE CRIMINAL LAWS CLEARLY NOTIFY CITIZENS OF THEIR COVERAGE, NOT DISCRIMINATE ARBITRARILY AGAINST CLASSES OF PERSONS, AND RESPECT FUNDAMENTAL LIBERTIES
A. The Legality Principle
B. The Equality Principle
C. The Liberty Principle

II. HISTORY: SODOMY STATUTES HAVE HISTORICALLY FOCUSED ON PREDATORY AND PUBLIC ACTIVITIES; CONSENSUAL “HOMOSEXUAL” ACTIVITIES BECAME THEIR FOCUS ONLY IN THE MID-TWENTIETH CENTURY
A. Nineteenth-Century Sodomy Laws
B. Expansion of Sodomy Laws, 1879-1969
C. Sodomy Reform and Reformulation, 1969-2002

III. DOCTRINE: TEXAS'S HOMOSEXUAL CONDUCT LAW VIOLATES THE DUE PROCESS, EQUAL PROTECTION, AND PRIVILEGES OR IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT
A. The Texas Homosexual Conduct Law Violates the Equal Protection Clause, as Construed in Romer v. Evans, For It Targets Gay People as an Outlaw Class Because of Antigay Animus
B. The Texas Homosexual Conduct Law Violates the Due Process Clause, as It Criminalizes Gay People's Most Private Activities; Bowers v. Hardwick Should Be Overruled
C. The Texas Homosexual Conduct Law Violates the Privileges or Immunities Clause

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2. REPORTED STATE SODOMY DECISIONS, NINETEENTH CENTURY
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I. COURTS APPLY HEIGHTENED SCRUTINY TO GOVERNMENTAL ACTIONS THAT ARE INHERENTLY SUSPECT

A. The Lack Of A Relationship Between A Characteristic And Ability Is Essential For Application Of Heightened Scrutiny

B. A History Of Discrimination Based On A Characteristic Is Essential For Application Of Heightened Scrutiny

C. Although They Are Neither Necessary Nor Sufficient, Additional Factors May Enhance The Justification For Heightened Scrutiny

1. Immutability

2. Political Powerlessness

II. GOVERNMENTAL ACTIONS THAT CLASSIFY ON THE BASIS OF SEXUAL ORIENTATION WARRANT HEIGHTENED SCRUTINY

A. Sexual Orientation Is Unrelated To Ability

B. Gay Men, Lesbians, And Bisexuals Have Suffered A Persistent History Of Discrimination

1. Early History of Discrimination

2. Present-Day Discrimination Against Lesbians, Gay Men, and Bisexuals

C. The Factors Of Immutability And Political Powerlessness Support Heightened Scrutiny For Government Classifications Based On Sexual Orientation

1. Immutability

2. Political Powerlessness

III. THIS COURT'S DECISION IN BOWERS V. HARDWICK DOES NOT PRECLUDE THE CONCLUSION THAT CLASSIFICATIONS BASED ON SEXUAL ORIENTATION DESERVE HEIGHTENED SCRUTINY
ARGUMENT

I. The Equal Protection Clause Is a Structural Check on Legislation by Majority Factions.
   A. The Structural Function of the Equal Protection Clause
   B. Meaningful Rational-Basis Review

II. The Asserted Public-Morality Interest in this Case Does Not Satisfy Rational-Basis Review.
   A. Moral Claims Standing Alone Are Insufficient State Interests When There Exist Substantial Indicia
      of Animus Against a Class of Persons
   B. The History, Context, and Structure of the Homosexual Conduct Law Indicate Animus Against Gays
      as a Class
ARGUMENT

I. REGULATION OF CONSENSUAL, NONCOMMERCIAL, NONPUBLIC, NONHARMFUL CONDUCT EXCEEDS THE POWER OF GOVERNMENT IN THIS COUNTRY

A. This Court Should Ask Whether the State's Police Power Extends This Far, Not Whether the Defendants Have a “Right” to Engage in the Conduct at Issue

B. In Our Political and Constitutional Tradition, Government Power Is Limited While the Number of Private Liberties Is Not

C. Prevention of Harm Is the Prime Justification for Invoking the State's Ability to Use the Police Power

D. The Police Power Does Not Extend to the Promotion of Private Morality

1. Traditionally, the police power allows regulation only of public morality

2. In practice, government rarely attempts to legislate private morality

E. A Free Society Cannot Allow a State to Forbid Private Behavior Based Solely on a Majority Opinion of Proper Moral Conduct, Like the One at Issue in this Case

II. TEXAS' STATUTE CANNOT SURVIVE RATIONAL BASIS REVIEW

A. The Texas Statute Does Not Advance a Legitimate Governmental Interest

B. It Is Impossible to Analyze Whether the Texas Statute is Rationally Related to its Goals
ARGUMENT

I. Laws That Criminalize Same-Sex Intimate Conduct, Such As Texas Penal Code Section 21.06, Impermissibly Require Adherence To Gender Stereotypes.

A. For Much Of This Nation's History, Gender Classifications In The Law Served As A Means Of Requiring Adherence To Gender Stereotypes That Were Understood As “Natural,” “Moral,” And “Traditional.”

B. This Court Has In Recent Decades Made Clear That The Equal Protection Clause Prohibits States From Requiring Adherence To Gender Stereotypes.

C. Prohibitions Of Sexual Intimacy Between Persons Of The Same Sex Enforce Gender Stereotypes.

*ii D. Gender-Based Criminal Statutes Warrant Particularly Careful Equal Protection Scrutiny.

II. Section 21.06 Contains A Facial Gender-Based Classification.

A. Section 21.06's Operation With Respect To Gender Parallels The Operation Of Laws That This Court Long Ago Recognized As Facially Discriminatory On The Basis Of Race.

B. Section 21.06 Facially Discriminates Based On Gender In Two Ways.

III. Section 21.06 Cannot Survive Rational Basis Review, Let Alone The Heightened Scrutiny Applied To Gender Classifications.
Argument

I. The Court Should Reconsider *Bowers v. Hardwick* and Recognize that Fundamental and Constitutionally Protected Right to Privacy Protects the Intimate Relationships for *All* American Families from Unjustified State Intrusion.

A. Protection of a Broadly Defined Family Is Implicit in the Concept of Ordered Liberty for All Americans.

B. Intimate Relationships Occupy a “Private Realm of Family Life the State Cannot Enter.”

C. Social and Cultural Developments Since 1986, and a Decent Regard for the Rights of All Americans, Require that this Court Revisit its *Bowers* Holding.

D. The Texas Homosexual Conduct Law and Others Like It Constitute an Unjustified State Intrusion on Ordered Liberty; and If the Rights of All Americans to Undertake Intimate Expressive Conduct Is to Be Protected, All “Sodomy” Laws Must Be Struck Down.

**SUMMARY OF ARGUMENT**

I. THIS COURT HAS TRADITIONALLY USED INTERNATIONAL, AND FOREIGN LAW RULINGS TO AID ITS CONSTITUTIONAL INTERPRETATION  
II. INTERNATIONAL AND FOREIGN LAW DECISIONS HAVE REJECTED THIS COURT'S DECISION IN *BOWERS* AS RESTING ON A TRIPLY FLAWED UNDERSTANDING OF THE RIGHT TO PRIVACY  
A. Decisional Privacy  
B. Relational Privacy  
C. Zonal Privacy  
III. INTERNATIONAL AND FOREIGN COURT DECISIONS HAVE INVALIDATED SODOMY LAWS FOR EXPRESSING AN IRRATIONAL ANIMUS AND PREJUDICE THAT DENIES A POLITICALLY UNPOPULAR GROUP EQUAL TREATMENT  
A. Irrational Animus And Prejudice  
B. Equal Treatment
ARGUMENT

I. BECAUSE OF THE IMPORTANT INDIVIDUAL INTERESTS INVOLVED, THIS CASE CALLS FOR A LESS DEFERENTIAL FORM OF RATIONALITY REVIEW

   A. This Court Has Been More Likely to Find Equal Protection Violations When Significant Liberty Interests Are Involved, Even When Those Interests Are Not Independently Considered to Be Fundamental

   B. Statutes That Criminalize Private, Consensual Homosexual Activity Interfere With Significant Liberty Interests

      1. Section 21.06 Interferes with the Intimate Relationships of Lesbians, Gay Men, and Bisexuals
      2. Section 21.06 Undermines the Parental Relationships of Lesbians, Gay Men, and Bisexuals
      3. Section 21.06 Restricts Employment Opportunities For Lesbians, Gay Men, and Bisexuals
      4. Section 21.06 Threatens the Sanctity of the Homes of Lesbians, Gay Men, and Bisexuals

   II. SECTION 21.06 IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST

      A. Section 21.06 Does Not Serve a Legitimate Government Purpose

      B. Even If This Court Were To Find the Presence of a Legitimate State Interest in This Case, Section 21.06 Still Would Not Be Rationally Related to Achieving That Purpose

      1. Nonenforcement of Statutes Like Section 21.06 Transforms Them Into Expressions of Constitutionally Impermissible Animus

         2. Vigorous Enforcement of Laws Like Section 21.06 Would Involve Constitutionally Repugnant Methods
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I. MANY RELIGIOUS BODIES OPPOSE LAWS THAT CRIMINALIZE PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS OF THE SAME SEX
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A. A Medically Reasonable and Rational Relationship Must Exist Between a Law and its Purported Public Health Objective

B. Because the Homosexual Conduct Law is at Once Grossly Over and Underinclusive as a Means of Preventing AIDS, It Cannot Plausibly Be Viewed as a Legitimate Public Health Measure

C. The Homosexual Conduct Law In Fact Undermines Public Health Interests, Defeating Any Possibility that the Law Could Be Defended as Rationally Related to Such a Justification

1. The Law Does Not Deter the Spread of AIDS and Impedes the Effectiveness of AIDS Prevention Efforts

2. The Law Adversely Impacts the Mental and Physical Health of Lesbians and Gay Men
Amicus Brief of Human Rights Campaign; National Gay & Lesbian Task Force; Parents, Families & Friends of Lesbians & Gays; National Center for Lesbian Rights; Gay & Lesbian Advocates & Defenders; Gay & Lesbian Alliance against Defamation; Pride at Work, AFL-CIO; People for the American Way Foundation; Anti-Defamation League; Mexican American Legal Defense & Education Fund; Puerto Rican Legal Defense & Education Fund; Society of American Law Teachers; Soulforce; Stonewall Law Association of Greater Houston; Equality Alabama; Equality Florida; S.A.V.E.; Community Center of Idaho; Your Family, Friends & Neighbors; Kansas Unity & Pride Alliance; Louisiana Electorate of Gays & Lesbians; Equality Mississippi; Promo; North Carolina Gay & Lesbian Attorneys; Cimarron Foundation of Oklahoma; South Carolina Gay & Lesbian Pride Movement; Alliance for Full Acceptance; Gay & Lesbian Community Center of Utah; and Equality Virginia in Support of Petitioners

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